

**A historic legal victory for First Nations children and Canada's  
failure to comply:**

Canadian Human Rights Tribunal finds that Canada is racially discriminating against  
165,000 First Nations children and their families

Committee on the Elimination of Racial Discrimination

21<sup>st</sup> – 23<sup>rd</sup> Reports of Canada

**ALTERNATIVE REPORT**



Submitted on June 29<sup>th</sup>, 2017 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 and policy development to benefit First Nations children, youth and families.

### **Introduction**

First Nations<sup>1</sup> children are dramatically over-represented amongst children being removed from their families and being placed in child welfare care. Researchers from the Canadian Incidence Study on Child Abuse and Neglect report that First Nations children are 12.4 times more likely to be placed via court order than other children in Canada. Factors contributing to the over-representation include poverty, poor housing, substance misuse related to multi-generational colonial harm and inequitable child and family services, particularly the lack of prevention services, on reserves. In fact, in a January 2016 decision, the Canadian Human Rights Tribunal (“Tribunal”) found that Canada’s child welfare program for First Nations children and families was discriminatory and contrary to the *Canadian Human Rights Act* because it created incentives to remove First Nations children from their homes.

Moreover, in the same ruling the Tribunal noted that government jurisdictional disputes between and within governments have a significant and negative effect on the safety and well-being of First Nations children, who are often denied or experience delays when seeking to access essential services other Canadians take for granted.<sup>2</sup> Jordan’s Principle was created to remedy the matter. It is a child first principle that requires the Government of Canada to ensure First Nations children can access public services free of discrimination and taking into full account their disadvantage. The Canadian Parliament unanimously passed Jordan’s Principle in 2007 and then crafted a definition so narrow no child ever qualified despite the federal government being aware of numerous cases where First Nations children were being denied services available to other children. Some situations involved Canada’s failure to provide life-saving equipment in a timely manner. Canada maintained its narrow implementation of Jordan’s Principle even after the Federal Court found it to be improper in 2013. In its 2016 order, the Canadian Human Rights Tribunal concluded that Canada’s narrow construction of Jordan’s Principle and failure to enact it in the child’s best interests amounts to discrimination on the basis of race and national or ethnic origin, contrary to the *Canadian Human Rights Act*.

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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.

<sup>2</sup> Wen:De Report Three, p. 16.

While the Government of Canada welcomed the original decision in 2016, the Tribunal has been so unsatisfied with Canada's compliance that it has issued three non-compliance orders and a fourth is expected shortly.

For example, after the Tribunal ruled, Canada implemented another narrow construction of Jordan's Principle limiting it to children on reserve who had a disability or critical short term illness. The government also had a lengthy administrative review process that delayed the receipt of services. In its May, 2016, non-compliance order, the Tribunal linked Canada's non-compliance with Jordan's Principle with the deaths of two girls in Wapekeka First Nation. The First Nation submitted an urgent funding proposal for children's mental health services in July, 2016, after learning of a suicide pact among children in the community. The federal government was still reviewing the proposal in January, 2017, when the girls died. After the tragic deaths a government of Canada official explained the Wapekeka proposal came at an "awkward time" for the federal government's funding cycle. Canada provided funding but only after the children died. The Band Manager for Wapekeka reports that the money Canada provided has since run out and has not been replaced. Another girl from Wapekeka died of suicide last week.

The Caring Society submits that Canada's failure to provide equitable and culturally based child and family services for 165,000 First Nations children and their families on reserves is contrary to Article 2 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") and Article 7 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("Declaration"). Likewise, jurisdictional disputes within and between governments and departments, which cause First Nations children on and off reserves to be denied or experience delays when accessing public services that other Canadians take for granted, is also contrary to Article 2 of the *Convention* and Articles 2 and 7 of the *Declaration*. The Caring Society also notes with great concern, Canada's failure to comply with domestic law regarding non-discrimination. There is simply no excuse for ongoing discrimination by the Government of Canada toward First Nations children – they already treat other children equitably. The Caring Society asks CERD to demand that Canada immediately and fully comply with its domestic and international human rights law obligations regarding First Nations children and their families.

