First Nations Child & Family Caring Society of Canada

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Models for First Nations Child and Family Service Delivery in Canada

Currently, most First Nations children and families receive child and family services through First Nations child and family service agencies (First Nations agencies) or via provincial/territorial governments in partnership with First Nations or First Nations authorized institutions. The passage of the *Act Respecting First Nations, Métis and Inuit Children, Youth and Families*, otherwise known as Bill C-92, passed in 2019 but at time of writing not enacted by Order in Council, recognizes First Nations jurisdiction in child and family services. However, the Act does not include a positive funding obligation for Canada or the provinces/territories to fund such models.

In general, First Nations agencies receive funding for service delivery to on reserve children and families via the federal government, which requires First Nations agencies to apply provincial/territorial child welfare laws as a condition of funding. When First Nations agencies provide services to a family resident off reserve, they need to negotiate a separate funding agreement with the province/territory to cover those costs. Where a First Nation has no First Nations agency, the province/territory will deliver child welfare services both on and off reserve and, in some cases, bill the federal government for services delivered to any child or family resident on reserve.

The split between federal funding and provincial/territorial jurisdiction has resulted in substantial inequities in on reserve child welfare delivery. In 2000, a report commissioned by the Government of Canada and the Assembly of First Nations in partnership with First Nations agency experts found a 22% shortfall in funding on reserve despite the higher needs of First Nations families.[i] A subsequent report published in 2005 found that the shortfall was 30% and was particularly acute in programs intended to keep children and families safely together.[ii]

In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a human rights case against Canada alleging its failure to implement Jordan's Principle and to provide culturally-based and equitable funding for First Nations child welfare was discriminatory and contrary to the *Canadian Human Rights Act*. In 2016, the Canadian Human Rights Tribunal (Tribunal) issued a landmark decision substantiating the discrimination and ordering Canada to cease its discriminatory conduct.[iii] The Tribunal was so unsatisfied with Canada's implementation of its 2016 order that seven non-compliance orders have subsequently been issued.[iv] More are possible.

The most substantive decision on child and family services following the 2016 decision was released in February of 2018. In this decision, the Tribunal ordered Canada to fund agency prevention measures, building repairs, intake and investigation, legal, mental health and band representative services at their actual cost. This provided some much-needed relief to First Nations children, youth, families and the agencies that serve them. One outstanding issue is that Canada refuses to fund the cost of building new facilities to house the programs and additional staff, effectively muting the ability of many agencies to deliver new services. This issue is currently before the Tribunal for adjudication.

The most common jurisdictional models developed by First Nations CFS Agencies as a result of the imposed legislation and funding procedures are as follows:

1. *The Delegated model*: As a condition of funding, the federal government requires First Nations agencies to operate pursuant to provincial/territorial laws.

First Nations agencies receive either full delegation from the province/territory, which means they provide the full range of child welfare services including prevention, intake and assessment to guardianship and in some cases adoption, or partial delegation (also called pre-mandated), where they deliver a subset of these services, often excluding intake and assessment. Surprisingly, the federal government has not amended its requirement for agencies to use provincial/territorial laws even though it has adopted the *Act Respecting First Nations, Métis and Inuit Children*. This means that the only current pathway for a First Nation to receive funding under Canada's First Nations Child and Family Services Program is by operating under the delegated model.

If a delegated agency delivers services to First Nations children, youth and families off reserve, they must also enter into a funding agreement with the respective province/territory.

2. *The Band By-Law Model*: The Indian Act is a racist and colonial piece of legislation that dates back to confederation and is still in effect. It regulates First Nations governance and a whole array of other matters including First Nations membership, registration, and things like wills and estates. The Act displaced traditional governance structures and introduced the band council system of government. It also allows for band councils to pass band by-laws and these come into effect when signed by the Minister of Indian Affairs (currently the Minister of Indigenous Services Canada or Minister of Crown Relations Canada, depending on the topic). In the 1980's, the Splats'in First Nation in British Columbia passed a by-law proclaiming jurisdiction over child and family services on reserve. The Minister of Indian Affairs originally resisted signing the by-law but relented after significant and very effective community advocacy. The Government of Canada funds the agency as an exception to its overall requirement that First Nations operate under provincial/territorial jurisdiction, but it has been reluctant to sign any more band by-laws regarding child and family services.

3. *The Tri-partite Model*: Under this governance model, provincial and federal governments delegate their law-making authority in child and family services to a First Nation, so long as they agree to meet or beat provincial standards. The Sechelt First Nation in British Columbia is one example of this model.

4. *First Nations not served by a First Nations Child and Family Service Agency*: Where First Nations are not served by a First Nations agency, the provinces/territories provide child welfare services and, in some cases, bill the federal government for on reserve service provision. The degree to which provinces/territories consult affected First Nations on child welfare delivery is uneven.

5. *The Self-Government Model*: Under this model, First Nations authority for child and family services is affirmed via a self-government agreement between the First Nation(s) and the Government of Canada and in some cases provinces/territories. Funding child welfare models operating under a self-government model are negotiated as part of the self-government agreement and thus this model is not eligible for funding pursuant to Canada's First Nations Child and Family Services Program.

6. *The Act Respecting First Nations, Métis and Inuit Children, Youth and Families.* Once enacted into law via an Order in Council, the *Act Respecting First Nations, Métis and Inuit Children* could affirm First Nations child welfare laws. It is important to note that while there is broad-based support among First Nations for the affirmation of First Nations jurisdiction in child welfare, not all First Nations support the Act. Some First Nations and First Nations experts feel it does not provide unqualified affirmation of First Nations jurisdiction and contains insufficient funding guarantees to ensure the inequities the Tribunal is remedying do not recur. For more detail on Bill C-92, now the *Act Respecting First Nations, Métis and Inuit Children,* please see this analysis by five leading Indigenous law professors prepared for the Yellowhead Institute.[v]

Please note that this information sheet is for general information only and does not constitute legal advice.

[i] D. McDonald and P. Ladd (2000). Joint National Policy Review on First Nations Child and Family Services. Ottawa: Assembly of First Nations.

[ii] Loxley, J, De Riviere, L, Prakash, T, Blackstock, C, Wien, F, & Thomas Prokop, S (2005). Wen: de: the Journey Continues. Ottawa: First Nations Child and Family Caring Society of Canada.

[iii] First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada, 2016 CHRT 2.

iv See for example, *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada*, 2016 CHRT 10.

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada, 2016 CHRT 16.

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada, 2017 CHRT 7.

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada, 2018 CHRT 14.

First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada, 2019 CHRT 7.

v N. Metallic, H. Friedland, J. Hewitt, S. Morales and A. Craft (2019). Does Bill C-92 make the grade. Retrieved: https://yellowheadinstitute.org/bill-c-92-analysis