

Human Rights & Essential Services in First Nation Communities

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1

How services on reserve work

- Funding by federal government through funding agreements
- Rules / standards by prov/terr through (indirectly, or directly in case of child welfare)
- Service delivery through First Nations or FN Agencies

**Exhibit: National Inquiry into Missing and
Murdered Indigenous Women and Girls**
Location/Phase: Part III: Quebec City
Witness: Naomi Metallic
Submitted by: Big Canoe? Comm. Counsel
Add'l info: P03P02P0101
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Initials

I/D

Entered

bj

A16

How did this come to be?

- Post WWII concerns with plight of First Nations
- Realization that FN lack services that all other citizens receive
- Assimilation in the form of formal equality:
 - Special rules are holding FNs back
 - Solution is absorption into mainstream
 - **Desire to see prov/terr to provide services on reserve**

3

How did this come to be?

- Feds insert s 88 into *Indian Act* 1951, purporting to authorize application of provincial law of general application
- Provinces extremely reluctant to extend services on reserve – only Ontario only agrees
- In 1964, Canada obtains Treasury Board approval to provide services on reserve adopting provincial rates and standards
 - Circulate 107 – “not possible to adopt all aspects of provincial policy to department administration” and each region to develop own “draft regulation which you feel should be applied to ... Indians in your region.”
 - = “comparability standard”

4

How did this come to be?

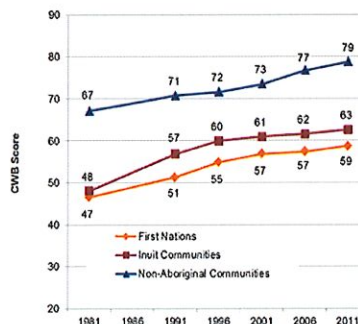
- 70-80-90s feds gradually implement program devolution
- Effectuated through funding agreements in the nature of contribution agreements
 - feds dictate terms / conditions of program delivery
 - extensive reporting requirements

5

Problems with this system

1. Living conditions have not improved

- FNs at virtually the bottom of every socio-economic indicator in the country



INAC, "Ministerial Transition Book: November 2015"

<https://www.aadnc-aandc.gc.ca/eng/1450197908882/1450197959844>

6

Problems with this system

2. Premised on assimilation

- Section 88 and provincial service provision to First Nations based on same policy of assimilation in White Paper

3. Largely leaves FNs out of policy development

- Feds abdicate a significant of its control to provincial policy
- Indirect delegation = provinces have no basis to care how they their rules / policies impact First Nations
- Direct delegation = majority of provinces don't consult / accommodation First Nations in policy development

7

Problems with this system

4. Not culturally appropriate

- Provincial system based on Euro-Canadian values (capitalism, liberalism, individualism, nuclear family, etc)
- FN values and parenting practices can be devalued / denigrated
- FN poverty + Euro-Canadian norms = children disproportionately apprehended on the ground of 'neglect'

8

Problems with this system

5. Contribution agreements model fundamentally flawed

- FN governments and agencies have no say and no choice
- Very little flexibility to FNs / agencies to modify programming to make more culturally appropriate
- Imposes inordinate reporting requirements and controls over FNs / Agencies by federal government
- Not appropriate for 'Nation to Nation' relationship

9

Problems with this system

6. Violates the rule of law

- No federal legislation, despite calls by Auditor General and others =
 - Too much discretion for feds to change funding, monitoring requirements, interpretations of program standards, etc.
 - Little FN access to dispute resolution / access to justice
 - Little accountability / oversight by Parliament of INAC policy and funding decisions

10

Canada's Auditor General

"The federal government has often developed programs to support First Nations communities without establishing a legislative or regulatory framework for them. ... Instead, the federal government has developed programs and services for First Nations on the basis of policy. As a result, the services delivered under these programs are not always well defined and there is confusion about responsibility for funding them adequately."

[*2011 June Status Report of the Auditor General of Canada*](#)

"The lack of substantive legislative authority could undermine parliamentary control and accountability. It precludes parliamentary debate on important questions ... In addition, it does not provide an instrument for Parliament to hold the Department accountable against program authorities, beyond those approved by the Treasury Board."

