

Canada's ongoing racial discrimination against  
165,000 First Nations children and their families

**REPORT TO THE HUMAN RIGHTS COUNCIL**

**Canada's Third Universal Periodic Review**



Submitted on October 7, 2017 by:  
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**We recognize progress in initiatives to better support aboriginal groups. However, we remain concerned by the disproportionate levels of poverty, violence and discrimination Aboriginal women and children face. Recent statistics indicate that on a per child basis, federal funding for First Nations child and family services has fallen to less than 80 percent of that provided by provincial and territorial governments for services in predominantly non-Aboriginal communities.”**

**- Eileen C Donahoe, US Ambassador  
UPR Intervention for Canada, 16<sup>th</sup> Session  
April 26, 2013**

## First Nations Child and Family Caring Society of Canada

The **First Nations Child and Family Caring Society of Canada** (“Caring Society”) is a non-profit, charitable organization that works to ensure the safety and well-being of First Nations children, youth and their families through education initiatives, public policy campaigns and providing quality resources to support communities.

### I. Factual Context

First Nations<sup>1</sup> children are dramatically over-represented amongst children removed from their families and placed in child welfare care. In particular, First Nations children are 12.4 times more likely to be placed into child welfare care than other Canadian children.<sup>2</sup> The over-representation of First Nations children in care is rooted in structural issues of poverty, poor housing and substance use resulting from the trauma of the residential school system and other colonial policies and practices. **Despite the higher needs of First Nations children, the Government of Canada has consistently provided less funding for First Nations child and family services than other Canadians receive,<sup>3</sup> particularly with respect to preventative services to keep children safely in their family homes. Furthermore, jurisdictional disputes between and within different governments in Canada often cause First Nations children to be denied essential public services that other Canadians take for granted, which further contributes to the unnecessary apprehension of First Nations children to state care.**

This discrimination dates back to confederation. Canada has known about its discrimination in its provision of child welfare services and other public services for decades but has repeatedly failed to remedy the discrimination despite available solutions and resources.<sup>4</sup> These dramatic inequities create compound hardships for First Nations children and their families yielding over-representation in juvenile justice, child welfare, poor health and educational outcomes, high rates of youth suicide and

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<sup>1</sup> According to the Federal Government definition of Aboriginal peoples in Canada, there are three Aboriginal groups: Inuit, Métis and First Nations. This report will focus on the discrimination experienced by First Nations children in Canada. These children reside on reserves and are thus uniquely impacted by the inequitable funding of the Government of Canada.

<sup>2</sup> Trocmé, MacLaurin, Fallon, Knoke, Pitman, & McCormack, 2006

<sup>3</sup> First Nations Child and Family Caring Society, 2014

<sup>4</sup> See for example, Bryce (1922), *A National Crime*; Caldwell (1967), *Indian Residential Schools*; Sims (1967), *The Education of Indians in Ontario*; Royal Commission on Aboriginal Peoples (1996); Joint National Policy Review on First Nations Child and Family Services (2000); Wen:de Reports (2005); Auditor General of Canada (2008, 2011); Working Group on Child Welfare, (2015) *Report to Canada's Premiers* and the Truth and Reconciliation Commission (2015) *Final Report: the Legacy*.

predisposing children for lifelong hardship.<sup>5</sup> The Caring Society wishes to bring these serious human rights violations to the attention of the United Nations Human Rights Council during Canada's Third Universal Periodic Review.

## II. Violation of Domestic Human Rights

In 2007, Canada's ongoing discrimination against First Nations children led the Caring Society and the Assembly of First Nations ("AFN") to file a human rights complaint alleging that Canada's provision of First Nations child and family services and its failure to properly implement Jordan's Principle (a child-first principle passed by Parliament in 2007 to ensure First Nations children can access public services on the same terms as other children)<sup>6</sup> was discriminatory on the basis of race and national ethnic origin contrary to the *Canadian Human Rights Act* ("CHRA").<sup>7</sup> The Canadian government vigorously fought the human rights complaint, trying on eight (8) separate occasions to have it dismissed on technical grounds. Despite Canada's legal tactics, a hearing before the Canadian Human Rights Tribunal ("CHRT" or "Tribunal") relating to the human rights complaint commenced in February of 2013 and concluded in October of 2014.

On January 26, 2016, the CHRT issued its ruling relating to the human rights complaint. The Tribunal found that the Government of Canada's provision of First Nations Child and Family Services Program ("FNCFS Program") is discriminatory on the basis of race and national ethnic origin and contrary to section 5 of the CHRA<sup>8</sup> and international human rights law.<sup>9</sup> In particular, the Tribunal held that Canada's discriminatory conduct "incentivizes" the removal of First Nations children from their families and communities, as without funds for preventative services, child welfare workers have little recourse but to remove children from their homes. The Tribunal also found that Canada's failure to implement Jordan's Principle amounts to racial discrimination contrary to the CHRA. The Tribunal ordered the Government of Canada to immediately cease its discriminatory behavior, provide "immediate relief", and further outlined a process for determining more specific remedies.<sup>10</sup> The Tribunal's findings and orders are binding under Canadian domestic law.

