

# INNOVATIVE JURISDICTIONAL MODELS FOR FIRST NATIONS CHILD WELFARE

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# Key Definitions on Indigenous Jurisdiction

- **Self-determination** - the right of Indigenous peoples to choose their destinies. In Canada, it means that First Nations, Inuit and Metis have the right to negotiate the terms of their relationship with Canada and choose governmental structure that meet their needs.
- **Self-government** – the ability of Indigenous peoples to enforce their own rules, resolve disputes, problem-solve, and establish their own governing institutions to carry out these tasks.

# Key Definitions on Indigenous Jurisdiction

- **Self-administration** - downloading of programs and services to be delivered by the Indigenous groups, but other governments makes all key decisions over program content, standards, funding, etc.
- **Comparability** – a federal funding and program standard that adopts provincial standards and funding levels for First Nations programs.

# Key Principles in Developing Indigenous Child Welfare Jurisdictional Models

1. Constitutionally, Canada can take the lead, in partnership with Indigenous groups, in taking a national approach.
2. TRC states that UNDRIP must form the framework of reconciliation.
3. Canada has committed to fully implement TRC and UNDRIP.
4. Indigenous self-determination, and its expression through self-government, are central principles underlying UNDRIP.

# Key Principles in Developing Indigenous Child Welfare Jurisdictional Models

5. The recognition of self-determination, including the inherent right of self-government, is Principle #1 of Canada's new 10 Principles to Respecting its Relationship with Indigenous Peoples.
6. The Tribunal in the *Caring Society* decision found that the comparability (key to FNCFS) is discriminatory because it fails to meet "the distinct needs and circumstances of First Nations children and families living on-reserve, including their cultural, historical and geographical needs and circumstances."

# Option 1: Status quo

- FNCFS is self-administration based on comparability.
- Not self-determination if it is imposed on First Nations.

# Option 2: Accommodation within provincial legislation

- Results in a variety of different approaches instead of one, single national approach.
- There are practical and constitutional limits on how far provinces and territories go in accommodating (\$\$/optics and singling out).
- Provinces should incorporate Jordan's Principle into their laws.

## Option 3: 'Just do it' – unilateral implementation by First Nations

- Benefit of this is developing law making and governance capacity.
- Risks include: non-recognition; lack of funding and support.

# Option 4: Sectoral self-government agreements

- Individual groups could seek a sectoral agreement on child welfare under the Inherent Rights Policy.
- Downside includes: long negotiations and fiscal formula for self-government problematic.

## Option 5: *Indian Act* bylaws on child welfare

- Way for FNs to take back jurisdiction under federal laws; INAC no longer vets bylaws and case law supports jurisdiction.
- FNs can collaborate together on by-laws in ways that permit more nation-oriented approaches.
- In cases of conflict, *Indian Act* bylaws are paramount over provincial laws.

# Option 6: Changes in federal funding agreements

- Feds need to untie funding for services from compliance with provincial rules (comparability).
- Untying is necessary but probably not sufficient on its own; needs to be paired with measures to ensure First Nations jurisdiction can displace provincial laws.
- Specific funding needed for community consultations/processes to develop culturally based standards and laws.

# Option 7: Specific federal legislation on child welfare

- TRC Call to Action #4 calls on Canada to legislate on national standard for Aboriginal child apprehensions.
- Such legislation could also recognize FN jurisdiction as in the US.
- Specific federal legislation could provide more guidance and clarity, as well as specify funding relationship more clearly than *Indian Act* bylaws.

# Option 8: General federal legislation on self-government

- RCAP recommended as an interim step on the path to nation-to-nation relationship, to be adequately funded.
- Although there is urgent need for this; reform in child welfare may be more urgent, justifying need for specific legislation now.

# Recap of options

1. Status quo
2. Accommodation within provincial legislation
3. 'Just do it' – unilateral implementation by First Nations
4. Sectoral self-government agreements
5. *Indian Act* bylaws on child welfare
6. Changes in federal funding agreements
7. Specific federal legislation on child welfare
8. General federal legislation on self-government