A historic legal victory for First Nations children:

Canadian Human Rights Tribunal finds that Canada is discriminating against 163,000 First Nations children and their families

Committee on Economic, Social and Cultural Rights

Sixth Periodic Report of Canada

ALTERNATIVE REPORT

Submitted on February 1, 2016 by:
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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 organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families.

Introduction

First Nations[1] children are dramatically over-represented amongst children being removed from their families and being placed in child welfare care. In particular, First Nations children are 12.4 times more likely to be placed into child welfare than other Canadian children.[2] The over-representation of First Nations children in care is related to the multi-generational residential school trauma, addictions, poverty, poor housing. Despite the higher needs of First Nations children, the Government of Canada has provided substantially less child and family services on reserve and in the Yukon than other Canadians receive[3]. Furthermore, jurisdictional disputes between and within different governments in Canada often cause First Nations children to be denied essential government services other Canadians take for granted and to be put into care unnecessarily. The Canada has known about these inequities since at least 2000 and yet has repeatedly failed to correct the deficiencies despite the numerous reports, including two by the Auditor General of Canada[4], documenting the inequality and linking it to the growing numbers of First Nations children in alternative care[5].

In 2007, Canada's inaction led the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations to file a human rights case alleging that Canada's provision of First Nations child and family services and failure to properly implement Jordan's Principle (a mechanism to ensure First Nations children can access public services on the same terms as other children whereby the government of first contact pays for the child's service and works out any jurisdictional matters later)[6] is discriminatory on the basis of race and national ethnic origin. The Canadian government vigorously fought the case trying on 8 separate occasions to have it dismissed on technical grounds, however the case finally went to trial in February of 2013 concluding in October of 2014. On January 26, 2016 the Canadian Human Rights Tribunal ("CHRT") issued its ruling finding the Government of Canada's provision of First Nations Child and Family Services

[1] According to the Federal Government definition of Aboriginal peoples in Canada, there are three Aboriginal groups: Inuit, Métis and First Nations.
[2] Trocmé, MacLaurin, Fallon, Knoke, Pitman, & McCormack, 2006
[3] First Nations Child and Family Caring Society, 2014
[4] Auditor General of Canada, 2008, 2011.
[5] Canadian Human Rights Tribunal, 2016 at para. 364
[6] Wed :De Report Three, p. 16.

Program ("FNCFS Program") to be discriminatory on the basis of race and national ethnic origin and contrary to domestic and international human rights law.[7] The Tribunal ordered the Government of Canada to immediately cease its discriminatory behaviour and outlined a process for determining more specific remedies. The Tribunal's finding and orders are binding under Canadian domestic law.

Although Government of Canada officials say they welcome the decision the Government of Canada has not ruled out an appeal nor have they taken any measures to comply with the order.

The Caring Society submits that Canada's failure to provide equitable and culturally appropriate services to 163,000 First Nations children and their families is contrary to Articles 2 and 10 of the *International Covenant on Economic, Social and Cultural Rights*, ("Covenant"). Likewise, Canada's failure to fully implement Jordan's Principle to resolve jurisdictional disputes within and between governments, which cause First Nations children to be denied or experience delays when seeking to access services other Canadians take for granted, is also contrary to Article 2 and Article 10 of the Covenant.

List of issues for Canada

In the list of issues in relation to the sixth periodic report of Canada, this Committee asked Canada to respond to the following question concerning Canada's protection of families, mothers and children:

> *Please describe the impact of the measures taken, including transitioning with First Nations Child and Family Services Programme to a more prevention-based model, to reduce the frequency of removing indigenous children from their parental home and placing them in foster care. Please update the Committee if the Canadian Human Rights Tribunal has released its judgement concerning the complaint filed by civil society in 2007 on the adequacy of funding provided to the First Nations Child and Family Services Programme, and outline the main aspects of the judgement.*

Caring Society's Response

In 2007, the Assembly of First Nations and the Caring Society filed a complaint pursuant to the *Canadian Human Rights Act* against the Government of Canada alleging that its flawed and inequitable provision of First Nations child and family services was discriminatory on the basis of race and national ethnic origin. The complaint was filed after the Government of Canada failed to address inequalities that contributed to First Nations children being removed from their families due to a lack of prevention supports. The Government of Canada's data shows that between

[7] Canadian Human Rights Tribunal, 2016

1989-2012, First Nations children on reserve and in the Yukon spent over 66 million nights in alternative care. Many of these children could have been with their families had the Government of Canada provided equitable and culturally based supports.

