

# **Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?**

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*In recent decades, the administration of public services for First Nations has increasingly shifted or “devolved” to the Band level. This paper, focusing on examples in education and child protection services, asks whether self-*

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*administration is a useful stepping stone to genuine self-government or rather a quagmire that presents a trap or obstacle on the path to First Nations' desired goals. First Nation-run programs have produced real benefits, and provide a certain minimal level of control over local services. In comparison with residential schools and the "sixties scoop" in child welfare, they are indeed a major improvement. But viewed against a future of genuine and effective Aboriginal governance, they are frustrating and inadequate. Moreover, the costs of self-administration are building up over time. This has been particularly true within the last 10 to 15 years, during which time funding has fallen to disgraceful and discriminatory levels while efforts towards full recognition of self-government have often stalled. In the ultimate analysis, the longer the status quo on devolution remains, the greater its toll and the more limited its usefulness as a transition to self-government.*

## I INTRODUCTION

Since the 1970s—and even earlier—the administration of public services for First Nations on reserve<sup>1</sup> has shifted steadily to the Band level. The devolution of program delivery has progressed sector by sector, starting with income assistance and education and expanding to include child welfare services, policing, some health care programs and more. Despite having gained momentum as a deliberate policy of Indian Affairs,<sup>2</sup> devolution has also engaged both First Nations and the provinces as active partners. In this paper, I examine program delivery devolution, focusing on education and child protection services, and attempt to evaluate how devolution has served First Nations.

First Nations and their supporters have always been clear that 'self-administration' is *not* self-government; at least, it is not the kind of self-government they have in mind as an inherent right and as a relationship that must be recognized and made into a reality. Looking back at the experiences of devolution and the literature discussing it, this claim is easily borne out. Self-administration is differentiated from full self-government at a funda-

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1 In this paper, 'Aboriginal' refers to all first peoples of Canada, including First Nations ('Indians' in the Constitution), Inuit and Métis. The *Indian Act* is applied to First Nations. Those individuals who hold registered status as 'Indians' under this Act are referred to in this article as 'Registered Indian'. This article focuses on First Nations, and particularly on reserve communities who are mostly composed of Registered Indians, whose lives usually remain governed by the *Indian Act* and who have largely come under federal jurisdiction with respect to essential services.

2 In this article I will generally use the term "Indian Affairs" to refer to the federal department responsible for policy towards First Nations. This is for the sake of simplicity, rather than referring to the department's various name changes and organizational shifts over the years. Currently the department is called Indian and Northern Affairs Canada (INAC).

mental structural level, primarily on the basis of jurisdiction; without recognized legal jurisdiction over areas of responsibility as an equal partner in the Canadian federation, First Nations lack the power to make any decisions about which public programs to pursue, how, and by what design. Under devolution, the local government supporting program delivery is usually little more than a bureaucratic shell, an “extension of someone else’s administrative apparatus.”<sup>3</sup>

However, if there is any case to be made for self-administration from a First Nations perspective, it is as a transitional tool. Discussing devolution as a transitional tool is not to give any endorsement to colonial views that First Nations are not ‘ready’ for self-government, but it is to recognize that the implementation of Aboriginal self-government is necessarily “a process, not a single act.”<sup>4</sup> This article does not propose that devolution is or was an ideal step in this process, but it asks whether, intentionally or unintentionally, it may nevertheless yield certain benefits. If so, devolution is unsatisfactory on its own, but is, arguably, useful as a “stepping stone” on the long path from subjugation to a future of genuine Aboriginal self-determination, a future in which First Nations are healthy, prosperous and realize their own goals for their communities. On the other hand, devolution may be a “quagmire” in which a dysfunctional, unjust and ineffective system is entrenched, causing untold damage to the First Nations people who rely on the system’s programs and services, and creating its own obstacles to positive change. I pursue my evaluation from this perspective. Regardless of the mixed intentions of the various individuals and institutions who have orchestrated devolution, has devolution been a stepping stone or a quagmire on the path to a better future?

The paper first turns to the question of why moving towards self-government is so important in the first place. This introductory section provides some context as to current conditions in First Nation communities and why self-government is the cornerstone element required to address the unjust gaps in quality of life between First Nations and other Canadians. The second section examines ‘self-administration’ or ‘program delivery devolution,’ terms that describe the predominant arrangement now in place, and

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3 Stephen Cornell, Catherine Curtis & Miriam Jorgensen, *The Concept of Governance and its Implications for First Nations: A Report to the British Columbia Regional Vice-Chief, Assembly of First Nations*, Joint Occasional Papers on Native Affairs No.2004-02 (Tuscon, AZ & Cambridge, MA: Native Nations Institute & The Harvard Project on American Indian Economic Development, 2004) at 28.

4 Ken S. Coates & W.R. Morrison, “From Panacea to Reality: The Practicalities of Canadian Aboriginal Self-Government Agreements” in Yale D. Belanger, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed. (Saskatoon: Purich Publishing, 2008) Ch. 5 at 114.

contrasts self-administration with self-government. Section III analyzes the various arguments that devolution has certain benefits as a “stepping stone”, and then examines contrasting arguments for devolution posing hazards as a “quagmire”. This section ends with an analysis of two critical factors that have intensified in recent years: underfunding, and weak progress towards genuine self-government. In this author’s view, these factors are tipping the balance towards negative results. These issues are explored further in case studies on education and child and family services in section IV.

If self-administered programs were properly funded, and were situated in a context of significant and ongoing structural change towards real self-government, perhaps they might have an overall benefit as a transitional tool. But the unfortunate reality is that underfunding and stagnation are undercutting any possible benefits of devolution and instead maximizing the disadvantages.

### Why Self-Government?

The fact that First Nations people live more difficult lives than most other Canadians may be well known, but the details bear repeating. Average income for Registered Indians in the year 2000 was less than \$17,000, in contrast to nearly \$30,000 for the overall Canadian population.<sup>5</sup> On reserve, as of 2006, 44 per cent of First Nation people live in homes in need of major repairs, an increase from 1996.<sup>6</sup> Mould infects almost half of the housing on reserve, and 100 reserves are under a boil-water advisory.<sup>7</sup> Infant mortality rates are higher for First Nations, unemployment is three times as high, and fewer than half of First Nations students graduate from high school.<sup>8</sup> Life expectancy for First Nations men and women is about six years lower than the Canadian average.<sup>9</sup> For First Nations youth aged 10 to 24, suicide is one of the leading causes of death.<sup>10</sup>

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5 Indian and Northern Affairs Canada, *Comparison of Socio-economic Conditions, 1996 and 2001: Registered Indians, Registered Indians living on reserve and the total population of Canada* (Ottawa: INAC, 2004) [INAC, *Socio-economic*].

6 Statistics Canada, “Aboriginal Population Profile, 2006 Census”, online: Statistics Canada <<http://www.statcan.ca/bsolc/english/bsolc?catno=92-594-XWE>>.

7 Assembly of First Nations, “Fact Sheet: The Reality for First Nations in Canada”, online: Assembly of First Nations <[http://www.afn.ca/article.asp?id=764#\\_edn1](http://www.afn.ca/article.asp?id=764#_edn1)> [AFN, “Fact Sheet”]. See also: Auditor General of Canada (2006) “Chapter 5: Management of Programs for First Nations” in *Report of the Auditor General of Canada – May 2006* (Ottawa: Minister of Public Works and Government Services, 2006).

8 INAC, *Socio-economic*, *supra* note 5.

9 Health Canada, “Statistical Profile on the Health of First Nations in Canada”, online: Health Canada <[http://www.hc-sc.gc.ca/fniah-spnia/pubs/aborig-autoch/stats\\_profil-eng.php](http://www.hc-sc.gc.ca/fniah-spnia/pubs/aborig-autoch/stats_profil-eng.php)>.

10 *Ibid.*

Canada is among the richest countries in the world and its people generally enjoy a high standard of living, ranking consistently near the top of the UN Human Development Index (HDI) which is based on life expectancy, per capita income and education. But the statistics above describe third-world conditions. First Nations, measured alone, rank 63rd on the HDI, according to Indian Affairs' own study.<sup>11</sup> Based on the HDI methodology, Indian Affairs developed a Community Well-being Index to compare quality of life in about 4,700 Canadian communities (geographic locations) on the basis of education, labour force participation, income and housing. One First Nation community ranked in the top 100. Of the 100 communities in Canada with the lowest well-being score, nearly all—92—are First Nations. Half of all First Nation communities scored in the bottom half of the index, as opposed to 3 per cent of other Canadian communities.<sup>12</sup>

These facts are grimly acknowledged by First Nations and other Canadians alike. But the question is, why? And what must be done?

Fortunately, we do not have to wait for answers. Both wide-ranging consultation with Aboriginal and non-Aboriginal Canadians, as well as statistical research comparing the successes and failures of different Indigenous communities in similar circumstances to First Nations, point to the same answer: the problem is the colonial legacy of external domination and subjugation of First Nation peoples, and a better future lies in revitalized communities with the ability to exercise genuine, effective and legitimate self-government in the interests of their people. Self-government is not a panacea on its own, but it is an essential element for success.<sup>13</sup>

The Royal Commission on Aboriginal Peoples (RCAP), which released its final report in 1996, compiled existing research, historical evidence, original research, and the experiences and wisdom of Aboriginal and non-Aboriginal people and groups. Commenting on the unjust and unequal social conditions in which Aboriginal Canadians people live, the Commission concluded the following as to its root cause and remedy:

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11 AFN, "Fact Sheet", *supra* note 7. See also: Martin Cooke *et al.*, "Indigenous Well-Being in Four Countries: An Application of the UNDP's Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand and the United States" (2007) 7:9 BMC Int. Health and Human Rights; and Martin Cooke, Daniel Beavon & Mindy McHardy, *Measuring the Well-Being of Aboriginal People: An Application of the United Nations' Human Development Index to Registered Indians in Canada, 1981–2001* (Ottawa: Indian and Northern Affairs Canada, 2004).

12 Mindy McHardy & Erin O'Sullivan, *First Nations Community Well-Being in Canada: The Community Well-Being Index (CWB)*, 2001 (Ottawa: Indian and Northern Affairs Canada, 2004).

13 See *e.g.* Royal Commission on Aboriginal Peoples, *Report: Vol. 3: Gathering Strength* (Ottawa: Supply and Services Canada, 1996) [RCAP, *Gathering Strength*] at Ch. 1 "New Directions in Social Policy". Also: Coates & Morrison, *supra* note 4.

This broader [historical] perspective has shown us that we are living with the painful legacy of displacement and assimilation policies that have undermined the foundations of Aboriginal societies. With the problems seen in this light, the solution is redistribution of power and resources so that Aboriginal people can pursue their social and economic goals and regain their health and equilibrium through means they choose freely.<sup>14</sup>

In addition, researchers at Harvard University conducted a major empirical study of Native American communities in the United States, and looked for predictors of economic prosperity. What they found was that the two most important factors for economic development in American Indian communities were the *degree* of genuine self-government (that is, real decision-making power) and the *quality* of that governance (that is, whether it met principles of good governance).<sup>15</sup> These findings are now being investigated further in Canada, but comparative analysis and preliminary indications show a similarly strong relationship between empowered, well-functioning Aboriginal governance structures and critical outcomes such as economic growth and mental health.<sup>16</sup>

The importance of self-government to improving the lives of First Nations people is clear. With this in mind, what is program delivery devolution or self-administration, and how does it compare with self-government?

## II SELF-ADMINISTRATION

### What It Is, What It Is Not

In devolution, First Nations assume the role of “administering and managing programs, without being granted any decision-making control over policy and legislative scope.”<sup>17</sup> It has come to include the local delivery on reserve both of programs previously provided to First Nations by the federal government, like education and income assistance, and of once (even if briefly) provincial ones, such as child and family services.<sup>18</sup> Notably,

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<sup>14</sup> RCAP, *Gathering Strength*, *ibid.*

<sup>15</sup> Cornell *et al.*, *supra* note 3 at 7.

<sup>16</sup> Stephen Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States*, JOPNA No. 2006-02 (Arizona: Native Nations Institute for Leadership, Management and Policy, on behalf of the Arizona Board of Regents and the Harvard Project on American Indian Economic Development, 2006) at 25.

<sup>17</sup> R.F. McDonnell & R.C. Depew, “Aboriginal Self-Government and Self-Determination in Canada: A Critical Commentary” in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed. (Saskatoon: Purich Publishing, 1999) Ch. 17 at 355.

<sup>18</sup> Although, note that child and family services were at one time part of the all-encompassing powers of the federal Indian Agent, and intertwined with the matter of education in the residential schools policy. If a First Nation family was deemed by the Indian Agent to have some problem, children were often removed—under federal authority—to residential schools. Provincial authority over child welfare on reserve only started after the revisions to the *Indian*

virtually all such programs would normally be the responsibility of the provincial governments in the non-Native context. However, s. 91(24) has made the provision of social services to “Indians” a perennial grey area within the traditional division of powers.<sup>19</sup> In the First Nations context, the federal department of Indian Affairs is expected to specialize in just about every subject matter, from health care to water treatment to education.

Devolution is essentially a downloading process in which a program’s operations are shifted to the local level, producing what can be called self-administration or perhaps self-management. The Band,<sup>20</sup> or another body authorized by the Band, gains control over the actual delivery of the program to the community. Most often, funding comes from Indian Affairs and the program’s structure is set by Indian Affairs policy requirements and, often, provincial laws and regulations.