[*1994 Report of the Auditor General of Canada to the House of Commons, Vol. 14, Chap. 23 at para. 23.44*](#)

"We believe that structural impediments severely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserves."

[*2011 June Status Report of the Auditor General of Canada*](#)

11

Problems with this system

7. Severe funding issues

- A knowingly narrow approach to comparability
 - INAC does not track whether it provides 'comparable services' to provinces (even though Auditor General has told it to)
 - Internal report from 2006 show INAC knows it's underfunding: *"if current social programs were administered by the provinces, this would result in significant increase in costs for INAC."*
- Funding also exacerbated by 2\$ growth on funding for FNs in place from 1996 to 2016

[*Caring Society v. Canada, 2016 CHRT 2 at para. 267*](#)

12

Other human rights cases alleging underfunding

“Although the child and family services case was the first of its kind to be adjudicated on its merits, similar complaints have also been filed with respect to other services that the Government of Canada funds and provides to First Nations peoples on reserve. For example, **there are currently complaints before the CHRT with respect to such matters as special education, health services, assisted living and income assistance benefits, and policing.**”

Canadian Human Rights Commission, “Submission to the Committee On The Elimination Of Racial Discrimination On The Occasion Of Its Consideration Of Canada’s 21st – 23rd Periodic Reports”, July 2017
http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_IFN_CAN_28040_E.DOC

13

Link between chronic underfunding and tragedies and social problems

- Suicides, house fires, disease, violence and murder; drug and related crimes; dismantling of police services on reserve; lack of emergency services; unsafe drinking water, etc.
- Social Assistance Research in the Maritimes – low welfare rates create food insecurity and other issues
- [PROOF Food Insecurity Policy Research](#) – food insecurity negative impacts physical, mental, and social health
- Links between housing insecurity and vulnerability
 - NBAPC *Nidap Wiquag* Study – 41 of 43 homeless youth in three NB cities came from reserves in NB and NS – lack of housing primary factor, as well as family drug and alcohol abuse, and physical and sexual abuse
 - “this data would indicate that **the homeless Aboriginal population is disproportionately coming from the reserve Aboriginal community**” (p. 33)

14

Problems with this system

8. It has resulted in significant overrepresentation of FN child in state and foster care

- Sixties Scoop – in 1977, the percentages of Aboriginal children in care: **AB – 44%; SK – 51%, MB – 60%**
- Statistics in a July 2015 report on Aboriginal child welfare issues to Canadian Premiers included the following statistics on the total representation Aboriginal children in permanent state care: **BC – 55%; AB – 69%; SK- 65%; MB – 87%; ON – 21%; QC – 10%; NB – 23%; NS – 23%; NFLD – 34%; YK – 64%; NWT – 95% and NU – 94%**

Aboriginal Children in Care Working Group,
Aboriginal Children in Care – A report to Canada's Premiers (2015), at 7-8.
<https://fncaringsociety.com/news/aboriginal-children-care-report-canadas-premiers>

15

Problems with this system

9. Fuels stereotypes and hate

- Public doesn't understand program devolution, thinks 'pots of money' thrown at FN issues and continuing poverty and social problems blamed on FN leadership for being corrupt or incompetent
- More generally, can perpetuate the infantilized of FNs in the perception of many Canadians.

16

Problems with this system

10. A Department without focus and a clear conflict of interest

- “There is a fundamental conflict between the monitoring and advisory roles of DIAND employees.”

[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 \(“Penner Report”\) at 92](#)

- Exacerbated by lack of any legislative objectives in enabling legislation

17

Intro to 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

- Case alleges that funding of child welfare services on reserve is inequitable and insufficient → 22% - 37% less than provincial programs.
- Initiated in 2006 by Caring Society and Assembly of First Nations
- Faced various preliminary challenges. Several timely disclosure issues by Canada.
- Cindy Blackstock was found to be subject of retaliation and privacy violations by Canada.