The Government of Canada spent over 5.3 dollars in its numerous unsuccessful attempts to get the case dismissed on jurisdictional grounds before hearings began before the CHRT. The Government of Canada also deployed at least 189 civil servants in the Departments of Justice and Aboriginal Affairs to follow the personal movements and selected electronic communications of Dr. Cindy Blackstock, the Executive Director of the First Nations Child and Family Caring Society to try to find "other motives" for the case so it could support Canada's attempts to have the case dismissed. Despite this surveillance continuing for some four years, Canada did not find any motives other than defending the human rights of children. The Privacy Commissioner of Canada found the collection of private information about Dr. Blackstock to be a violation of the Privacy Act. In June of 2015, the Canadian Human Rights Tribunal found that Canada wilfully and recklessly retaliated against Dr. Blackstock for filing the complaint. The Caring Society submits that Canada's retaliatory conduct is contrary to its obligations under the Declaration for the Protection of Human Rights Defenders and Articles 4 and 5 of this Convention.

On January 26, 2016, the CHRT released its historic decision relating to the complaint related to the alleged discrimination against the children.[8] It found that the Government of Canada is racially discriminating against 163,000 First Nations children and their families by providing flawed and inequitable child welfare services to First Nations children and by allowing jurisdictional disputes between and within governments to cause First Nations children to be denied or experience delays when seeking to access essential government services available to other children.

The key findings are the CHRT are:

- The Government of Canada's FNCFS Program's funding structures are discriminatory and promote negative outcomes for First Nations children and families, namely the incentive to unnecessarily take children into care. [9]
- The Government of Canada's FNCFS Program causes First Nations children and families to be denied the opportunity to remain together and be reunited in a timely manner. [10]
- There is often a lack of coordination of services relating to health, safety and well-being on reserves which causes First Nations Peoples to be denied services available to other Canadians. This causes First Nations children to be placed into care unnecessarily.[11]

[8] Canadian Human Rights Tribunal, 2016
[9] Canadian Human Rights Tribunal, 2016 at para 344
[10] Canadian Human Rights Tribunal, 2016 at para 349
[11] Canadian Human Rights Tribunal, 2016 at para 391

- The Government of Canada's FNCFS Program does not provide culturally appropriate child welfare services to First Nations children and their families. It does not meet the real needs of First Nations children and their families or take into account their historical, cultural and geographical circumstances.[12]
- The Government of Canada's "one-size fits all" approach to child welfare services does not work for First Nations child and families. [13]
- The Government of Canada's FNCFS Program contains no mechanism to ensure that the child and family services provided to First Nations Peoples living on reserves are reasonably comparable to these provided to other children in similar circumstances. [14]
- The Government of Canada has been aware of the adverse impacts caused by its FNCFS Program for many years, and that, despite that knowledge and numerous reports and recommendations to address those adverse impacts, has failed to significantly modify its FNCFS Program.
- Under the Government of Canada's provision of First Nations Child and Family Services Program ("FNCFS Program"), it is difficult for First Nations Peoples living in rural and isolated communities to access services which are available off reserve including mental health services, services to strengthen families and services for family preservation and reunification.[15] This is despite the significant technological advances available in Canada to facilitate such service delivery. It is important to note that the Government of Canada has repeatedly demonstrated its ingenuity in overcoming challenges related to remoteness related to the extraction of natural resources but continues to approach addressing remoteness in the human rights context with significantly less enthusiasm.

The CHRT ordered the Government of Canada to immediately cease discriminating against First Nations children and their families and to ensure that First Nations children are no longer denied services provided to other Canadians as a result of jurisdictional disputes between and within governments.

The CHRT held that a true reform, rather than ad hoc solutions, are required in order to address the discrimination against First Nations children. According to the CHRT, the focuses of child welfare services ought to be to provide substantive equality by focusing on the distinct needs and circumstances of First Nations children and families living on-reserve, including their cultural, historical, and geographical needs and circumstances. However, the CHRT reserved its decision relating to systemic remedies and individual compensation for the children impacted by the discrimination.