In many ways, self-administration is best understood by comparing it to what it is not: genuine self-government. Two decades ago, First Nations representatives were already raising their voices about the vast difference “between managing and governing.”<sup>21</sup> Over 10 years ago, the Royal Commission on Aboriginal Peoples reported that federal and provincial governments have “handed over bits and pieces of the administrative apparatus” to Aboriginal peoples but “continue to block Aboriginal nations from assuming the broad powers of governance.”<sup>22</sup> Most recently, at the request of the Assembly of First Nations, scholars at the Native Nations Institute and the Harvard Project on American Indian Economic Development prepared a detailed summary of the difference between self-administration and self-

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*Act* in 1951 which added what is now s. 88, stipulating that provincial laws “of general application” apply to Indians. Provincial child welfare activity with respect to First Nation communities accelerated in the 1960s and 70s, and involved the removal of thousands of children from their families (see section IV of this paper, below, at the sub-section on child and family services). The connection to residential schools remained direct even under provincial authority; particularly in the early years, children removed by provincial child welfare authorities were sometimes placed in Indian residential schools, while others were sent for adoption or to other placements.

- 19 Referring to s. 91(24) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Victoria, c. 3. See e.g. Hugh Shewell & Annabella Spagnum, “The First Nations of Canada: Social Welfare and the Quest for Self-Government” in John E. Dixon & Robert P. Scheurell, eds., *Social Welfare with Indigenous Peoples* (New York: Routledge, 1995) at 16.
- 20 A Band is a First Nation community registered under the *Indian Act*. Devolution generally applies to Registered Bands subject to the *Indian Act*.
- 21 Myrtle Bush, Mohawk Council of Kahnawake, speech transcribed in Native Training Institute of Québec, *Bound for Greater Autonomy: Proceedings from the Indian and Inuit Nations Conference, November 7–10 1988* (Village des Hurons, Wendake (Québec): Native Training Institute of Québec, 1988) at 46.
- 22 Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996) [RCAP, Highlights] at “Looking Forward, Looking Back”.

government in the First Nations context. Stephen Cornell, Catherine Curtis and Miriam Jorgensen described “true self-government” as “significant jurisdictional power in the hands of First Nations,” where the First Nation is performing a variety of functions through institutions of their own design, is accountable to their own citizens rather than to a single funder, and relates as a partner to other governments within the federation.<sup>23</sup> In contrast, self-administration is “a model in which Indigenous government is designed by someone else ..., funding comes from someone else, accountability is to someone else, and programs are designed and evaluated by someone else.”<sup>24</sup> Self-government includes genuine legal authority respected internally and externally, whereas devolution is to manage and implement programs at only an administrative and operational level.

Exact typologies of self-government vary, and there is no settled definition.<sup>25</sup> Many have pointed out that governments around the world take a wide variety of forms, and Aboriginal self-government arrangements are diverse both in theory and in practice. What matters for the purpose of being *self-governing* is not any particular form, but rather the extent of the nation’s ability to choose its own structure, laws, mechanisms and institutions.<sup>26</sup>

The notion of “extent” or “degree” raises the question of whether self-governance is best thought of as a continuum, in which self-administration is perhaps a very weak form, but some form nonetheless. RCAP spoke of the “road” or “path” to self-government, and frequently referred to existing Aboriginal governments *as* governments despite highlighting their shortcomings.<sup>27</sup> John Hylton describes First Nations as “increasingly self-governing,” and he frames program management as a kind of incremental step forward though not the final one.<sup>28</sup> Indian Affairs has outlined a “governance continuum,” extending from the *Indian Act* at one end to a s. 35 constitutionalized model at the other.<sup>29</sup> Frances Abele and Michael J. Prince identified the exercise of delegated powers in tandem with the *Indian Act* as

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23 Cornell *et al.*, *supra* note 3 at 29.

24 *Ibid.* at 28. Their paper also provides a useful table comparing the two concepts at pages 30-31.

25 Yale D. Belanger, “Introduction” in Yale D. Belanger, *supra* note 4 at vii.

26 Cornell *et al.*, *supra* note 3 at 5-6.

27 See generally the report (all volumes) of the Royal Commission on Aboriginal Peoples, and especially Royal Commission on Aboriginal Peoples, *Report: Vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996) [RCAP, *Restructuring the Relationship*] at Ch. 3 “Governance”.

28 John H. Hylton, “Conclusion” in John H. Hylton, *supra* note 17 [Hylton, “Conclusion”] Ch. 21 at 433.

29 Presentation of John Graham, in Institute on Governance, *Roundtable on Government-to-Government Relationships in the First Nations Context, Summary of the 9th IOG Aboriginal Governance Roundtable, Ottawa, April 28 2005*, IOG 2005-1099 (Ottawa: Institute on Governance, 2005) at 5.



one form of self-government, albeit the weakest form and one which is almost universally seen as “a way station or transitional model on the way to something better.”<sup>30</sup> Others differentiate self-administration from “true”<sup>31</sup> or “full”<sup>32</sup> self-government, perhaps allowing for the interpretation that the difference is one of degree.

Ultimately, though, the question of whether or not self-administration is some very limited form of self-government is largely semantic, and not crucial for the purpose of this paper. Even the federal government has by now recognized that real Aboriginal self-government entails structural change that goes far beyond the existing *Indian Act* model.<sup>33</sup> Different Aboriginal communities aspire to different forms of self-government, but none is content with the limited and deeply colonial structure that characterizes the *Indian Act* and program delivery devolution. As Cornell, Curtis and Jorgensen concluded on self-administration, “[s]ome people may call this self-government but it is hardly worthy of the name.”<sup>34</sup> For all practical purposes then, self-administration is clearly *not* self-government and not the goal to which First Nations aspire.

But can devolution, nevertheless, be a transitional point on the journey of self-government towards a better future for First Nations? A number of authors have positioned it in this way. In 1991, Peter Douglas Elias described a model that begins with internal community empowerment and moves progressively outward. In this scheme, transitional steps include pushing the limits of existing Band powers under the *Indian Act*, followed by “program devolution,” “function devolution” and “legislated self-government”; the process culminates in “comprehensive negotiated agreements.”<sup>35</sup>

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30 Frances Abele & Michael J. Prince, “The Future of Fiscal Federalism: Funding Regimes for Aboriginal Self-Government” in Yale Belanger, *supra* note 4 Ch. 8 at 161.

31 Cornell at al., *supra* note 3 at 29.

32 Douglas Durst, *It’s Not What, But How! Social Service Issues Affecting Aboriginal Peoples: A Review of Projects* (Regina: University of Regina Faculty of Social Work & Human Resources Development Canada, 2000) [Durst, *It’s Not What, But How*] at 88.

33 The federal government’s 1995 Inherent Right Policy recognized self-government as an inherent Aboriginal right. However it maintained that, to come into effect, self-government must be negotiated and areas of jurisdiction handed over. The policy also outlined which subjects of jurisdiction would be available for negotiation and which would not, as well as detailing other caveats and requirements. Many question whether this policy truly recognizes self-government as an inherent right, and whether it forms a sufficient basis to reach genuine self-government arrangements. However, at a minimum it does recognize that the existing *Indian Act*-based structure is inadequate.

34 Cornell *et al.*, *supra* note 3 at 28.

35 Peter Douglas Elias, *Development of Aboriginal Peoples’ Communities* (North York: Centre for Aboriginal Management Education and Training (CAMET) & Captus Press Inc., 1991) at 107-118. Note that the precise difference between the two forms of devolution Elias enumerates is not entirely clear. In his description, “function devolution” provides greater responsibility for that subject area, including block funding for greater flexibility.

Douglas Durst, focusing on the social service context, proposed a “Circle of Self-Government” in which ‘autonomy’ is both the historical starting point and the future end point. In between, the model cycles through ‘colonialism’ in which programs are completely controlled by outsiders, an ‘integrated’ stage in which outsiders seek Indigenous input, a ‘delegated’ system with local program delivery but resting on the legal authority of an external power, and ‘co-jurisdiction’ in which both the First Nation and an external power have authority. The delegated system is a clear reference to self-administration.<sup>36</sup> Durst notes that these stages are not necessarily sequential and might be jumped.<sup>37</sup>

Recent commentators such as Ken Coates and W.R. Morrison stress that even comprehensive self-government agreements are far from a final end point, since implementation and improvement on many levels stretch forward into the future, despite the achievement of some type of formal legal recognition.<sup>38</sup> Cornell *et al.* of the Harvard Project and John Graham of the Institute on Governance have explored what they call “incremental” or “evolutionary” ways to increase First Nations’ governance powers and move step-wise from self-administration to self-governance.<sup>39</sup>

The theory that program delivery devolution may function as a transition is therefore not new, but begs critical examination. To see whether it is borne out, we must first explore where it came from. How did self-administration become the predominant method by which First Nations, particularly people living on reserve, receive their public services?

### The Devolution Trend

The provision of social programs by Indian Affairs was not the federal government’s original plan. In the initial post-war period the federal government’s Indian policy was still firmly based on assimilation; the government remained convinced that Indians would sooner or later (preferably sooner) merge into the Canadian mainstream and disappear as unique legal and political communities. However, while retaining assimilationism, federal policy began to distance itself from blatantly racist views of Indians as

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36 Durst, *It’s Not What, But How*, *supra* note 32. Durst set out the same model in previous works, particularly: Douglas Durst, *The Circle of Self-Government: An Observer’s Field Guide to Aboriginal Government of Social Services* (Regina: University of Regina Faculty of Social Work, 1996).

37 *Ibid.*

38 Coates & Morrison, *supra* note 4.

39 John Graham, *Rethinking Self-Government: Developing a More Balanced, Evolutionary Approach*, Policy Brief No. 29, September 2007 (Ottawa: Institute on Governance, 2007) [Graham, *Rethinking*] at 7 and generally; Cornell *et al.*, *supra* note 3 especially 14-23 (actions for First Nations) and 24-27 (actions for federal and provincial governments).

savages and began slowly shifting to a more ‘liberal’ vision that focused on individual rights and equality. Instead of civilizing the Indian through segregation, such as in residential schools, the latest idea was to effect assimilation by immediately integrating First Nations into mainstream society. Following the recommendations of the 1946 Joint Committee and, later, the 1966 Hawthorn-Tremblay Report, Indians were increasingly considered to be deserving of (and eventually became legally entitled to) citizenship and the vote without further qualification. Mainstream views slowly came to see Indians as holding equal rights with other Canadians.<sup>40</sup> This ‘progressive’ policy, it was thought, would soon do away with the ‘Indian problem,’ and new social service programs expanding at the provincial level would be provided to First Nations as to everyone else.

However, this scheme suffered two fatal blows. First, the provinces proved highly reluctant to extend their programs to Indians—a position that has persisted to a large extent to the present day.<sup>41</sup> Second, the policy of forced assimilation culminated and then died—officially at least—with the proposal of the 1969 White Paper, its historic rejection by Aboriginal peoples, and its subsequent withdrawal in 1971. Faced with these realities, the federal government began expanding its own public services to First Nations in the 1960s and 1970s, making some effort to keep up with new provincially supported services such as health care and social assistance.<sup>42</sup>

Before long, Indian Affairs started to pursue devolution. Originally they focused on amending the *Indian Act* and taking unilateral actions that were applied nationally without consultation with or the consent of First Nations. Sometimes federal and provincial governments concluded service agreements on their own.<sup>43</sup> However with time it became standard to allow First Nation communities to decide whether to opt-in to particular programs—provided, of course, they met the requisite criteria and agreed to the pre-set conditions. This “Hobson’s choice” format, still prevalent today, in effect challenges First Nation communities to “take it or leave it.”<sup>44</sup>

Self-administered program delivery continued to expand in the 1980s and early 1990s, moving into new fields such as child welfare, substance abuse treatment, and employment training. Early in this decade Indian

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40 Shewell & Spagnum, *supra* note 19 at 3.

41 *Ibid.* at 4.

42 *Ibid.* at 4 and 6. However, keep in mind that the history of each sector is unique, and that circumstances varied in different provinces and territories.

43 McDonnell & Depew, *supra* note 17 at 353-354. An example is the 1965 *Memorandum of Agreement Respecting Welfare Programs for Indians* (“Indian Welfare Agreement”) between Canada and Ontario.

44 Douglas Durst, “The Wellness of Aboriginal Children: Seeking Solutions through Self-Government” in John H. Hylton, *supra* note 17 [Durst, “Wellness”] at 199.

Affairs issued a statement clearly endorsing “the transfer of government-administered social services” to local First Nations communities, “as and when they were ready to assume control.”<sup>45</sup> The number of tripartite and bipartite agreements to effect such transfers multiplied.<sup>46</sup> Under pressure, Indian Affairs sought input from First Nation communities on various programs, and solicited community proposals for its consideration.<sup>47</sup>

Yet throughout this time First Nations were promoting a much more comprehensive vision for change. Since the publication of the White Paper the Aboriginal rights movement had taken off, articulating a clear and forceful demand for recognition of Aboriginal peoples’ inherent rights to their lands and to govern themselves as self-determining peoples. First Nations and other Aboriginal groups developed modern organizations to promote and realize this agenda. Their claims began to be recognized in Canadian courts, beginning especially with the *Calder* judgment of 1973,<sup>48</sup> which found that Aboriginal title survived at common law and was enforceable. Politicians constitutionalized “existing” Aboriginal and treaty rights through s. 35 of the *Constitution Act, 1982*, and received the Penner Report (*Report of the Special Committee on Indian Self-Government*) in the following year. Penner recommended self-government with powers similar to provinces,<sup>49</sup> though the federal and provincial response at the time was lukewarm.<sup>50</sup> Through the 1980s and early 1990s, Aboriginal self-government remained the subject of constitutional negotiations. These negotiations tried (unsuccessfully) to produce further amendments to the 1982 Constitution on the subject of self-government.