## **Human Rights Complaint Regarding Canada's Racial discrimination against First Nations children**

In 2007, the Assembly of First Nations and the Caring Society filed a complaint pursuant to the *Canadian Human Rights Act* alleging that Canada's 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 federal government 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 spent over \$5.3 million in legal fees to support its numerous unsuccessful attempts to get the case dismissed on jurisdictional grounds before hearings began before the Canadian Human Rights Tribunal.

On January 26, 2016, the Tribunal released its decision ("Decision") relating to the complaint referred to above.<sup>3</sup> It found that the Canadian government is racially discriminating against 165,000 First Nations children and their families by providing flawed and inequitable child welfare services and failing to ensure equitable access to government services available to other children.

The key findings of the Tribunal were:

- Under the Government of Canada's 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. This includes mental health services, services to strengthen families, and services for family preservation and reunification.<sup>4</sup>
- The Government of Canada's "one-size fits all" approach to child welfare services does not work for children and families living on reserves.<sup>5</sup>
- The Government of Canada's FNCFS Program contains no mechanism to ensure child and family services provided to First Nations Peoples living on reserves are reasonably comparable to those provided to children in similar circumstances off reserve.<sup>6</sup>
- The Government of Canada's FNCFS Program funding structures are discriminatory and promote negative outcomes for First Nations children and families, namely the incentive to take children into care.<sup>7</sup>
- The Government of Canada's FNCFS Program causes First Nations children and families to be denied the opportunity to remain together or be reunited in a timely manner.<sup>8</sup>

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<sup>3</sup> *First Nations Child and Family Caring Society of Canada and the Assembly of First Nations v Attorney General of Canada*, 2016 CHRT 2 (*Caring Society v Canada*, 2016 CHRT 2)

<sup>4</sup> *Caring Society v Canada*, 2016 CHRT 2, para 314

<sup>5</sup> *Caring Society v Canada*, 2016 CHRT 2, para 315

<sup>6</sup> *Caring Society v Canada*, 2016 CHRT 2, para 334

<sup>7</sup> *Caring Society v Canada*, 2016 CHRT 2, para 344

<sup>8</sup> *Caring Society v Canada*, 2016 CHRT 2, para 349

- 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 and First Nations children to be placed into care unnecessarily.<sup>9</sup>
- The Government of Canada's FNCFS Program is not culturally appropriate. It does not meet the real needs of First Nations children and their families or take into account their historical, cultural and geographical circumstances.<sup>10</sup>

The Tribunal 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 Tribunal reserved its decision relating to systemic remedies and individual compensation for the children impacted by Canada's discriminatory conduct.

### **Canada's Non-Compliance with the Tribunal's Decision**

Following the Decision, the Caring Society presented the Department of Indigenous and Northern Affairs Canada ("INAC") with detailed immediate relief reforms based on recommendations arising from expert reports. The recommendations from these reports, dating back two decades, were already agreed to by INAC. Drawing on a 2012 document on funding shortfalls for First Nations child welfare prepared by senior officials at INAC, the Caring Society estimated that the immediate shortfall in First Nations child welfare funding for 2016/2017 is at minimum \$155 million over and above the \$71 million the government allotted in Budget 2016. In total, \$216 million is required just for immediate relief for child welfare, plus additional funds for full implementation of Jordan's Principle. More funds will be needed to achieve formal and substantive equity.

On April 26, 2016, the Tribunal released its review of INAC's compliance report, noting that they have the burden to prove that the \$71 million allotted for First Nations child and family services in Budget 2016 is sufficient to alleviate its discrimination against First Nations children, but had failed to do so. The Tribunal ordered INAC to provide more detailed financial reports linking their actions to the Tribunal's orders. In addition, the Tribunal found that INAC's progress on Jordan's Principle did not comply with the Decision requiring the federal government to implement Jordan's Principle, and they ordered the government to comply by May 10, 2016. Further submissions revealed that INAC was taking over \$10 million of the \$71 million to cover its own costs thus further reducing the relief from discrimination for children.

On September 15, 2016, the Tribunal found INAC's compliance to be in violation of both earlier orders, and was "concerned to read in INAC's submissions much of the

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<sup>9</sup> *Caring Society v Canada*, 2016 CHRT 2, para 391

<sup>10</sup> *Caring Society v Canada*, 2016 CHRT 2, para 465

same type of statements and reasoning that it has seen from the organization in the past”.<sup>11</sup> For example, INAC asserted that it is up to each FNCFS Agency to determine how they allocate funding for prevention and cultural programming, even though agencies lack sufficient funding to deliver these services in the first place. In addition, INAC said they would determine funding for remote and small agencies at a later date, despite the fact that they have been studying the challenges faced by these agencies for years, and the direct order by the Decision to incorporate additional resources and revisit their flawed funding model for these agencies within the year.