18

Intro to *Caring Society* (cont'd)

- Jan. 26, 2016, Tribunal finds Canada / Indigenous and Northern Affairs Canada has been knowingly underfunding First Nations child welfare services
- Orders Canada to immediately cease discrimination and "REFORM" the child welfare program
- Tribunal retains supervisory jurisdiction over other remedies
- Four compliance orders since 2016 ruling (which Canada did not appeal)
- 2018 order finds many immediate relief orders had not been adequately addressed by Canada
 - Canada cease its discriminatory funding practice of not fully funding the costs of **prevention** and must provide funding for actual costs of least disruptive measures

19

Key findings of *Caring Society*

1. Affirms that Canada is accountable

- Finds INAC has and exercises overall control over child welfare on reserve pursuant to s. 91(24) and is accountable under human rights (and has fiduciary duty)
- Finding includes recognition that Aboriginal children have a generic s 35 right of all Aboriginal to be transmitted their language and culture

20

Key findings of *Caring Society*

2. Finds that systems that perpetuate historic disadvantage endured by Aboriginal people (i.e., assimilative) are discriminatory.

- Child welfare became the replacement for residential schools when IRSs started to close
- Current system provides incentive to remove children as a first resort rather than last resort
- Removal of children stands to adversely impact FN children's ability to learn their language and culture
- **"Similar to the residential school era, today, the fate and future of many First Nation children is still being determined by government." (para. 426)**

21

Key findings of *Caring Society*

3. Substantive equality is more than comparability / mirroring provincial services

- Finds that domestic and international human rights law require **"the distinct needs and circumstances of First Nations children and families living on-reserve, including their cultural, historical and geographical needs and circumstances"** be considered **"in order to ensure equality** in the provision of child and family services to them (para. 465).
- A strategy based on comparable funding levels, based on the application of standard funding formulas, is not sufficient.

22

An equality right to self-government?

- Tribunal does not mentions / discusses self-government, but...
- The logical conclusion of requirement for cultural appropriate and needs-based service is self-determination / self-government
- *"The principle is simple. Only Indian people can design systems for Indians. Anything other than that is assimilation."*
Member of the Carrier-Sekani Tribal Council, quoted in the 1981 [Penner Report](#) at 29
- Makes federal policy to apply provincial rules in other service areas (s 88 of *Indian Act*) open to potential equality challenge

23

Practical principles on moving forward

1. Making space

- Vacating jurisdiction; agreements; legislation; civil procedure rules; policy; etc.

2. Resourcing

- Financial, supports, training, advocacy, awareness raising

3. "Nothing about us without us"

- Partnerships not imposing (even if you think your idea is great)

24

Ways forward: Making Space

- FNs 'just do it' – exercise inherent jurisdiction
- FN by-laws on essential services (Spallumcheen First Nation precedent)
- General federal legislation recognizing Aboriginal self-government over internal matters
- Specific federal legislation over essential services:
 - Caring Society / Grammond: recognizing and implements inherent jurisdiction of FNs over child welfare (like US)
- Greater provincial accommodation within provincial legislation (e.g., child welfare, policing)

25

Ways forward: Resourcing

- Canada must fund essential services according to standard set out in *Caring Society* (culturally appropriate and meet needs and circumstances)
- Mechanism should be legislated (predictable, stable, permanent) and clearly set out accountability of Canada
 - Contribution agreement model / onerous reporting should be scrapped
- The new framework for implementing Aboriginal rights will not change anything even conditions on reserve are not drastically improved (same messaging came from RCAP).

26

Ways forward: “Nothing about us without us”

- Advisory committees to inform Minister are not sufficient.
- Real partnerships.
- “...First Nations communities and their leaders need to play a major role [in reform of social assistance]. Given their fundamental need to preserve First Nations values and culture, it would be unlikely that their problems could be adequately addressed by solutions imposed from outside.”
[1994 Report of the Auditor General of Canada to the House of Commons, Vol. 14, Chap. 23](#) at para. 23.95
- “We recognize that the federal government cannot put all of these structural changes in place by itself since they would fundamentally alter its relationship with First Nations. For this reason, First Nations themselves would have to play an important role in bringing about the changes. ...”
[2011 June Status Report of the Auditor General of Canada](#)

27

Wela’liq
Thank you
Merci

28