The Royal Commission on Aboriginal Peoples was struck in 1991 and began work on a massive project to build a shared understanding of Canada’s past and lay out a vision for the future. In 1996 it released a five-volume report focusing on a renewed ‘nation to nation’ relationship as the foundation for positive change. Meanwhile, in 1995, the federal government took a step towards adopting this vision as its own, issuing its Inherent Right Pol-

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45 Shewell & Spagnut, *supra* note 19 at 28. Note that this text is quoting Shewell & Spagnut, and is not a direct quote of the Indian Affairs’ statement described. They indicate that such a statement was issued in May 1982.

46 *Ibid.*

47 McDonnell & Depew, *supra* note 17 at 354.

48 *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313. For more on the context and significance of the *Calder* case, see Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

49 Special Committee on Indian Self-government (Chairman Keith Penner), *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: House of Commons, 1983) [Penner Report].

50 Elias, *supra* note 35 at 25.

icy framework which recognized self-government as an inherent Aboriginal right—though subject to negotiation and approval. While the policy has significant shortcomings, and a few modern treaties had been concluded before it, the new framework did open the door to a much larger treaty process.<sup>51</sup>

In this context, a few First Nations are indeed starting to conclude and implement new self-government agreements that entail recognition of their legal jurisdiction and much wider powers. Some such agreements are comprehensive and often tied to the settlement of a land claim, as with the *Nisga'a Final Agreement*<sup>52</sup> or the agreements with Yukon First Nations.<sup>53</sup> A small number of sectoral self-government agreements have been concluded on specific subject matters, including the *Mi'kmaq Education Agreement* (now *Mi'kmaw Kina'matnewey Education Agreement*) which allows for not only program delivery, but also law-making jurisdiction, in education to be exercised by the participating Mi'kmaq nations of Nova Scotia.<sup>54</sup> Another education agreement recently concluded in British Columbia is considered later in this paper.

While the period from the mid-90s onward will be considered in greater detail below, what is important to note at this point is that, despite the opening towards self-government negotiations, self-administration programs directed from the top by Indian Affairs remain by far the most common arrangement to this day—more than 25 years after the introduction of s. 35 and well over a decade since RCAP and the Inherent Right Policy. For instance, Indian Affairs claims that some 91 per cent of children on reserve are served by their First Nations Child and Family Services Program.<sup>55</sup> Other major programs administered by Indian Affairs include Elementary/Secondary Education, the scholarship-based Post-Secondary Education program, Income Assistance (that is, welfare), Community Infrastructure and Housing, the Family Violence Prevention Program, and the health-related

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51 Brian Crane, Robert Mainville & Martin W. Mason, *First Nations Governance Law* (Toronto: LexisNexis Butterworths, 2006) at Ch. 3.

52 *Nisga'a Final Agreement*, ratified by the Nisga'a Nation on November 9, 1998, by British Columbia on April 22, 1999 (see: *Nisga'a Final Agreement Act*, R.S.B.C. 1999, c. 2) and by the federal government on April 13, 2000 (see: *Nisga'a Final Agreement Act*, R.S.C. 2000, c. 7).

53 *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, 1993. See: *Yukon First Nations Land Claim Settlement Act*, S.C. 1994, c. 34 and *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35. See also the agreements with each participating Yukon First Nation.

54 Mi'kmaq Education Agreement, 1998. See: Mi'kmaq Education Act, S.C. 1998, c. 24. and Mi'kmaq Education Act, S.N.S., c. 17. Renewed by 10 First Nations in 2005 as the Mi'kmaw Kina'matnewey Education Agreement.

55 Indian and Northern Affairs Canada, "First Nations Child and Family Services Program", online: INAC <[http://www.ainc-inac.gc.ca/ps/fnc\\_e.html](http://www.ainc-inac.gc.ca/ps/fnc_e.html)>.

Adult Care and Assisted Living programs.<sup>56</sup> Self-government with real jurisdiction is still the exception, while devolution schemes with only program delivery at the First Nation level remain the rule.

### **Ambivalence from First Nations**

The response from First Nations to devolution has been mixed. To be sure, First Nations have generally denounced program devolution, and have clearly maintained that their right to self-determination and therefore legal jurisdiction must be recognized and respected within the context of more robust self-government. Devolution did not fulfill the vision of cultural, economic and social revitalization these communities hoped to achieve. Elias argues that, at least in the early years, a blatant downloading process “wholly controlled by the federal government” left First Nation communities “saddled” with programs they did not want and were not prepared to take on.<sup>57</sup> Elias writes that Bands were often “suspicious” of devolution, that they worried that they would end up “locked into” a system that only recognized self-administration rather than self-government, and in which mere program delivery was the “ultimate form” of local control.<sup>58</sup>

*Wahbung: Our Tomorrow*, issued by the Manitoba Indian Brotherhood in 1971, was an early treatise promoting the vision of self-government and simultaneously criticizing the new phenomenon of devolution:

The practice of program development in segments, in isolation between its parts, inhibits if not precludes effective utilization of all resources in the concentrated effort required to support economic, societal and educational advancement.<sup>59</sup>

Instead, the Brotherhood urged the development of Indian institutions to pursue their own development goals in a comprehensive and non-dependent way. After more experience with it, First Nations’ frustrations with program delivery only grew. The Union of BC Indian Chiefs issued a striking rebuke of devolution in 1987:

The transfer of program dollars to the respective Indian administrators cannot be interpreted as devolution of “real” power to Indian governments: nor can the process amount to self-determination powers in any recognizable form of self-

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56 Indian and Northern Affairs Canada, “Social Policy and Programs”, online: INAC <[http://www.ainc-inac.gc.ca/ps/soc\\_e.html](http://www.ainc-inac.gc.ca/ps/soc_e.html)>; Indian and Northern Affairs Canada, “Education”, online: INAC <<http://www.ainc-inac.gc.ca/edu/index-eng.asp>>. See also Shewell & Spagnut, *supra* note 19 for further discussion of some of the Social Policy programs and their development.

57 Elias, *supra* note 35 at 109.

58 *Ibid.* at 113.

59 Manitoba Indian Brotherhood, quoted in Elias, *ibid.* at 11.

government. Devolution as advanced by the Department of Indian and Northern Affairs is fraudulent.<sup>60</sup>

In the mid-80s, a leaked memo from the Mulroney government urged further devolution of “community management” to Bands—under strict funding caps—as a strategy to cut federal spending. The memo, strongly reminiscent of the White Paper, also recommended the transfer of as many expenditures as possible to provinces, the privatization of Indian land, and the complete elimination of the department of Indian Affairs. Quickly dubbed The Buffalo Jump of the 1980s, the memo fuelled Aboriginal perceptions that devolution was a trick designed to herd First Nations off the cliff into political and cultural oblivion.<sup>61</sup>

Though details of the laws, policies and funding schemes guiding devolved programs have changed over the years, the fact that all of these remain under the purview of outsiders has not. As Aboriginal law professor Darlene Johnston noted recently to this author, “on reserve, devolution is a dirty word.”

And yet, almost all First Nations have participated in at least some type of self-administration program—if not many—and have usually done so by their own consent. “There are few bands,” wrote Hugh Shewell and Annabella Spagnut in 1995, “which do not administer at least some of the Department’s programmes.”<sup>62</sup> Durst found that though Aboriginal leaders “have feared the erosion of their inherent and treaty rights” by virtue of participating in self-administration programs which fail to recognize their jurisdiction, they have “reluctantly agreed to these contracts” as a stopgap measure, given that they have been “offered no alternatives.”<sup>63</sup> This takes us back to the Hobson’s choice—take it or leave it—that First Nations face when considering devolution.

First Nations’ consent to, and even demand for, program delivery is understandable if one considers the immense dissatisfaction with the *status quo ante* in which the federal and provincial governments made decisions for First Nations, without any input, causing massive harm to individuals and communities. These ongoing harms provided a huge incentive to ameliorate the situation as soon as possible, and to any possible extent.

The disastrous residential schools system, which began in the late 19th century and peaked in the 1960s and continued even into the following

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60 Elias, *ibid.* at 113.

61 Menno Boldt, *Surviving As Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993) at Appendix 8, The Ministerial Task Force on Program Review (‘The Nielsen Report’ and ‘The Buffalo Jump of the 1980s’): Summary. See also: Sally M. Weaver, “Indian Policy in the New Conservative Government, Part 1. The Nielsen Task Force of 1985” (1986) 2:1 Native Studies Review 1.

62 Shewell & Spagnut, *supra* note 19 at 18.

63 Durst, “Wellness”, *supra* note 44 at 199.

decades, was reason enough for First Nations to be eager to run their own schools on reserve, which they began to do in the 1970s. Residential schools stole thousands of First Nation children from their homes for the purpose of wiping out their Aboriginal identity and instilling Christian civilization in its place. The schools often failed to provide adequate food, clothing and sanitary living conditions, resulting in death rates some have estimated as being at 50 per cent in the pre-World War II period. Physical, psychological and sexual abuse were rampant.<sup>64</sup> Following years of litigation and negotiation, a settlement was finally concluded in 2005 that provides for some compensation for survivors, a Truth and Reconciliation Commission, commemoration and a research archive, and support for healing programs.<sup>65</sup>

Similarly, the massive and culturally-biased “scoop” of children into the provincial child welfare systems, starting in the late 1950s and accelerating through the 60s and 70s, made the development of First Nation-run child welfare agencies in the 1980s an urgent necessity. Once provincial child welfare agencies gained authority over Indians by virtue of the 1951 *Indian Act* amendments, they took over from where federal officials left off in terms of the large-scale removal of First Nation children. They placed some children in residential schools and sent thousands of children for adoption into white families. By the late 60s, already 30 to 40 per cent of all children in child welfare care in Canada were Aboriginal. Many of the children adopted out into white families have since resurfaced, often suffering from trauma and alienation reminiscent of the suffering of residential school survivors.<sup>66</sup>

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64 Royal Commission on Aboriginal Peoples, *Report: Vol. 1: Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996) [RCAP, *Looking Forward, Looking Back*] at Ch. 10 “Residential Schools”. For most of the residential school policy’s lifetime, the federal government partnered with churches to run the schools. As RCAP described: “The common wisdom of the day that animated the educational plans of church and state was that Aboriginal children had to be rescued from their ‘evil surroundings’, isolated from parents, family and community, and ‘kept constantly within the circle of civilized conditions’.” Students at the schools were punished, usually physically, for speaking their language. Even in formal educational terms, the schools were an utter failure. Teachers were usually unqualified, grade achievement levels low and graduates rarely found work. Residential schools left traumatized individuals and devastated communities in their wake, with patterns of abuse transmitted to subsequent generations.

65 *Agreement in Principle between Canada as represented by the Hon. Frank Iacobucci, the Plaintiffs as represented by the National Consortium, Merchant Law Group and other legal counsel as undersigned, the Assembly of First Nations, and the General Synod of the Anglican Church in Canada, the Presbyterian Church in Canada, the United Church of Canada, and Roman Catholic Entities*, 20 November 2005, online: Assembly of First Nations <[http://www.afn.ca/residentialschools/PDF/AIP\\_English.pdf](http://www.afn.ca/residentialschools/PDF/AIP_English.pdf)>.

66 RCAP, *Looking Forward, Looking Back*, *supra* note 64 and Marlyn Bennett, Cindy Blackstock & Richard De La Ronde, *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada*, 2nd ed. 2005. (Winnipeg: The First Nations Research Site of the Centre of Excellence for Child Welfare and the First Nations Child and Family Caring Society, 2005). The child welfare saga has considerable overlap with residential



It is nearly impossible to overstate the devastation wrought by these policies on First Nation individuals, families, communities and cultures. Federal and provincial programs in education and child welfare were decimating Aboriginal peoples, and First Nations lacked any control over these initiatives. The desperation of these circumstances gives 'take it or leave it' a truly grim context; the option of waiting for Canadian governments to legally recognize jurisdictional Aboriginal self-government was a luxury that simply could not be afforded.

Granted, not all First Nations have taken on all devolved programs, and the time and circumstances of each devolution process has varied enormously. For instance, First Nations in Manitoba were among the first to participate in the child welfare program, while those in Saskatchewan did not do so until more than 10 years later.<sup>67</sup> Yet, overall, the prospect of improving on the past, however marginally, has been very difficult to refuse. First Nations hoped that some improvement would result from self-administration, and that jurisdiction would be settled in their favour over the course of a longer struggle. Though they agree that "the real issue is jurisdiction," in the meantime "many are taking advantage of a policy which permits them ... to acquire as much control as possible."<sup>68</sup> In this context, First Nations' ambivalent approach towards program delivery devolution is understandable.