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<sup>5</sup> See for example, UNICEF (2009) *Canadian Supplement to the State of the World's Children*; Canadian Paediatric Society (2015), *Are we doing enough*; Canadian Human Rights Tribunal (2016 CHRT 2) *First Nations Child and Family Caring Society et al. v Attorney General of Canada*. Truth and Reconciliation Commission of Canada (2015) *The Legacy*.

<sup>6</sup> Wed :De Report Three, p. 16.

<sup>7</sup> Section 5 of the *Canadian Human Rights Act* R.S.C., 1985, c. H-6

<sup>8</sup> Section 5 of the *Canadian Human Rights Act* confers a right to non-discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

<sup>9</sup> *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 2

<sup>10</sup> Jordan's Principle is a "child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in

Although Canada did not seek a judicial review (appeal) of the decision, it has failed to comply with the CHRT's order. Following the decision, Canada admitted that the "immediate relief" provided in its Budget 2016 for child and family services and its funding projections for the next four years were actually developed BEFORE the CHRT ruled in January of 2016 and have not changed since.<sup>11</sup> Put simply, Canada took no measures to comply with the CHRT's decision after it was rendered. Canada's non-compliance is so severe, that on November 1, 2016, the House of Commons of the Parliament of Canada unanimously voted on a motion to spur compliance with the CHRT's orders. In particular, the motion called on Canada to immediately inject \$155 millions into its First Nations child welfare program in order to lessen the impact of its discriminatory treatment of First Nations children and their families. Despite this motion, Canada has still not complied with the CHRT's orders by investing the required resources to remedy its discriminatory treatment of First Nations children.

Faced with Canada's non-compliance of its decision, the CHRT has been forced to issue three further orders in order to compel Canada to cease its discriminatory treatment of First Nations children ("compliance orders").<sup>12</sup> In its most recent non-compliance order, issued in May 2017, the Tribunal ruled that that "Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle".<sup>13</sup> The Tribunal issued a series of specific orders, including: to cease applying its narrow definition of Jordan's Principle, to evaluate Jordan's Principle requests within 12-48 hours, to develop an internal system to track the number of Jordan's Principle requests received and to report its progress to the Tribunal within six (6) months. Canada was also ordered to post the full and proper definition of Jordan's Principle on its websites and post bilingual televised announcements about Jordan's Principle on the Aboriginal Peoples Television Network and to develop a training program for its staff on Jordan Principle in consultation with the complainants.

Rather than seek to comply with the Tribunal's latest order in good faith, the Government of Canada opted to seek a judicial review of the decision before the Federal Court of Canada. In total, Canada has spent over \$700 000 in legal fees fighting

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receiving them." See paragraph 351 of *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 2

<sup>11</sup> Indigenous and Northern Affairs. INAC's Response to the Canadian Human Rights Tribunal Order of September 14, 2016. It states:

The rationale for the five-year plan was developed in fall 2015 as part of the 2016 federal Budget process, prior to the January 26, 2016 Tribunal decision. As part of this annual process, departments usually prepare their proposals between September and November, after which time further deliberations are subject to Cabinet confidence until the Budget is announced

<sup>12</sup> *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indian and Northern Affairs and Northern Development Canada)*, 2016 CHRT 10; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indian and Northern Affairs and Northern Development Canada)*, 2016 CHRT 16; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indian and Northern Affairs and Northern Development Canada)*, 2017 CHRT 14.

<sup>13</sup> 2017 CHRT 14

the complaint. Meanwhile, First Nations children continue to receive inequitable and discriminatory child welfare services and are taken from their homes unnecessarily due to inadequate of resources and barriers to accessing public services.

The CHRT is expected to release a fourth non-compliance order regarding Canada's failure to equitably fund child welfare services for First Nations children in the coming weeks or months.

### **III. Concerns Expressed by International and Regional Treaty Bodies**

In 2013, at the Second Universal Periodic Review (UPR) of Canada, the UNHRC recommended that Canada "take steps to ensure that all Canadian children have equal access to government services such as health, education and welfare, and address the disparities in access to these services for Indigenous children in particular, as recommended by the Committee on the CRC".<sup>14</sup> In addition, the UNHRC recommended that Canada "ensure parity of funding and services between Aboriginal and non-Aboriginal communities".<sup>15</sup>

In addition to this, numerous international and regional treaty bodies have expressed concerns regarding Canada's racially discriminatory conduct against First Nations children and families through its FNCFS Program and its failure to implement Jordan's Principle. These include, by way of example:

