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# Reforming First Nation Child and Family Services: A Critical Review of the Final Agreement

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**IN MID-JULY,** after years of Human Rights Tribunal Rulings, litigation and negotiation, the Assembly of First Nations (AFN) announced an agreement with Canada aiming to end discrimination against First Nation children in the child welfare system. AFN National Chief Cindy Woodhouse Nepinak **hailed** the agreement as a turning point and thanked the "Government for coming to the table with us to fix this discriminatory system to ensure these harms never happen again."

The discussion since the announcement has revolved around the nearly $48 billion settlement, with little attention to the reforms. Yellowhead Institute obtained a copy of the agreement and while there are positive steps towards addressing the issues — and significant commitment from Canada — there are outstanding questions and limitations which may not achieve the intended outcome.

With a Special Chiefs Assembly being called to vote on the agreement later in the month, this Brief offers elected leadership and analysts (as well as communities who do not have access to the agreement) a resource to challenge the short-comings and propose changes that would more likely lead to the end of discrimination against First Nation children.

## Historic, Temporary Cash

The agreement's funding plan is comprehensive, with Canada committing $47.8 billion over ten years, ending in 2034. The funding is meant to cover child welfare operations including capital spending, prevention, household supports, and so on. Importantly, the agreement promises that Canada "shall not decrease the total funding commitment" during the initial five-year period. Rather, the funding will be "upwardly adjusted for inflation and population growth" and there will be an additional allocation for remote First Nations communities, reflecting higher service delivery costs.

That being said, the agreement has no commitment to funding beyond ten years. While the agreement mentions potential "additional investments over and above the funding commitment," these are discretionary. The res ult could be the creation of a child and family support infrastructure (that will likely take up to a decade to create) that finds itself without dedicated support thereafter.

**This is a very big problem. How can "long-term reform" expire after merely a decade? Even if the reforms do help end discrimination, without committed funding beyond ten years, it will be a temporary solution.**

Moreover, Canada has some discretion over the capital spending elements of the agreement. For instance, if the funds allocated in the agreement for capital spending are not exhausted, reallocating those funds is not a certainty.

Meanwhile, on prevention resources, the agreement stipulates that prevention funding "shall not be reallocated by First Nation Child and Family Services (FNCFS) agencies to cover costs related to protection services, except for least disruptive measures." In many ways, to keep a focus on prevention, this makes sense. But there are questions here about the self-determination pretensions in the agreement — if Canada believes that a self-government framework drives the agreement, as they have said — should communities themselves not have more discretion here? (More on this below).

## Governance & Accountability, Sort of

There are few areas of First Nation policy with robust oversight. Typically, accountability is ad hoc via advocacy by communities or after the fact, such as an Auditor-General report. But this agreement creates a new model with multiple oversight bodies, including a Reform Implementation Committee (RIC) and Systemic Review and Technical Advisory Committees. But are these committees actually empowered?

As we have seen with United Nations Declaration legislation, oversight is undertaken by report, with very few compliance powers. That seems to be the case here as well. The agreement calls for a mere two assessments of the reforms, one at the midpoint and one at the end of the ten years. Neither of which include anything that can compel Canada to actually implement the agreement. It is important that there will be First Nation representatives on these committees to review assessment reports and try to hold Canada accountable, but without an outline of their enforcement powers (and there are few), any concerns they raise may be heard but not acted upon.

There is an additional concern here, which is the exclusion of First Nations from this governance structure. The RIC, tasked with ensuring implementation of the agreement, will have regional First Nation representatives from Chiefs of Ontario, Nishnawbe Aski Nation and the Assembly of First Nations (parties to the agreement) but no mechanism to engage actual communities beyond the existing frameworks. In fact, RIC deliberations are confidential. And so not only do these committees lack enforcement power, but they are also designed to limit transparency.

**From an accountability perspective, there is little in the actual agreement for First Nations to compel compliance or require Canada (or the RIC) be accountable for the effective implementation of the reforms.**

## Resolving (Some) Disputes

The one tool that First Nations do have is a dispute resolution process, which includes the establishment of a Tribunal to handle disputes that arise from parties to the agreement or claimants (First Nations Child and Family Services agencies). The process is designed to be culturally appropriate and accessible, with legal supports and the innovation of a "Cultural Officer" to guide disputes in a culturally sensitive manner.

That being said, compliance is once again a weakness in the agreement.

First, given Quebec's attempt to torpedo the First Nations, Inuit and Métis Children, Youth and Families legislation in court, we can expect disputes between provinces, territories, the federal government and First Nations Child and Family Services (FNCFS) agencies. Despite this looming context, the dispute resolution process is silent on how to manage these likely jurisdictional and funding disputes. So, conflict will emerge and fester between FNCFS and their provincial or territorial counterparts. But dispute resolution is limited even further in scope. In cases where Canada is found to be failing in the implementation of the agreement, the Tribunal can merely make recommendations for corrective action. Even the assessment reports mentioned above can not be brought to the dispute resolution process.