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schools. In the 1950s and 60s, child welfare authorities often placed First Nations children in residential schools, giving the schools an increasing role as social welfare institutions. By 1966, Indian Affairs estimated that 75 per cent of the children left in residential schools were "from homes ... considered unfit for school children." In later years, including today, First Nations children taken by social workers often have come from families that were devastated by the residential school experience. Furthermore, poverty alone (and closely related issues such as housing) often provides enough justification for child removal. Particularly during the 1960s to 80s, care by extended family members rather than by biological parents was seen as unacceptable parental neglect, undercutting traditional models of child care and attempts within communities to cope with the impact of residential schools. In those years, child protection authorities conducted little screening of the homes to which First Nations children were sent as it was assumed that white, middle-class families would provide children with better opportunities. A number of children experienced abuse. As adolescents, many adopted First Nations children faced a crisis of identity and alienation, often running away and/or turning to substance abuse.

67 Durst, "Wellness", *supra* note 44 at 195-196. First Nations in Manitoba began to develop child welfare agencies in the early 1980s, while Nations within the Federation of Saskatchewan Indian Nations originally refused to take on administration in this area without recognition of their jurisdiction. After further negotiations with both the federal government and Saskatchewan, they founded agencies within the INAC (Indian Affairs) scheme in the late 1990s. Their agencies also operate according to the FSIN's (Federation of Saskatchewan Indian Nations) own laws; although their authority over child and family services is not fully recognized externally, Durst called this approach "co-jurisdiction."

68 Shewell & Spagnut, *supra* note 19 at 31-32. Note that these comments were written about child protection specifically.

### III STEPPING STONE OR QUAGMIRE?

#### Potential Benefits

Self-administration is not an acceptable final arrangement. In the 1970s or 1980s the federal government might have considered self-administration as an end-point, but it has never been endorsed as such by First Nations. Yet as a transitional tool and an improvement on the past, self-administration has potential benefits that deserve consideration. Many authors who document the shortcomings of devolution have highlighted certain positive aspects and have qualified their criticism with the hope that it may be a “stepping stone towards more complete self-government.”<sup>69</sup> This theory deserves further exploration.

How might self-administration work as a stepping stone? I consider four possible benefits: (1) local responsiveness and greater effectiveness, (2) capacity-building, (3) the opportunity to experiment with inter-First Nation cooperative arrangements, and (4) future transfer of gains into a more genuine self-government arrangement. Note that I examine the potential hazards of self-administration in the subsequent section, and that some of those arguments will critique the benefits described here.

Perhaps the most obvious potential benefit of local program delivery is that programs delivered under local control are often more responsive to their own community. The program will likely be based more on the community’s real needs and goals, will be a closer cultural match, and will enjoy greater acceptance and support within the community. Though the program is bound by an external legal and policy framework,<sup>70</sup> a fair amount of flexibility may be possible. The fact is that these programs are just not the same as the old programs run entirely by outsiders. Elias describes how First Nations child and family services agencies often integrate the use of Elders, rely more on extended family for care arrangements, focus on supporting the child within the family rather than apprehensions (where possible), and engage in a variety of culturally based programming for the child and family.<sup>71</sup> Similarly, First Nations schools have developed culturally relevant curriculum material, brought in Elders and others with traditional knowledge to impart their teachings, and have reinvigorated the instruction of Indigenous languages.<sup>72</sup> Durst argues that since provincial and federal authorities

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69 Elias, *supra* note 35 at 110.

70 This usually includes Indian Affairs funding and eligibility policies, as well as provincial laws, regulations and policies pertaining to the relevant subject area.

71 Elias, *supra* note 35 at 156-157.

72 K.P. Binda with Sharilyn Callilou, *Aboriginal Education in Canada: A Study in Decolonization* (Mississauga: Canadian Educators’ Press, 2001).

are far removed from the communities in most cases, First Nations operating devolved programs may in fact enjoy greater authority in program design on the ground than may appear on paper, exercising “considerable control at the local level.”<sup>73</sup>

Evidence suggests that this greater adaptation and sense of ‘ownership’ of a social service program at the local level is likely to be more effective. In other words, self-administered programs are more likely to succeed in generating the desired outcomes of the program. Making this social policy case for self-government, Hylton argues that externally imposed programs fail Aboriginal people and do not produce positive results, while programs by and for Aboriginal people are simply more effective and ultimately no more expensive.<sup>74</sup> He shows that a large body of research has documented the ineffectiveness of externally controlled programs and has investigated a number of explanations for this fact.<sup>75</sup> In contrast, evaluations of Aboriginal-run programs show a number of benefits, including cultural match, higher quality, and increased access.<sup>76</sup> Drawing on international research and a major empirical study of Native American communities in the US, Stephen Cornell also makes an empirical argument that the more Indigenous peoples control their own public services, the more successful these services will be in reducing poverty and meeting other functional goals.<sup>77</sup>

A second potential set of benefits could be characterized as capacity-building. This occurs on a number of levels. Individually, local delivery usually prioritizes the use of local and/or Aboriginal staff. In this way, more people from each First Nation gain the training and experience necessary to work successfully in that subject area. Human resource capacity improves at a number of levels, including, of course, direct delivery skills, but also in management areas like program coordination, finance and policy.

Communally, the First Nation as a whole gains experience in the policy field in question. This involves familiarity with the landscape of existing federal and provincial laws, policies and practices on that subject, as well as a lived history of mistakes and successes in the operational sphere. Having run a program locally for some time, Band Councillors, administrators, pro-

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73 Durst, *It's Not What, But How*, *supra* note 32 at 102.

74 John H. Hylton, “The Case for Self-Government: A Social Policy Perspective” in Hylton, *supra* note 17 [Hylton, “Case for Self-Government”] Ch. 4 at 78.

75 *Ibid.* at 83-85.

76 *Ibid.* at 85-86. Hylton does not specify exactly what he means by “Aboriginal-run” programs, or programs “by and for” Aboriginal people. However, considering the examples he uses in the child protection context, and the scarcity of any programs with real jurisdiction at his time of writing, it is almost certain that he is referring to self-administered programs in which delivery is local, but the legal structure is not.

77 Cornell, *supra* note 16 especially at 17 and 27-28.

gram staff and community members may have a clearer sense of how they would choose to design laws and programs in that sector.

Institutionally, devolution has often led to the founding of new First Nation program-delivery institutions at the local level. For example, over a hundred First Nation child and family service agencies now exist and over five hundred First Nation schools are now on reserve.<sup>78</sup> Starting up such institutions is expensive, difficult and necessarily slow. These institutions are valuable assets to First Nations communities that can be improved upon and developed further in the future. Band governments themselves have also grown in response to devolution, developing “significant planning and administrative bureaucracies with which both to negotiate and deliver these programmes.”<sup>79</sup> Arguably, a stronger and more experienced Band government will be in a better position to negotiate and deliver on genuine self-government as well.<sup>80</sup>

Third, new models of inter-First Nation cooperation can be developed and tested out through self-administration. Since devolution has usually put service delivery at the Band level, it has had the unfortunate effect of confusing self-government with decentralization. However, the two are distinct; a self-governing First Nation does not have to do everything itself—it may *choose* how it wants to conduct governance and administer services, and may choose to do either or both of these things with other communities.<sup>81</sup> It should be recalled that there is room for substantial creativity; the options are not simply between the full separation of each local community or full merger. Inter-First Nation cooperative arrangements can exist at various governmental or administrative levels, may use different institutional bodies

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78 On child protection agencies: Auditor General of Canada, “First Nations Child and Family Services Program – Indian and Northern Affairs Canada” in *Report of the Auditor General of Canada – May 2008* (Ottawa: Minister of Public Works and Government Services, 2008) [Auditor General, “Child and Family Services” (May 2008)] at Ch. 4 which indicates that 108 agencies are supported by Indian Affairs; and also Marlyn Bennett, *First Nations Fact Sheet: A General Profile on First Nations Child Welfare in Canada* (Ottawa: First Nations Child and Family Caring Society, n.d.) online: FNCFCFS <<http://www.fncaringsociety.com/docs/FirstNationsFS1.pdf>> [Bennett, Fact Sheet] at 1 which says there are 125 agencies in total. On schools: Michael Mendelson, *Improving Education on Reserves: A First Nations Education Authority Act* (Ottawa: Caledon Institute for Social Policy, July 2008) indicating 550 schools; and also Auditor General of Canada, “Chapter 5: Indian and Northern Affairs Canada – Education Program and Post-Secondary Student Support” in Auditor General of Canada, *Report of the Auditor General of Canada to the House of Commons – November 2004* (Ottawa: Office of the Auditor General of Canada, 2004) [Auditor General, “Education” (Nov. 2004)] at 5.15, which counts about 500 schools at that time.

79 Shewell & Spagnum, *supra* note 19 at 18.

80 A critique of this argument, particularly with respect to the institutional development of Band Councils, follows in the next sub-section of this paper which considers whether devolution is not beneficial but rather a hazardous quagmire.

81 Cornell *et al.*, *supra* note 3 at 16.

and mechanisms, and may be used for different purposes. In fact, where self-government agreements have been concluded, First Nations have often chosen to create a mixture of smaller and larger institutions that involve some measure of inter-First Nation cooperation, that retain local governance as well, and that accord with their own traditions, regional relationships and practical needs.<sup>82</sup>

‘Aggregation’ in Aboriginal self-government is a controversial topic. While some promote its potential benefits,<sup>83</sup> many others have raised concerns.<sup>84</sup> However, First Nations have the right to determine their own political arrangements and administrative strategies. The key factor is consent: any imposed structures, including the use of incentives or conditions designed to coerce First Nations to aggregate services, are unacceptable. If and when the necessity of consent is upheld, self-administration may provide opportunities for First Nations to experiment with inter-community cooperative arrangements one sector at a time, at a largely administrative rather than governmental level, and without the finality of a major self-government agreement. This could allow for functional and meaningful arrangements for managing programs to be tried out with less risk.<sup>85</sup>

For example, a number of child and family services agencies serve more than one First Nation. In this case, each nation has ‘delegated up’ to administer its service through a larger regional arms-length body. This model means that policy decisions can be retained at the local level, and allows for economies of scale (where possible) and for regulatory distance between operational and political bodies. Similarly, some First Nations are beginning to use regional bodies at a provincial/territorial or Tribal Council level to provide some of their educational services, with some parallels to the concept of a school board.<sup>86</sup> The BC First Nations Education Steering

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82 See Crane *et al.*, *supra* note 51. For example, consider the arrangements set out in the Yukon First Nation Agreements, the Mi’kmaq Education Agreement, the Nisga’a Final Agreement, and the Tlicho Agreement, among others, discussed in Chapter 3 of that book.

83 See for example, the “nation model” in RCAP, *Restructuring the Relationship*, *supra* note 27; and the work of John Graham, *infra* note 85.

84 For one example, see McDonnell & Depew, *supra* note 17 at 356-367.

85 For more on aggregation in the First Nations context, see John Graham, *Aggregation and First Nation Governance, Policy Brief No.18 – December 2003* (Ottawa: Institute on Governance, 2003) and John Graham, *Aggregation and First Nation Governance: Literature Review and Conclusions* (Ottawa: Institute on Governance, 2003). Graham makes a case that while some of the traditional arguments for aggregation have indeed been proven to be weak, there are stronger arguments showing that it can provide real benefits for good governance within First Nations and can help implement programs more effectively. He explores a number of single- and multi-tiered possibilities.

86 Harvey McCue Consulting, *First Nations 2nd & 3rd Level Education Services: A Discussion Paper for the Joint Working Group, INAC-AFN* (Harvey McCue, April 2006). See also below at footnotes 140 to 142 and accompanying paragraph in text.

Committee is a good example, and is considered in the case study on education at the end of this paper.

Finally, self-administration may be a beneficial transition in that the more appropriate programming, new capacity and regional arrangements developed through self-administration have the potential to be integrated into more genuine self-government systems. Instead of answering to a legal and policy framework decided by the federal and provincial governments, these operating systems could shift their orientation to a recognized Aboriginal government with full jurisdictional powers when those legal and structural changes are officially recognized and come into effect. For instance, instead of following provincial child welfare legislation, an established First Nation child and family service agency could derive new legal and regulatory authority from the laws and policies of a First Nation government.

Indeed, pre-existing First Nations programming, capacity and coordination would be immensely valuable assets to a First Nation government that achieves greater legal authority. Instead of waiting for the operational work to occur only after jurisdiction is recognized on paper, First Nations may be reaching implemented self-government more quickly by taking advantage of opportunities for change as they present themselves. These opportunities could be affected by a First Nation's particular interest in a certain sector, by the vagaries of provincial or federal elections, by provincial or federal willingness to review a given policy sector at a certain moment, or by other factors. Graham and others argue that "incremental and gradual approaches" to self-government are necessary given that governance cannot be implemented overnight and that it requires each First Nation to find its own path.<sup>87</sup> Even First Nations that already have major self-government agreements in force on a legal level are moving slowly and step-wise towards implementation, as change cannot occur on the ground instantaneously.<sup>88</sup> A pragmatic approach for other First Nations might pay off in the long run if the gains made through self-administration can be transferred once legal jurisdiction is eventually respected.

### Potential Hazards

The arguments above show how self-administration has been, and might be, useful as a transitional regime. The major critique of self-administration is one this paper explored earlier: that it unjustly fails to recognize First Nations' rights to self-determination, and therefore fails to recognize the right to legal jurisdiction within a genuine self-government arrangement. If

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<sup>87</sup> Graham, *Rethinking*, *supra* note 39 at 7 and generally.