[12]Canadian Human Rights Tribunal, 2016 at para 465
[13] Canadian Human Rights Tribunal, 2016 at para 315
[14] Canadian Human Rights Tribunal, 2016 at para 334
[15] Canadian Human Rights Tribunal, 2016 at para 314

Article 2

The child welfare services provided to First Nations children and their families by Government of Canada through the FNCFS Program have not been significantly updated since the early-1990's. As a result, child welfare services provided to First Nations children and their families are underfunded and inequitable and not comparable to these provided to other Canadians.[16] In fact, Government of Canada officials peg the funding shortfall at between 22 per cent and 34 per cent less than what other children receive.[17]

The Caring Society submits, and the Canadian Human Rights Tribunal found, that Canada's FNCFS Program provides inequitable child welfare services to First Nations children that are not culturally appreciate. This is contrary to Article 2 of the Convention.

Article 10

The child welfare services provided to First Nations children and their families by Government of Canada through the FNCFS Program are insufficient to fulfill the requirements of child welfare legislation and standards requiring the provision of the widest possible protection and assistance to families to remain safe and intact. [18] According to the CHRT, "many First Nations children and their families are denied the opportunity to remain together or to be reunited in a timely manner". The Government of Canada's FNCFS Program does not account for the actual services needs for First Nations children and families. As a result, the CHRT found that the FNCFS Program creates an incentive to take children into care and to remove them from their families and communities.[19] Similarly, the lack of coordination of services relating to health, safety and well-being on reserves causes First Nations Peoples to be denied services available to other Canadians and causes First Nations children to be placed into alternative care unnecessarily.[20]

It is also important to emphasize that the inequities in FNCFCS are compounded by Canada's failure to equitably fund culturally based education, health, language and culture and basics like water for First Nations children. As is the case in First Nations child welfare, the government of Canada has known about these inequalities for decades and yet has developed a piece meal approach that fails to remedy the discrimination[21].

[16] Canadian Human Rights Tribunal, 2016 at para. 385
[17] Canadian Human Rights Tribunal, 2016 at para 388
[18] Canadian Human Rights Tribunal, 2016 at para 385
[19] Canadian Human Rights Tribunal, 2016 at para 386
[20] Canadian Human Rights Tribunal, 2016 at para 391
[21] Report of the Auditor General of Canada, 2011.

The Caring Society submits Canada is breaching Article 10 of the Covenant by failing to provide the widest possible protection and assistance to First Nations children and their families. The Caring Society further submits that Canada is in breach of Article 10 of the Covenant by failing to resolve jurisdictional disputes between and within governments which cause First Nations children to be denied or experience delays when seeking to access essential services.

Proposed Recommendations:

1) Urge Canada not to judicially review (appeal) the decision of the Canadian Human Rights Tribunal to the Federal Court of Canada;
2) Urge Canada to implement the decision 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. To fully implement Jordan's Principle throughout all government departments and in all services provided to First Nations children and their families;
    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) Urge Canada to 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) Urge Canada to fund and convene a National Advisory Committee on First Nations child welfare to work with the Canadian Human Rights Commission, the Assembly of First Nations and the Caring Society to identify discriminatory elements in Canada's provision of FNCFS Program;
5) Urge Canada to fund tri-partite regional tables with representation from the Caring Society and the Assembly of First Nations, and the possibility of participation by First Nations Child and Family Service Agencies to negotiate (not discuss) the implementation of equitable and culturally based funding mechanisms and policies for each region having the benefit of guidance from the National Advisory Committee; and
6) Urge Canada, in partnership and consultation with the Assembly of First Nations, the Caring Society and the Canadian Human Rights Commission, to 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.

7) Urge Canada to stop discrimination in other First Nations children's services such as in education, health, culture and language and basics like water.
8) That Canada, in consultation with human right and Indigenous peoples organizations, implement effective measures to ensure the protection of human rights defenders pursuant to Canada's obligations under this Convention, the International Covenant on Civil and Political Rights and the Declaration on Human Rights Defenders.

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