How, then, will the Tribunal actually prevent ongoing discrimination, where it appears?

Finally, the process as spelled out in the agreement is very likely to result in time-consuming, bureaucratic wrangling that could draw out implementation for months or even years, resulting in similar trends that we've seen in child welfare — notably with Jordan's Principle disputes — or, more broadly and slightly unrelated, with modern treaties. Even though agreements are in place, their implementation is fraught in all cases, with extensive lobbying and negotiation required to resolve the parties' respective perspectives on what the agreements actually mean.

The agreement most certainly expresses a clear recognition of past violence, stating that "the harms experienced by First Nations citizens in the Indian Residential School system, the Indian Day Schools, and the Sixties Scoop … [have] damaged their traditional child-rearing practices and parenting skills, intergenerationally." But the weak dispute resolution process (or monitoring and enforcement provisions generally) may not be able to prevent future harms for the next generation.

## The Fuzzy Shapes of Indigenous Law, Culture & Self-Government

On self-government, the agreement explicitly recognizes "the inherent right of self-government …affirmed by section 35 of the Constitution Act, 1982," and asserts that the reforms will respect Indigenous rights as outlined in the United Nations Declaration on the Rights of Indigenous Peoples. The principles guiding the reforms outlined in the agreement even include "recognition of Indigenous legal traditions and principles." This is the philosophy that guided the First Nations, Inuit and Métis Children, Youth and Families legislation and one that was defended at the Supreme Court in Quebec's earlier mentioned challenge to the law.

However, at the community level, there have long been complaints among FNCFS agency staff that they are simply replicating the existing child welfare system — but now administering it — and calling it self-determination. This is a model of devolution that has applied in education and, to a lesser extent, justice and healthcare. What is Indigenous about the reforms?

The two elements in the agreement include the aforementioned Cultural Officers and a Measuring to Thrive "holistic" Framework. Cultural Officers are engaged in cases of disputes and support the cultural appropriateness — and in some cases interpret the use of "Indigenous legal traditions" — of any resolution processes. This review is packaged in recommendations to the dispute adjudicator. The Measuring to Thrive Framework, meanwhile, considers indicators of child well-being such as access to land, spirituality, language, etc.

It is most definitely a shift towards more meaningful indicators of well-being for children in care. Together, they will be useful reforms. But there will no doubt be challenges. On the former, it is possible that the Cultural Officer's recommendations are not heeded; in the latter, many communities struggling to revitalize language and culture in the face of broader forces of colonialism will reflect poor "thriving" indicators, and their FNCFS agencies will be subject to review. In other words, they will absorb some of the accountability that rightly belongs to Canada.

**These cultural elements are symbolic but also substantive. Yet, without a comprehensive engagement with Indigenous power and authority, they are limited. There is no dispute resolution process to address First Nation power vis-a-vis provinces and territories, a lack of enforcement powers, and a half-formed attempt to ground reforms in Indigenous values.**

## Conclusion: Avoiding the Future Fight

The fight to end discrimination against Indigenous children has been long.

In the past decade it has been led by the First Nation Caring Society — effectively advocating for children in the media, intervening in numerous Federal Court cases, and making persuasive arguments at the Human Rights Tribunal, which paved the way for a settlement in the first place. But as soon as negotiations began, the Assembly of First Nations began rejecting their advice. In the fall of 2021, Canada had offered an earlier low-ball settlement that the AFN seriously considered. When the Caring Society outlined its shortcomings, Executive Director Cindy Blackstock was **mocked by Chiefs**, and the Caring Society's recommendations to strengthen an agreement at the July 2022 Special Chiefs Assembly were all rejected.

It seems that in early 2024, remaining experts and community voices stopped being consulted as well. It is no surprise, then, that the agreement is lacking in the areas outlined above and areas that the Caring Society has **noted elsewhere**. Recommendations by other experts in the **"Doing Better"** report — specifically around dispute resolution — could have strengthened the agreement but were not heeded.

Now, on the eve of another Special Chiefs Assembly to consider another agreement, community leadership will finally have access to the elements of the deal. They will be told how innovative, transformative, and lucrative the reform is and that there is no time to make amendments — so just support it.

It is the hope that leadership — and communities more broadly — decide for themselves based, in part, on the opinions of those who helped clear the path. There is space to make reforms more sustainable, accountable, and useful so that our children and their children don't have to pick up the fight again in court, litigation and negotiation, or in care.

**CITATION**
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