<sup>88</sup> See Coates & Morrison, *supra* note 4.

we put this aside on the basis that self-administration is a pathway to a regime in which these rights are recognized, can we say that it is indeed worthwhile? Unfortunately, even considered as only a transition, devolution has a number of worrisome shortcomings. Three concerns are discussed below: (1) poor program quality and cultural mismatch, (2) entrenchment of a dysfunctional governance structure, and (3) building inertia and further obstacles to positive change.

First, some authors argue the programs themselves are poor, perhaps even worse than they would be otherwise. By retaining the constraints of federal and provincial standards, design and goals, devolved programs have limited cultural compatibility and “rarely involve innovation.”<sup>89</sup> Dominant-culture program models are often replicated without a sufficient opportunity for the community to consider its own needs. At their worst, local programs may be no more than a mini-version of federal or provincial programming with little adaptation. Once entrenched, these programs may be unlikely to change significantly even if such change becomes legally possible at a later time. Communities that take on too many programs too quickly may find themselves overwhelmed, lacking enough trained staff and attention to devote to each subject.<sup>90</sup> This may be especially true for small or remote communities with weak pre-existing internal capacity.

Moreover, the problematic governance structure underlying the devolution regime creates a chaotic and dispute-fuelled environment, which prohibits smooth and accountable management. Between the unclear roles and rights of the federal, provincial and First Nations governments, everyone wants a say, no one wants to pay, and no one accepts responsibility for failure. Program staff struggle to respond to the demands of their multiple bosses in each of these governments—a “constant source of conflict.”<sup>91</sup> Staff are forced to waste inordinate amounts of time resolving such disputes and preparing reports, therefore taking time away from their normal tasks. Sometimes beneficiaries are deprived of their service while departments argue over who will pay.<sup>92</sup> In her reports from both 2000 and 2004, the

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89 Elias, *supra* note 35 at 110.

90 Aurélien Gill, as described in Native Training Institute of Québec, *Bound for Greater Autonomy: Proceedings from the Indian and Inuit Nations Conference, November 7-10, 1988* (Village des Hurons, Wendake (Québec): Native Training Institute of Québec, 1988).

91 Shewell & Spagnut, *supra* note 19 at 21. Shewell & Spagnut reference “two lines of authority” as in the Band Council and Indian Affairs, yet in most cases program staff would also be subject to one or more authorities from the provincial government as well. Multiple federal departments (e.g. Health Canada and Indian Affairs) may also be involved.

92 On child protection, see the case study at the end of this paper. On education, see the case study at the end of this paper and, for instance, Andrea Bear Nicholas, “Canada’s Colonial Mission: The Great White Bird” in K.P. Binda with Sharilyn Callilou, *supra* note 72.

Auditor General of Canada cited unclear roles and responsibilities as a major concern in the education sector.<sup>93</sup>

Though devolution may be building capacity, the structure it is building up is rarely based on principles of good governance. Accountability mechanisms under devolution are outside looking—that is, towards Indian Affairs and other funders and regulators—rather than being oriented to be accountable to the citizens and government of a First Nation.<sup>94</sup> *Indian Act* Band governments are set up to funnel resources, are devoid of most decision-making and responsibility, and create a recipe for politicized spending, as well as cynicism about the role of government.<sup>95</sup> While Band governments have grown as institutions, they have grown in the image of Indian Affairs, with their employees and structure “organized around the Departmental programmes they deliver.”<sup>96</sup> Instead of developing into legitimate, locally adapted governance institutions based on the customary law and cultural world view of the First Nation, self-administration has “tacitly compelled bands to adopt forms of organization distinct from their own and more congruent with department [that is, Indian Affairs] and, in some cases, provincial structures.”<sup>97</sup> With devolution, colonial dependency may have become more seamlessly incorporated into First Nation communities and more entrenched than otherwise would have been the case.

There may also be some ways in which self-administration creates inertia and inhibits progress towards greater self-determination. Some have suggested that devolution leaves First Nations to “do the Department’s dirty work” by allowing Indian Affairs to offload responsibility for reducing Aboriginal social-economic deprivation.<sup>98</sup> Arguably, this lets Indian Affairs off the hook, thus reduces public pressure on the federal government, and it simultaneously makes First Nations look incompetent, thus increasing public scepticism about Aboriginal self-government. Self-administration also forces First Nations to compete for the basic resources necessary to run their programs—a time-consuming headache that could distract attention and energy away from the movement for systemic change.<sup>99</sup> Ultimately, devolution could be the quagmire many First Nation leaders feared it would be—a

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93 Auditor General, “Education” (Nov. 2004), *supra* note 78 at 5.1, 5.3, 5.25 and 5.26.

94 John Graham and Jake Wilson, *Aboriginal Governance in the Decade Ahead: Towards a New Agenda for Change – A Framework Paper for the TANAGA Series* (Ottawa: Institute on Governance, 2004) at 6-7 and 19-22; RCAP, *Restructuring the Relationship*, *supra* note 27 at Ch. 3 “Governance”.

95 Cornell *et al.*, *supra* note 3 at 9.

96 Shewell & Spagnut, *supra* note 19 at 21.

97 *Ibid.* at 44.

98 *Ibid.*

99 *Ibid.*



messy and degrading debacle causing more trouble than it is worth and from which it is difficult to emerge into a more fair and just arrangement.

### **Reaching the Breaking Point**

So far, the judgment as to whether self-administration is, on balance, a stepping stone or quagmire is a close call. Considering only the benefits and hazards assessed above, it would be difficult to decide whether devolution has been an all-round disaster or rather a marginally useful, though frustrating, route forward. However if devolution once held any promise of benefit, that promise is quickly being lost. Despite some real gains made towards self-government since the mid-1990s, progress has been exceedingly slow and self-administration remains the norm well over a decade later. The last 10 to 15 years have seen some meaningful change, but not nearly enough. First Nations are now reaching a breaking point where the costs of self-administration are quickly overwhelming its usefulness. Two critical factors are tipping the balance: crippling underfunding and the immense difficulties with self-government negotiations and other negotiations that address structural change. As Canadians, we would be foolish to ignore the urgency of this increasingly desperate situation.

The course of the Aboriginal rights movement over the last 40 years demonstrates why tensions are building. Devolution began in earnest in the 1970s, at a time when Aboriginal people were only beginning to organize significantly following the White Paper of 1969. The National Indian Brotherhood, now the Assembly of First Nations, was founded in 1968.<sup>100</sup> The 1973 *Calder* judgment opened up new possibilities for the litigation and negotiation of Aboriginal title claims, and this pushed governments to take Aboriginal rights claimants more seriously. Devolution expanded significantly in the 1980s and early 1990s in an optimistic environment in which Aboriginal self-determination was gaining recognition. The constitutionalization of existing Aboriginal and treaty rights in 1982, the release of the pro-self-government Penner Report in 1983, and (initially) the post-constitution conferences ongoing in the 1980s created a sense of forward motion and potential for further progress. For a time, self-government looked likely to be brought into the constitutional fold.

The Royal Commission on Aboriginal Peoples added to the impression that the principle of self-determination was increasingly recognized and would soon be realized. RCAP accepted self-government as an inherent right

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<sup>100</sup> Though the organization has earlier roots, the NIB (National Indian Brotherhood)/AFN has operated continuously since 1968 and changed its name in 1982 when it underwent a significant reorganization towards a First Nations representative structure. For further details see notes 124 and 125.

and as one already constitutionally protected in s. 35.<sup>101</sup> It emphasized the role of a renewed nation-to-nation relationship between Aboriginal peoples and the rest of Canada, based on the mutual principles of recognition, respect, sharing and responsibility. The Commission stressed that this new relationship would be the key to improving the daily lives of Aboriginal individuals and communities.<sup>102</sup> This renewed relationship, including self-government, forms the underlying structure required to achieve positive changes in all sectors, from education to health and healing to economic growth. With this in mind, RCAP explored self-government models in some detail, and urged all parties to move forward with negotiation and implementation without delay.<sup>103</sup>

However the mid 1990s contained not only landmark successes, but also signs of greater resistance. The release of RCAP's report was a historic achievement that charted a course for the redefinition of the Crown-Aboriginal relationship. Yet meanwhile, the Charlottetown Accord, which would have added specific provisions on Aboriginal self-government to the Constitution, failed in 1992. This left the constitutional status of self-government unclear—a problem that the courts have failed to remedy in the years since.<sup>104</sup> A growing neo-conservative ideology presented a new backlash against Aboriginal rights from within the non-Aboriginal public, taking up the calls for smaller government, individualism, no 'special rights,' and a free market in property.<sup>105</sup>

The decade and more since the mid-1990s has seen some real progress, to be sure, but ultimately has failed to deliver on the promise of significant change for Aboriginal peoples. Two problems are especially important for the question of devolved programs.

The first major problem has been at the negotiation tables, which held the promise of structural change on questions of legal jurisdiction among others. By the mid-90s, there was some hope that land and self-government claims would soon be resolved. Yet by now, in 2008, only a handful of

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101 RCAP, *Restructuring the Relationship*, *supra* note 27 at Ch. 3 "Governance".

102 RCAP, *Looking Forward, Looking Back*, *supra* note 64 at Ch. 16 "The Principles of a Renewed Relationship".

103 RCAP, *Restructuring the Relationship*, *supra* note 27 at Ch. 3 "Governance".

104 Crane, *supra* note 51 at 47.

105 Tom Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queen's University Press, 2000) stakes out the "no special treatment" position in some detail. This perspective was popular among some provincial governments in the late 1990s and early 21st century, and is now a major influence at the federal level, since the election in 2006 of Prime Minister Stephen Harper and his Conservative government. Flanagan has been among Harper's top advisors.

major agreements have been concluded, mostly in the north.<sup>106</sup> Most First Nations remain under the *Indian Act* system, exercising only the weakest delegated powers. Willingness from the provinces to participate meaningfully in negotiation has been uneven, and many First Nations are dissatisfied with the limits and restrictions that have been predetermined by federal and provincial negotiation policies. Even where negotiation processes are functioning, they move at glacial speed. While the achievements that have been made are important, the overall pace has been significantly slower than expected.

The second major problem is that funding for devolved programs has dwindled, particularly since the 1995–96 cap limited growth in Indian Affairs' spending on core programs to 2 per cent per year. Core programs include "education, child and family services, income assistance, Indian government support, housing, capital and infrastructure and regulatory services programs."<sup>107</sup> The funding cap has continued to the present day. 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,<sup>108</sup> the effect has been a marked *decrease* in the real purchasing power of 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 real loss.<sup>109</sup> The shortfall accumulated just from the cap was over \$1.3 billion in education- and skills-development spending alone, as of September 2007.<sup>110</sup> This is merely the amount that would be required to restore funding to previous levels, let alone to meet actual needs or provide for ongoing development.

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106 For a current list, see Indian and Northern Affairs Canada, "Agreements", online: INAC <[http://www.ainc-inac.gc.ca/pr/agr/index\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/index_e.html)>. Note that many of the individual agreements listed are part of the overall umbrella agreement with Yukon First Nations. Most agreements are in BC, Yukon and the Northwest Territories. In Inuit self-government, consider the case of Nunavut, as well as the recent Labrador Inuit agreement in Newfoundland & Labrador, and the Nunavik agreement in northern Quebec. For a comprehensive and recent review of self-government agreements see: Bradford W. Morse, "Regaining Recognition of the Inherent Right of Aboriginal Governance" in Yale D. Belanger, *supra* note 4.

107 INAC Cost Drivers Study, excerpted in Assembly of First Nations, *From Poverty to Prosperity: Opportunities to Invest in First Nations – Pre-Budget Submission to the House of Commons Standing Committee on Finance, September 2007* (Ottawa: AFN, 2007) [INAC Cost Drivers Study] at the Appendix.

108 *Ibid.*

109 Assembly of First Nations, *Fiscal Fairness for First Nations*, online: AFN <<http://www.afn.ca/misc/RFBS.pdf>>.

110 Assembly of First Nations, *From Poverty to Prosperity: Opportunities to Invest in First Nations – Pre-Budget Submission to the House of Commons Standing Committee on Finance, September 2007* (Ottawa: AFN, 2007) [AFN, *Pre-Budget Submission*] at (i).

If one compares First Nations program funding and provincial program funding, the shortfall is even larger. In 2000, child welfare funding levels from Indian Affairs were 22 per cent less than provincial averages and have seen no improvement since.<sup>111</sup> The federal formula for funding Band-operated schools is well known to provide less funding than provincial formulas; a BC study found it provided on average 20 per cent less, though in some cases up to 75 per cent less,<sup>112</sup> while a Quebec study that focused its comparison on schools with similar characteristics found a gap of 25 to 63 per cent.<sup>113</sup> Other areas such as housing, infrastructure (including school buildings) and water have been even harder hit, since Indian Affairs has unilaterally reallocated money from these areas to others. Payments to provincial authorities on behalf of First Nations—rather than to First Nations institutions themselves—have been given priority as Indian Affairs claims these are less discretionary.<sup>114</sup>

The 2005 Kelowna Accord was a historic agreement with Aboriginal peoples that included clear funding targets. Kelowna focused on the gap in socio-economic development indicators between Aboriginal people and other Canadians, and set out to end these inequalities by 2016.<sup>115</sup> After beginning with the 2004 Aboriginal Roundtable process, continuing through “sector group” meetings, and ending with the final conferences in May and November 2005, the Kelowna process managed to secure an agreement that earmarked over \$5 billion in new funding.<sup>116</sup> The First Nations (AFN) political accord made a number of commitments to move forward on jurisdiction and self-government.<sup>117</sup>

Kelowna was not perfect. While it recognized the need for change at a political/legal level,<sup>118</sup> and allocated funding towards these long-term pro-

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111 R. MacDonald & P. Ladd, *Joint National Policy Review on First Nations Child and Family Services* (Ottawa: Assembly of First Nations and the Department of Indian Affairs and Northern Development Canada, 2000). See also the section on child and family services in section IV of this paper.