- In 2009, UNICEF expressed concern regarding the under funding of child welfare services provided to First Nations children in Canada.<sup>16</sup>
- In April 2012, the UN Committee on the Elimination of Racial Discrimination recommended that Canada discontinue the unnecessary removal of Aboriginal children from their families and it provide sufficient funding for Aboriginal family and child care services.<sup>17</sup>
- In December 2012, the UN Committee on the Rights of the Child expressed concern regarding the "significant overrepresentation of Aboriginal children in out-of-home care" and recommended that Canada "take urgent measures" to address the problem.<sup>18</sup>

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<sup>14</sup> A/HRC/24/11 at para 128.129

<sup>15</sup> A/HRC/24/11 at para 128.64

<sup>16</sup> UNICEF (2009) Canadian Supplement to the State of the World's Children

<sup>17</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention : concluding observations of the Committee on the Elimination of Racial Discrimination : Canada*, 4 April 2012, CERD/C/CAN/CO/19-20.

<sup>18</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada*, adopted by the Committee at its sixty-first session, 6 December 2012, CRC/C/CAN/CO/3-4.

- In his 2014 report on the situation of Indigenous Peoples in Canada, the UN Special Rapporteur on the Rights of Indigenous Peoples pointed to Canada’s child welfare system as one of the causes for his “significant concern” for the health and well-being of Indigenous Peoples in Canada.<sup>19</sup>
- In August 2015, the UN Human Rights Committee expressed further concern regarding the insufficient funding of child welfare services provided to Indigenous children in Canada. It urged Canada to provide sufficient funding for family and childcare services on reserves.<sup>20</sup>
- In March 2016, the UN Committee on Economic, Social and Cultural Rights expressed concern that the inadequate funding of child welfare service for Indigenous Peoples living on reserve exacerbated the higher likelihood that Indigenous children be placed in childcare institutions. It recommended that Canada increase its funding of child welfare services for Indigenous Peoples.<sup>21</sup>
- In December 2016, the Inter-American Commission on Human Rights convened a hearing on the human rights situation of Indigenous children in Canada.
- In August 2017, the UN Committee on the Elimination of Racial Discrimination (“CERD”) stated that it was “alarmed” despite its previous recommendation and multiple decisions by the Canadian Human Rights Tribunal, less money is provided for child and family services to Indigenous children than in other communities, and that this gap continues to grow. CERD also expressed concern that the federal government has adopted an overly narrow definition of the Jordan’s Principle, as stated in the Canadian Human Rights Tribunal’s 2016 decision, and has failed to address the root causes of displacement, while tens of thousands of children are needlessly removed from their families, communities and culture and placed in state care.<sup>22</sup>

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<sup>19</sup> Report of the Special Rapporteur on rights of indigenous peoples, James Anaya, *The situation of indigenous peoples in Canada*, 4 July 2014, [A/HRC/27/52/Add.2](#), para. 31.

<sup>20</sup> Human Rights Committee, Concluding observations on the sixth periodic report of Canada CCPR/C/CAN/CO/6, para. 19

<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, Concluding observations of the sixth periodic report of Canada, 23 March 2016, E/C.12/CAN/CO/6, para 35.

<sup>22</sup> CERD/C/CAN/CO/21-23, para 27.

### III. Recommendations:

The Caring Society urges the Human Rights Council to make the following recommendations to the Government of Canada:

- 1) Immediately withdraw its June 23<sup>rd</sup>, 2017 application for judicial review of the decision of the Canadian Human Rights Tribunal (2017 CHRT 14) that affirms the equality rights of 165,000 First Nations children.
- 2) Immediately implement all orders of the Canadian Human Rights Tribunal in good faith, in consultation with First Nations peoples and in a manner that promotes and protects the best interest of First Nations children, namely,
  - a. Fully implement Jordan's Principle throughout all government departments and in all services provided to First Nations children and their families; and
  - b. Undertake immediate measures to relieve the children's suffering by substantially increasing culturally based prevention services intended to keep children safely in their homes and implementing other reforms to relieve the deep inequality in service provision while First Nations and the Government of Canada negotiate a more robust solution.
- 3) Compensate First Nations children and their families who were taken into care from 2006 to today in accordance with the *Canadian Human Rights Act* and principles of international human rights law.
- 4) Retroactively examine all Jordan's Principle requests dating back to February 2006 (one year prior the filing of the human rights complaint) and immediately provide the appropriate service where necessary and/or compensation in accordance with the *Canadian Human Rights Act* and with principles of international human rights law.
- 5) In partnership and consultation with the Assembly of First Nations, the Caring Society and the Canadian Human Rights Commission, develop an independent expert structure with the authority and mandate to ensure that it maintains non-discriminatory and culturally appropriate First Nations Child and Family Services. This body must also be adequately and sustainably funded by Canada.
- 6) Immediately stop discrimination in other First Nations children's services such as education, health, culture and language and basics like clean water.
- 7) In consultation with human rights and Indigenous peoples' organizations, implement effective measures to ensure the protection of human rights defenders pursuant to Canada's obligations under the *International Covenant on Civil and Political Rights* and the *Declaration on Human Rights Defenders*.