112 Bill Postl, *British Columbia First Nations Schools Funding Analysis: 2003/04 School Year*, submitted to Indian and Northern Affairs Canada (June 30, 2004, revised April 5, 2005).

113 First Nations Education Council (FNEC)/Department of Indian Affairs and Northern Development (DIAND), Tuition Fees Committee, *An Analysis of Educational Costs and Tuition Fees: Pre-school, Elementary School and High School Levels: Final Report* (FNEC & DIAND, February 2005).

114 AFN, *Pre-Budget Submission*, *supra* note 110 at 2.

115 Lisa L. Patterson, *Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005*, PRB 06-04E May 4 2006 (Ottawa: Library of Parliament, 2006) at 7.

116 *Ibid.*

117 Canada and Assembly of First Nations, *A First Nations – Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments*, Ottawa, May 31, 2005.

118 *Ibid.*

cesses,<sup>119</sup> it left the details of self-government for further discussion. The exact mechanisms through which the funding earmarked in the deal would flow were not yet set out; likely, most dollars would have gone through traditional program devolution channels. However, implementation of the Kelowna program would, at least, have gone some way towards relieving the acute financial pressure on First Nations after years of belt-tightening in communities that were already among the poorest in the country. Unfortunately, as is well known, the Conservative federal government that came to power in 2006, led by Prime Minister Stephen Harper, immediately abandoned Kelowna. The direction ahead, not to mention future funding prospects, remains unclear.

The hazards of devolution take on a new weight in this context, and its potential benefits are hollowed out. Any ability to deliver improved, effective and culturally innovative programming is quashed by underfunding. Nascent institutions are struggling to survive, let alone flourish. Given the immense socio-economic disadvantages and challenges that characterize many First Nations communities, essential programs like education and child protection in those communities need *more* attention and resources than mainstream provincial programs—not less. The unsurprising result is abysmal ‘outcomes’, such as low graduation rates and high child-protection placement rates. Staff positions are so precarious and salaries so low that First Nation schools and child protection agencies have serious difficulties attracting and retaining staff. Those dedicated individuals who remain are consumed by crisis management and burnout, which leave little time to develop and implement the best programs.<sup>120</sup> What is more, the dysfunctional jurisdictional structure underlying devolution becomes more pervasive, more deeply entrenched, and more resistant to change the longer it continues.

What kind of ‘capacity’ is being built through self-administration, when programs are brought to their knees by underfunding and the next generation of First Nation youth is abandoned without adequate education, strong families or other essential supports? And what kind of ‘transition’ is under way when genuine self-government is so remote and uncertain that it feels more like a distant dream than an immediate reality? At this point, devolution is looking like a raw deal.

Apathy in the face of this escalating crisis is even more disconcerting given the ever-mounting evidence that self-government plays an absolutely pivotal role in social and economic development in Indigenous communities.

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119 Patterson, *supra* note 115 at 8-9. The sum of \$170 million over 5 years was earmarked in the Accords for this purpose.

120 Hylton, “Case for Self-Government”, *supra* note 74 at 87.

As discussed in the section I of this paper, we are unlikely to see significantly higher employment, less poverty, lower high-school drop-out rates, less incarceration or a lower incidence of family breakdown in First Nation communities without a revitalization of healthy, legitimate, First Nation governance at the centre of effective public programs. With so much to gain from genuine self-government, and so much being lost with the *status quo*, the failure to take action is nothing less than tragic.

#### IV CASE STUDIES: GETTING STUCK

Examples from education and child and family services have been used throughout this paper to illustrate the trend towards devolution, its potential costs and benefits, and the twin damaging factors of underfunding and slow movement beyond self-administration to genuine self-government. At this point it is worthwhile to briefly examine these two self-administered programs in more detail. In each case there are real benefits from the programs, but these benefits are precarious. On the other hand the costs—including costs to the children served by the programs—continue to grow in the absence of self-government.

##### Education

Elementary and secondary education for First Nations children depends on whether the child is considered to be resident on or off reserve.<sup>121</sup> For off reserve residents, services are left to provincial systems and school boards. On reserve, devolved programs are funded through Indian Affairs. Bands may provide services through their own schools on reserve (70,000 students) and/or through agreements for services with local provincial school boards (50,000 students).<sup>122</sup> In terms of dollars, it is Indian Affairs' largest program, comprising over one-fifth of its total budget.<sup>123</sup>

Education was one of the first programs to be devolved to the Band level. With ongoing abuse and, quite literally, cultural genocide perpetrated in residential schools, and few formal education opportunities otherwise, it is no wonder that education was a flagship issue in the early Native rights movement. The National Indian Brotherhood's 1972 *Indian Control of Indian Education* was not only an early statement of a First Nations-centred vision for the education sector, it was an early rallying point for self-govern-

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121 This paper does not discuss post-secondary education. For the basic legal framework on First Nation education see Jack Woodward, *Native Law*, looseleaf, updated to 2008, Release 1 (Toronto: Thomson Carswell, 1989) at 390-393.

122 Recent figures on number of students obtained from Mendelson, *supra* note 78.

123 Auditor General, "Education" (Nov. 2004), *supra* note at 78 at 5.15.

ment and cultural renewal generally.<sup>124</sup> Yet the structure promoted by *Indian Control* is rather vague; the term used most often—“Indian control”—is not clearly defined. The report does urge a shift to full First Nations jurisdiction, but it also seems to acknowledge that this is a distant, rather than immediate, possibility.<sup>125</sup> The most straightforward recommendation is for the federal government to “transfer to local Bands the authority and the funds”<sup>126</sup> for education, but the report adds that this transfer should include “provisions for eventual complete autonomy.”<sup>127</sup>

By the late 1990s there were four hundred First Nation schools and today there are about 550.<sup>128</sup> Some important successes have been achieved. The development of “Indian-friendly curricula and materials” has seen a great deal of progress, despite the need to comply with provincial curriculum standards.<sup>129</sup> Schools have played a central role in the reinvigoration of First Nations’ languages and traditions. Overall enrolment and graduation rates have increased,<sup>130</sup> and the gap between First Nation and non-Aboriginal achievement is slowly closing.<sup>131</sup>

Yet there are serious concerns. Graduation rates and educational achievement levels, both on and off reserve, remain substantially lower than for other Canadians. The Auditor General projects that at the current rate of progress the educational achievement gap will not be closed for another 28 years.<sup>132</sup> Administrators at the Band level often lack sufficient experience

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124 National Indian Brotherhood, *Indian Control of Indian Education* (Ottawa: National Indian Brotherhood, 1972). On the significance of this document and the close link between the education movement and the self-government movement generally, see McBride & Smith, *infra* at 131; and also the Assembly of First Nations, “Assembly of First Nations – The Story”, online: AFN <<http://www.afn.ca/article.asp?id=59>>.

125 National Indian Brotherhood, *ibid.* See, among others, pages 5 and 27-28. Page 5, for instance, demands eventual First Nations jurisdiction, but in the interim argues for federal, rather than provincial, authority: “The Federal Government has legal responsibility for Indian education as defined by the treaties and the Indian Act. Any transfer of jurisdiction for Indian education can only be from the Federal Government to Indian Bands.”

126 *Ibid.* at 6.

127 *Ibid.* at 27.

128 Auditor General, “Education” (Nov. 2004) *supra* note 78 at 5.15; Mendelson, *supra* note 78.

129 Sharilyn Callilou, “Sunrise: Activism and Self-Determination in First Nation Education (1972-1998)” in Hylton, *supra* note 17 at 160.

130 George E. Burns, “Finance, Equity and Equality: Broken Trust in Education” in K.P. Binda with Sharilyn Callilou, *supra* note 72 at 66.

131 Stephen McBride & Patrick Smith, “The Impact of Aboriginal Title Settlements on Education and Human Capital” in Roslyn Kunin, ed., *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.* (Vancouver: The Laurier Institution: 1998) at 174.

132 Auditor General, “Education” (Nov. 2004), *supra* note 78 at 5.2. The report finds that the time required to close the gap increased from 27 years in 1996 to 28 years in 2001. In other words, though the gap is indeed reducing, the rate of progress is slow and *getting slower*. This is largely because the educational attainment of non-Aboriginal Canadians continues to increase,

and educational background.<sup>133</sup> Underfunding has had serious and direct detrimental effects. Teacher salaries are much lower than in provincial systems, thus making it virtually impossible to retain staff.<sup>134</sup> With capital and infrastructure among the worst hit sectors since the 1995 funding cap, schools on reserve are literally falling apart.<sup>135</sup>

The entire governance structure underlying self-administration is causing dysfunction. Caught within a bureaucratic “jungle of federal and provincial regulations” and directions from competing bosses, First Nations educators find that their ability to tailor local programs is minimal and that most real control, particularly over financial matters, remains with Indian Affairs.<sup>136</sup> On the other hand, Seth Agbo and others draw attention to Indian Affairs’ “policy of non-interference” when it comes to oversight of program quality and standards. In many cases, Band authorities have also abdicated the same responsibility, citing their lack of jurisdiction in the current arrangement:

[L]ocal people continue to view the school as a creation of INAC [Indian and Northern Affairs Canada, referred to in this paper as Indian Affairs] and have also continued to adopt the policy of non-interference or “No Policy Policy” (Hall, 1992). To put the issue another way, everybody and nobody seems to be in charge of schooling for children in some band-operated schools.<sup>137</sup>

It seems little has improved. The Auditor General’s primary concerns about the Indian Affairs/First Nations education system in 2000 were unclear roles and responsibility, lack of accountability and hands-off management; her primary concern in 2004 was that these problems “remained unchanged.”<sup>138</sup>

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thus raising the bar. This trend is likely to continue as the educational demands of our increasingly knowledge-based economy continue to rise.

133 Seth A. Agbo, “Decentralization of First Nations Education in Canada: Perspectives on Ideals and Realities of Indian Control of Indian Education” (2002) 33:3 *Interchange* 281 at 294-295.

134 Auditor General, “Education” (Nov. 2004), *supra* note 78 at 5.50.

135 INAC Cost Drivers Study, *supra* note 107. See for instance: Colleen Shenk, “Joyless return for native students” *The Toronto Star* (August 26, 2008), re lack of usable school building in Attawapiskat First Nation for over eight years; “Parents demand new First Nation school” *CBC News* (April 9, 2008), re school at Tobique First Nation in New Brunswick with leaky roof causing mould, cracked walls, and water damage; Carl Clutchey, “Maintenance woes keep school closed” *The Chronicle Journal* (Thunder Bay) (January 11, 2008), re closure of school at Marten Falls First Nation due to lack of potable water, inoperable emergency sprinklers and heating problems; and Louise Brown, “School’s out too often on native reserves: Kashechewan pupils latest to close classes, Mould, bad water common in North” *The Toronto Star* (November 5, 2005) re school closures due to unsafe building conditions at Attawapiskat First Nation, Muskrat Dam First Nation, Caribou Lake First Nation and Kashechewan First Nation.

136 Andrea Bear Nicholas, “Canada’s Colonial Mission: The Great White Bird” in K.P. Binda with Sharilyn Callilou, *supra* note 72 at 16-17.

137 Agbo, *supra* note 133 at 297, citing in part D.R. Hall, “FED-BOS: The Federally Controlled, Band Operated School and the No-Policy Policy” (1992) 19:1 *Can. J. of Native Education* 57.

138 Auditor General, “Education” (Nov. 2004), *supra* note 78 at 26.



With the governance and management voids produced by self-administration leading to growing chaos and poor outcomes for students, there is a real risk that Indian Affairs will end up stepping back in to take a more active role in management and oversight. Indeed, at times both Agbo (a non-Aboriginal former teacher and principal on reserve) and the federal Auditor General seem to recommend this.<sup>139</sup> Yet this would be a clear step backward, not a step forward. Greater non-Aboriginal control of education will only lead to worse results, more frustration, and further colonization.

The governance void in education is particularly stark in the absence of what are called second-tier and third-tier services. Normally, schools provide their services with the management support of a school board (second tier) and the high-level policy support of a ministry (third tier). First Nation schools are generally on their own, operating without this architecture of institutions to support them. Michael Mendelson of the Caledon Institute for Social Policy notes that the “policy vacuum” is quite stark; compared to detailed provincial statutes on education, the *Indian Act* contains only a few remarks on the subject, most of which merely serve to compel school attendance.<sup>140</sup> There are no statutes or regulations with regard to the quality or content of education. While federal policy states that the schools are supposed to be “comparable” with provincial ones thus allowing students to enter into other institutions without setback, this is not linked with the actual funding formula. In fact, students often experience problems with transfer to high school or to post-secondary education.<sup>141</sup> The quality assurance, human resource management, curriculum and program development and other services that would normally be provided by a school board are usually not available, and neither are the curriculum development and basic standards that would be provided by a Ministry of Education.<sup>142</sup> Operation, without governance, leaves schools floundering.

A rare step forward is taking place in British Columbia. First Nations in that province formed the BC First Nations Education Steering Committee (FNESC) in 1999 to provide a number of second-tier (that is, school board-type) services to its members and also to negotiate for full jurisdiction on their behalf. In July 2006, FNESC concluded a framework agreement with

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139 See *ibid.* and Agbo, *supra* note 133, *e.g.* at 297-299, at various points urging the federal government to take a more active role in evaluating, monitoring, ensuring standards and quality, increasing reporting requirements, etc.

140 *Indian Act*, R.S. 1985, c. I-5 at ss. 114-122.

141 Mendelson, *supra* note 78.

142 McCue, *supra* note 86 and Mendelson, *ibid.* McCue (2006) lists a number of potential Aboriginal second-tier initiatives underway, however Mendelson (2008) notes that these are mostly in early planning stages, that some initiatives have dropped off, and that most would provide only some second-tier functions, with hardly any set to provide third-tier functions. BC's FNESC is the most comprehensive.

the BC and federal governments that recognized First Nations jurisdiction over education. After federal enabling legislation was enacted, BC's *First Nations Education Act* received royal assent on November 29, 2007.<sup>143</sup> The agreement establishes a First Nation Education Authority, derived from the FNEESC, which will take on functions such as certifying teachers and schools, and monitoring standards. Participating First Nations who opt-in to the agreement will have the authority to make their own laws on education and create a community-level body to deliver local services. Funding will be arranged on five-year terms.<sup>144</sup>

The BC Ministry of Education is also pursuing a strategy to increase First Nation input into the off-reserve school system. Thirty-six school boards have negotiated Enhancement Agreements with the First Nations in their district and the Ministry; these agreements provide for the inclusion of more First Nation-specific programming.<sup>145</sup> The *First Nations Education Act* and Enhancement Agreements provide a positive model in which self-administration does indeed appear to be yielding to self-government.

However, aside from exceptions like BC, the old system generally prevails. This usually means that education off reserve has little to no Aboriginal content, and education on reserve is starved of funds and operates within an unjust, unaccountable and largely non-existent governance structure. In both places, Aboriginal children are failing because the system is failing them. Meanwhile, provincial and federal governments have been slow to conclude fair and effective self-governance agreements, whether comprehensive or sectoral. Given the increasing demand<sup>146</sup> for Aboriginal employees, the youth of the Aboriginal population, and the vital importance of education to overall development and prosperity, apathy on this issue is hard to understand.

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143 *First Nations Education Act*, SBC 2007, c.40 (not yet in force) online: BC Legislature <[http://www.leg.bc.ca/38th3rd/3rd\\_read/gov46-3.htm](http://www.leg.bc.ca/38th3rd/3rd_read/gov46-3.htm)>; First Nations Education Steering Committee, *Press Release: For Release November 30, 2007* (Vancouver: FNEESC, 2007) online: BC Ministry of Education <[http://www.bced.gov.bc.ca/abed/fnesc\\_nr\\_jurisdiction.pdf](http://www.bced.gov.bc.ca/abed/fnesc_nr_jurisdiction.pdf)>. The federal statute is: *First Nations Jurisdiction over Education in British Columbia Act* 2006, c. 10 (introduced as Bill C-43 on November 23, 2006, Royal Assent December 12, 2006, into force November 22, 2007).

144 First Nation Education Steering Committee (BC), *First Nation Education Jurisdiction: An Overview of the Agreements* (n.d.) online: FNEESC <<http://www.fnesc.bc.ca/Attachments/Jurisdiction/PDF%27s/Overview%20of%20jd%20docs%20clean%20version.pdf>>.

145 BC Ministry of Education, Aboriginal Education Enhancement Branch, *Aboriginal Education Enhancement Agreements* (Victoria: BC Ministry of Education) online: BC Ministry of Education <<http://www.bced.gov.bc.ca/abed/agreements/brochure.pdf>>.

146 McBride & Smith, *supra* note 131 comment that as self-administration and self-government institutions grow, the demand for educated Aboriginal persons is already far higher than supply and set to increase: at 169.

### Child Welfare

As in education, the drive towards devolution in child welfare came from crisis; however, the story is less well known than the story of residential schools, although the two are closely linked. When residential school enrolment was declining in the 1960s, child welfare apprehensions were on the rise. Provincial child protection agencies received the green light to go on reserve when s. 88 was added to the *Indian Act* in 1951, confirming that provincial laws “of general application” apply to “Indians.” While at first their involvement was minimal, by the 1960s, 70s and early 80s provincial agencies were conducting massive child-apprehension operations on reserve, sometimes en masse. Children were usually quickly sent for adoption into white families, often far away.<sup>147</sup>

Most child welfare apprehensions of First Nations children were—and are—on grounds of “neglect”, which is often simply poverty. Sometimes cultural bias plays a role.<sup>148</sup> However, First Nations families and communities have also faced traumatic breakdowns in the wake of residential schools. One report on First Nations child welfare succinctly summarized the impact of residential schools and its social cost:

On a psychological level, First Nations children learned fear, self-hate and anger. Loss of their identity became acute. The damage caused indescribable pain. The suffering manifests itself throughout many First Nations communities and has a direct impact on alcohol and drug abuse, suicides, high incarceration rates, tragic deaths and the general disarray of First Nations communities.<sup>149</sup>

This suffering was passed on to home communities and subsequent generations.<sup>150</sup> Yet the more children removed, the greater the despair.<sup>151</sup> Removed children often experienced serious crises in adolescence, leading not infrequently to serious social and psychological problems and often the

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147 Bennett, *Fact Sheet*, *supra* note 78 at 6-7. See also footnote and accompanying text, *supra* note 66.

148 First Nations Child and Family Caring Society, *Wen:de – We Are Coming to the Light of Day* (Ottawa: FNCFC, 2005) at 8 [FNCFC, *Wen:de*]. Cultural bias was often a factor in the assumption that the child would be better off in a white family, in racist appraisals of First Nations families and communities, in misunderstanding community care arrangements (e.g. with extended family members) as parental neglect, and in misunderstandings of other First Nations child care practices. Poverty can determine neglect directly through the ground of “physical neglect”, i.e., the failure to provide adequate clothing, food, housing, etc. for the child. Neglect may also be found for a failure to supervise and protect. A 2003 national statistical study found that First Nations child apprehensions were on the basis of neglect in a high majority of cases; further analysis found that poverty, poor housing and substance abuse were the primary drivers of the findings of neglect; Cindy Blackstock, Nico Trocmé and Marlyn Bennett “Child Maltreatment Investigations Among Aboriginal and Non-Aboriginal Families in Canada” (2004) 10:8 *Violence Against Women* 901.

149 Bennett, Blackstock & De La Ronde, *supra* note 66 at 21.

150 *Ibid.* at 23.

151 *Ibid.* at 20.

loss of their own children.<sup>152</sup> The cycle of trauma and state ‘care’ has been hard to break, and has replicated the disastrous impact of residential schools.

In response, First Nations began creating their own child and family services in the 1980s. Indian Affairs eventually approved a program in which agencies could be certified by their province and the federal government would provide funds according to a formula. First Nations child and family services agencies (CFSAs) proliferated rapidly in the 1980s and 1990s, though not all First Nations children—even on reserve—are covered by a First Nations agency, and coverage off reserve is not possible through the Indian Affairs program (although it has been made possible in rare cases through provincial initiatives).<sup>153</sup> Today there are over 100 First Nation CFSAs providing some or all of the provincially-authorized range of child protection services.<sup>154</sup>

As in education, First Nations felt the need to bring family services ‘home’ on an urgent basis, but maintained their call for full jurisdiction and self-government. Delivering programs under provincial law and under Indian Affairs’ criteria was considered an “interim step to reclaiming full jurisdiction over child welfare” and a means to provide more “culturally appropriate services.”<sup>155</sup> Researcher Marlyn Bennett explains First Nations’ ambivalence:

In the meantime, First Nations governments and their child welfare agencies have reluctantly accepted to implement provincial child welfare legislation. Provincial jurisdiction, for the time being, is accepted as an interim arrangement until such time as specific First Nations legislation is developed and enacted by First Nations through the self-government process.<sup>156</sup>

Benefits have accrued from child welfare devolution, including a far higher success rate in finding child placements with a cultural match, an increase in the overall access to services, and more appropriate services.<sup>157</sup> Self-administration has also brought about the development of CFSAs as new First Nations-based institutions.

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152 *Ibid.* at 24.

153 Manitoba’s Aboriginal Justice Inquiry – Child Welfare Initiative led to a reorganization of child welfare services that allows for Aboriginal families, wherever they are, to be served by an Aboriginal agency if they choose this option (see, e.g. Bennett, *Fact Sheet*, *supra* note 78 at 6). Some provinces have approved urban child welfare agencies oriented towards the Aboriginal community, such as Native Child and Family Services of Toronto (started in 1985, fully mandated in 2004).

154 Bennett, *Fact Sheet*, *supra* note 78 at 1. For a list of agencies, see the member list of the national First Nations Child and Family Caring Society, online: FNCFCFS <<http://www.fncaringsociety.com/resources/agencyList.php>>.

155 Bennett *et al.*, *supra* note 66 at 27.

156 Bennett, *Fact Sheet*, *supra* note 78 at 6-7.

157 FNCFCFS, *Wen:de*, *supra* note 148 at 30.

Yet, by now, underfunding in the self-administered system is becoming a crisis of its own. The funding formula determined by Indian Affairs, known as Directive 20-1, has changed little since the late 1980s and has not been adjusted for the cost of living since the 1995 cap.<sup>158</sup> Agencies calculate a 14 per cent loss in real funds from inflation alone between 1996 and 2004.<sup>159</sup> Overall, First Nations children involved with protective services on reserve are receiving at least 22 per cent less funding per child than the average funding in the provincial systems.<sup>160</sup>

In addition, the formula is biased towards compensation for ‘maintenance,’ paid when a child is apprehended and taken into care, and provides few, if any, resources to pay for preventative and family support measures. Even when such “least disruptive measures” are required by the provincial statutes the agencies are mandated to comply with, federal and provincial governments’ mutual refusal to fund them means that First Nations children end up with fewer and poorer-quality services.<sup>161</sup> It also means that more First Nations children are taken from their homes, since preventative services are not available to prevent a situation from getting worse, and since removal of a child is usually the only way for that child to be eligible for any funded services.<sup>162</sup>

Not only does the funding program specifically for child and family service agencies have a clear and devastating impact on children and families in distress, the funding cuts and lack of progress in many other sectors affect the quality of life in families on reserve and directly lead to child welfare involvement. Research has found that poverty, poor housing and parental substance abuse—far more than physical or sexual abuse—are the top three reasons First Nation families enter the child welfare system.<sup>163</sup> These structural issues go far beyond child protection programming, and touch on the drivers of poverty including lack of education, the federal funding cuts to housing and infrastructure on reserve, and the weak availability of high-quality and appropriate health and cultural services to help communities heal from addictions and associated trauma.

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158 *Ibid.* at 20; Auditor General, “Child and Family Services” (May 2008), *supra* note 78.

159 FNCFCs, *Wen:de, ibid.* at 46.

160 MacDonald & Ladd, *supra* note 111. The lower funding amount in absolute terms is all the more shocking when one considers the much higher needs, on average, of First Nations families involved with child protection services: FNCFCs, *Wen:de, supra* note 148 at 15.

161 *Ibid.* at 17-19, 21; Corbin Shangreux, *Staying At Home: Examining the Implications of Least Disruptive Measures in First Nations Child and Family Service Agencies* (Ottawa: First Nations Child and Family Caring Society, 2004).

162 Shangreux, *ibid.*

163 Nico Trocmé *et al.*, “The Experience of First Nations Children Coming Into Contact With the Child Welfare System in Canada: The Canadian Incidence Study on Reported Abuse and Neglect” (2005) in FNCFCs, *Wen:de, supra* note 148.

The crisis in First Nations child protection services, particularly the dysfunctional CFSA funding regime and its impact, was thoroughly documented in a joint Indian Affairs/AFN policy review in 2000.<sup>164</sup> Nothing was done. A further joint research project involving Indian Affairs from 2004 to 2005 asked the national association of First Nation CSAs and a team of experts to compile three volumes of further research, including extensive exploration of proposals for change.<sup>165</sup> Yet again, no follow-up action occurred. In February 2007, the CSAs and the AFN resorted to a discrimination claim at the Canadian Human Rights Commission. “The federal government still has not acted,” said Cindy Blackstock, head of the national First Nation CSA organization, upon filing the claim.<sup>166</sup> The human rights claim has been accepted for investigation by the Commission, and remains in progress.<sup>167</sup>

These problems were recently confirmed in a scathing report by the Auditor General of Canada in May 2008. The Auditor General found that Indian Affairs’ funding formula for child and family services “is outdated,” “leads to inequities,” is unrelated to the actual costs of services, and that “the shortcomings of the funding formula have been known to INAC for years.”<sup>168</sup> The report agreed that First Nations children do not always have access to services that meet provincial legislated requirements or that compare with services available off reserve; and it found that lack of funding and funding inflexibility had the result that some children who should have received preventative services in their homes “were instead being placed into care.” Indian Affairs had been informed of this problem not only by agencies, but by several provincial governments.<sup>169</sup>

Meanwhile, movement towards self-government in child welfare remains elusive. Some of the few self-government agreements that have been concluded do provide for governing authority in child welfare, but implementation is still in progress.<sup>170</sup> A couple of First Nations are implementing

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164 The report from this process is MacDonald & Ladd, *supra* note 111.

165 These three reports are: John Loxley, Fred Wien & Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report* (Vancouver: FNCFCs, 2004); *Wen:de Report: We Are Coming to the Light of Day*, *supra* note 148; and J. Loxley *et al.*, *Wen:de: The Journey Continues* (Ottawa: FNCFCs, 2005). All reports are available online from the First Nations Child and Family Caring Society: <<http://www.fncfcs.com/projects/nationalPolicy.html>>.

166 Assembly of First Nations, Press Release, *Canadian Human Rights Complaint on First Nation Child Welfare Filed Today by Assembly of First Nation and First Nations Child and Family Caring Society of Canada* (February 23, 2007) online: AFN <<http://www.afn.ca/article.asp?id=3374>>.

167 Author’s personal communication with Cindy Blackstock, Executive Director, First Nation Child and Family Caring Society, spring 2008.

168 Auditor General, “Child and Family Services” (May 2008), *supra* note 78 at 4.51, 4.52 and 4.57.

169 *Ibid.* at 4.35 and 4.66.

170 See generally Coates & Morrison, *supra* note 4.

agreements that provide for some law-making authority on child protection—but short of full jurisdiction.<sup>171</sup> Aside from this handful of limited exceptions, self-administration rather than genuine self-government remains the norm in child protective services.

As with education, the current dysfunctional arrangement leaves “uncertainty about who should monitor services and evaluate programs.”<sup>172</sup> The Auditor General’s report describes an empty governance structure, without sufficient goals and standards, information on program quality and outcomes for children, or evaluation.<sup>173</sup> Agencies also waste a vast amount of time and money trying to solve jurisdictional disputes. These are often disputes over which federal or provincial agency will pay for services for special needs children—services that would normally be available without delay for non-First Nations children. A survey of only 12 agencies reported a total of 393 such disputes within one year, which took up an average of over 50 employee-hours *per dispute*.<sup>174</sup> Mobilization is now occurring around Jordan’s Principle, named in honour of a child who was denied access to services due to such a dispute and who died before it was resolved. The Principle states that the first department of contact must pay for normally available services without delay, and resolve jurisdictional disputes later. In December 2007, a private member’s bill that adopted this principle was passed in the House of Commons; however the minority federal government refuses to implement it.<sup>175</sup>

Some regions have experienced more progress than others; for instance, Manitoba’s Child Welfare Initiative did improve provincial policy, organizational structure, and access to more appropriate services whether on or off reserve. However no province has pursued a wider sectoral shift in jurisdiction, as is now starting to occur in the BC education project, and comprehensive self-government negotiations remain slow across the country.

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171 See Bennett, *Fact Sheet*, *supra* note 78. One First Nation has the power to make child welfare laws through an *Indian Act* Band by-law (*Spallumcheen*) and one has the power to do so through a municipal-style governance agreement (Sechelt).

172 Durst, “Wellness”, *supra* note 44 at 200.

173 Auditor General, “Child and Family Services” (May 2008), *supra* note 78 *e.g.* at 4.19 (no policy structure to ensure programs are comparable to provincial services), 4.23 (no information on cultural appropriateness of services), 4.45 (Indian Affairs has insufficient human resources devoted to the program), 4.86 (no information on the outcomes of funding on the safety, protection, or well-being of children) and 4.90 (insufficient evaluation).

174 FNCFCs, *Wen:de*, *supra* note 148 at 17 and 26. See also *ibid.* at 4.39: Funding disputes between Indian Affairs and Health Canada are compromising the “availability, timing and level of services to First Nations children.”

175 On Jordan’s Principle see First Nations Child and Family Caring Society, *Fact Sheet: Jordan’s Principle*, online: FNCFCs <<http://www.fncfcs.com/docs/JordansPrincipleFactSheet.pdf>>.

With as many as a tenth of all Registered Indian children in the country now 'in care' in child protection systems nationwide, the *status quo* is truly "untenable," to quote a leading report.<sup>176</sup> Indian Affairs' own data shows a 71.5 per cent increase in the number of on reserve First Nations children in care from 1995 to 2001.<sup>177</sup> As in education, what was hoped to be a temporary transition has proven very problematic.

## V CONCLUSION

First Nations' right to self-determination will not be fully realized until their ability to exercise self-government within Canada is respected. In the meantime, devolution and self-administered program delivery have become the norm since the 1969 White Paper. Devolution was favoured by federal and provincial governments as a way to offload difficult and unpopular programs and as a way to placate demands for greater self-government. However, they retained legal authority and a web of regulatory, administrative and financial controls. First Nations were suspicious of devolution, knowing full well how far it was from their goals. But most First Nations accepted and even lobbied for greater powers in program delivery as an interim measure. They hoped that self-administration would be a helpful transition to genuine self-government and were anxious to alleviate the worst effects of the prior programs run entirely by outsiders.

First Nation-run programs have produced real benefits and provide a certain minimal level of control over local social services. In comparison with residential schools and the "sixties scoop" in child welfare, they are indeed a major improvement. But viewed against a future of genuine and effective Indigenous governance, they are frustrating and inadequate.

Moreover, the costs of self-administration are building up over time. This is particularly true over the last 10 to 15 years during which funding has fallen to disgraceful and discriminatory levels while efforts towards self-government have often been stymied, delayed and ignored.

In this paper, I proposed four potential benefits of self-administration if it is considered a transitional tool. Underfunding and insufficient forward motion serve to corrode each of these:

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176 FNCFCFCS, *Wen:de*, *supra* note 148 at 7, 18 and 42.

177 B. McKenzie, *Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review* (Montreal: Kahnawake Shaktotii'takenhas Community Services, unpublished, 2002), cited in Shangreux, *supra* note 161 and in FNCFCFCS, *Wen:de*, *supra* note 148.



<b>Potential benefit of devolution</b>	<b>Effects of underfunding and stagnation</b>
More responsive, culturally adapted and effective programs	<ul style="list-style-type: none"> <li>• Programs cannot afford a full range of high-quality services, thus leaving services with limited availability and/or poor quality.</li> <li>• Programs do not have enough resources to develop innovative and culturally adapted service models.</li> </ul>
Capacity-building for First Nations staff, institutions and communities	<ul style="list-style-type: none"> <li>• Programs have insufficient resources for staff training and institutional start-up/development.</li> <li>• Service-delivery institutions often lack basic infrastructure (for example, school buildings, classroom materials). Institutions beyond the immediate delivery level (that is, management and policy structures) are often absent.</li> <li>• Capacity is built around non-Aboriginal criteria and models; illegitimate and unaccountable institutions become more entrenched over time.</li> <li>• With no structural change on the horizon, some communities become cynical about capacity-building, losing faith that it is part of process building real self-government.</li> </ul>
Lower-risk experimentation with inter-First Nation cooperative arrangements	<ul style="list-style-type: none"> <li>• Building alliances is possible but difficult absent funding to support negotiations and institution-building efforts.</li> <li>• There are limited incentives and limited gains to such cooperation if further self-government powers are not on the way.</li> </ul>
Transferability of gains with recognition of jurisdictional self-government	<ul style="list-style-type: none"> <li>• This is theoretically possible, but feels very remote if self-government negotiations are not occurring or not progressing.</li> </ul>

Meanwhile, the potential hazards of devolution are amplified, deepening the quagmire:

Potential hazard	Effects of underfunding and stagnation
Programs too constrained by outside models to be effective	<ul style="list-style-type: none"> <li>• Programs do not have resources to develop culturally based, effective models.</li> <li>• Aboriginal program models require fundamental paradigm changes (for example, integrated services) that are not possible within the confines of each siloed program; outside models of service delivery become further internalized and ingrained.</li> </ul>
Dysfunctional governance structure is entrenched	<ul style="list-style-type: none"> <li>• An empty governance role for First Nations becomes further normalized and institutionalized over time.</li> <li>• A dysfunctional system compounded by scarce resources can lead to crisis situations (for example, loss of essential services for children in care when jurisdictional disputes arise).</li> </ul>
Devolution creates inertia and obstacles to change	<ul style="list-style-type: none"> <li>• First Nation communities are consumed with advocating for resources to cover basic needs; these pressing needs are likely to take priority over long-term negotiations.</li> <li>• Underfunded and dysfunctional programs and services make First Nation communities appear incompetent, thus weakening non-Aboriginal support for self-government</li> </ul>

First Nations, the federal government and the provincial governments all have some power to move the agenda ahead. The ‘self’ in self-government can only come from First Nations. Some communities are well organized internally, encourage participation and are working together towards their own goals. Others, says Satsan (Herb George) of the Centre for First Nations Governance, could be doing more with the authority already in their possession.<sup>178</sup> The innovation, direction and content of self-government are necessarily internal. First Nations can look to each other and within their own communities for ideas, and move ahead towards achieving their own goals to the greatest possible extent.

Federal and provincial governments need to make self-government and equitable, high-quality social programs for First Nations a priority, and this priority must be backed up with the requisite financial commitments at budget time and with political commitments at negotiating tables. The human and economic costs of the *status quo* are too high, especially when compared with the proven benefits to be gained from moving forward. “If central

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<sup>178</sup> In communication with the author.

governments wish to perpetuate Indigenous poverty, its attendant ills and bitterness, and its high costs,” commented researcher Stephen Cornell, “the best way to do so is to undermine tribal sovereignty and self-determination.”<sup>179</sup> Unfortunately, the current federal government has shown little leadership on this issue. AFN leader Phil Fontaine aptly expressed his disappointment with the February 2008 federal budget and its misplaced priorities with the following commentary: “It is disheartening that this government sets out reducing the cost of a toaster by a couple cents as a national objective, but not helping First Nations children finish high school or grow up in safe homes.”<sup>180</sup>

Other Canadians, too, need to gain more understanding of the past and current systems before jumping to quick conclusions about the ‘solution’ to First Nations’ despair. One problem with self-administration is that it defies hasty characterization; to some, it looks like self-government. This has led some people to interpret current problems as self-government having been tried and failed. In their eyes, the rights advocated by First Nations are already in place, and the ‘new’ way evidently does not work. In fact, as described in this paper, the predominant current system—self-administration based on program delivery only—is far removed from self-government. Genuine Aboriginal self-government is so new in Canada that it is only just beginning to lend itself to study. Preliminary research does show that communities with *greater* levels of self-government do experience better social results.<sup>181</sup> What we do know for certain is that the old, colonial system based on assimilation and no First Nation control was an unequivocal failure. Unfortunately, when people interpret the current situation as the failure of self-government they often gravitate towards ‘solutions’ that sound very much like the old system—a dangerous proposition indeed if one considers the depth of harm caused by colonial practices.

Where we are now is a murky middle period, or “between stories” as Mary Battiste puts it more eloquently.<sup>182</sup> Most Aboriginal legal scholarship

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179 Cornell, *supra* note 16 at 28.

180 Assembly of First Nations, Press Release, *AFN National Chief Calls Federal Budget a “Bitter Disappointment”* (February 27, 2008) online: AFN <<http://www.afn.ca/article.asp?id=4029>>.

181 Cornell, *supra* note 16 discusses this preliminary research at 19. An oft-cited early study is by Michael Chandler & Chris Lalonde, “*Cultural Continuity as a Hedge Against Suicide in Canada’s First Nations*”, (1998) 35:2 *Transcultural Psychiatry* 193, which found that BC communities with greater levels of self-governance had fewer youth suicides. Further research by these authors is confirming their hypothesis: see *e.g.* Michael Chandler & Chris Lalonde, “*Cultural Continuity as a Protective Factor Against Suicide in First Nations Youth*” (2008) 10:1 *Horizons* 68.

182 Mary Battiste, Forward to Marlene Brant Castellano, Lynne Davis & Louise Lahache, eds., *Aboriginal Education: Fulfilling the Promise* (Vancouver: UBC Press, 2000). Battiste bor-

focuses on either condemning the past or identifying a vision of the future. These are hugely important tasks, but the present also deserves careful attention—especially as to whether or not it is leading to desired goals.

“Between stories” is a disruptive, confusing, chaotic time characterized by constant change and a patchwork of *ad hoc* arrangements. Research on the transitional period is difficult for those reasons, and also because program evaluations have the potential to be susceptible to bias. Indian Affairs has an interest in self-promotion and in the *status quo*, and in its reports it will usually try to show that whatever program is currently in operation is working well. First Nations groups have an interest in change, and therefore will likely want to show either that a current program is a success (that is, to say “the present is better than the past” and “we are competent, see how self-government can work”), or that it is a disaster (that is, to say “we need greater self-government and more money”).

These political interests and the massive social and financial stakes involved in the debate make impartial research difficult. However the task of describing and evaluating programs—even those thought to be transitional—is hugely important. Some programs and communities may be maximizing the potential benefits of devolution and fuelling further positive change while other situations may be so problematic as to constitute a step backward, rather than forward. Hylton marked devolution as an area deserving further research, and, although self-administration has now been around for some time, this need remains true today.<sup>183</sup>

The central message of this article is that the longer the *status quo* on devolution remains, the greater its toll and the more limited its potential usefulness as a transition. First Nations’ frustration with interim arrangements is evident:

We have heard often that we are in a transition period. Transition means the passage from one state, or stage to another. But transition also implies that there is some continued movement forward.<sup>184</sup>

These remarks were made 20 years ago. By now, movement forward is long overdue.

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rowed this phrase from philosopher Thomas Berry and applied it to the current situation of the Aboriginal peoples of Canada.

183 John H. Hylton, in Hylton, *supra* note 17 at 9.

184 Myrtle Bush, *supra* note 21 at 42.