In March, 2017, the Representative for Children and Youth from the province of British Columbia released a report entitled *Delegated Aboriginal Agencies: How resourcing affects service delivery*. This report directly links the substantive under funding of delegated First Nations agencies to an inability to provide culturally appropriate services and that little has been done to resolve this situation.

On June 22, 2017, the Prime Minister of Canada stated that the Government of Canada has not addressed the inequitable provision of funds for FNCFS agencies because he believes that “there is an unevenness across Indigenous communities in terms of their capacity to actually deliver [child and family] services”. This is the same argument that was thoroughly assessed and unequivocally dismissed by the Tribunal. When questioned by the Tribunal, the only concerns Canada could demonstrate in regards to capacity were related to the lack of equitable funding from the federal government. First Nations communities have successfully cared for their children since time immemorial and have demonstrated the leadership, vision, and capacity to continue to do so.

The Tribunal also found that INAC had not complied with previous Tribunal orders to apply Jordan’s Principle to all First Nations children on and off reserve and ordered them to immediately do so. Documents from the Department of Health Canada dated after the release of the Decision show that INAC continued to restrict Jordan’s Principle to children on reserve with disabilities and short term illnesses and has implemented a process that will inevitably result in service delays and possibly service denials. The Caring Society wrote a letter to the Minister of Health in September, 2016, expressing our concern that the definition used by Health Canada was non-compliant. The Caring Society attached several examples of government public information materials propagating the narrow and non-compliant approach to Jordan’s Principle. The Minister did not reply until December, 2016, and that letter did not address the Caring Society’s concerns regarding the non-compliant definition.

Faced with the formal non-compliance order in May, 2017, federal officials suggested that the definition on the public relations materials was a

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<sup>11</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 16, para 29

“communications problem” and that they always had a more open view of Jordan’s Principle. To the degree this is true; the public knew nothing of it.

### **Canada’s ongoing non-compliance with the Tribunal’s orders**

In November, 2016, the Complainants (Assembly of First Nations and the Caring Society) and the interested parties (Chiefs of Ontario and Nishnawbe Aski Nation) filed formal motions of non-compliance. Canada took the position that it has complied with the orders. Three days of hearings on the non-compliance motions were held in March, 2017. The Tribunal released its ruling on Jordan’s Principle on May 26, 2017 (2017 CHRT 14).

In the May, 2017, ruling the Tribunal states that “Canada has repeated its pattern of conduct and narrow focus with respect to Jordan’s Principle” and issues a third set of compliance orders.<sup>12</sup>

#### *The definition of Jordan’s Principle:*

1. As of May 26, 2017, Canada shall cease using definitions of Jordan’s Principle that do not comply with the Tribunal orders.
2. As of May 26, 2017, Canada will start using a definition based on the following principles:
  - i. Jordan’s Principle applies equally to all First Nations children both on and off reserve and is not limited to First Nations children with disabilities, or short-term issues creating critical needs for health and social supports.
  - ii. Jordan’s Principle applies to all government services and ensures that there are no gaps in government services to First Nations children.
  - iii. The government department of first contact will pay for the service to a First Nations child without engaging in administrative procedures before funding is provided.
  - iv. In cases when a government service is not necessarily available to all other children, or is beyond the normative standard of care, the government of first contact will still evaluate the needs of the child to determine if the provision of services should be provided to ensure substantive equality.
  - v. A jurisdictional dispute between departments or between governments is not a necessary requirement for the application of Jordan’s Principle.
3. Canada shall not use or distribute a definition of Jordan’s Principle that is in any way contrary to the orders listed above.
4. By November 1, 2017, Canada shall review previous requests (dating from April 1, 2009) for funding, whether made pursuant to Jordan’s Principle or otherwise.

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<sup>12</sup> *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2017 CHRT 14

*Processing and tracking of Jordan's Principle cases:*

5. By June 28, 2017, Canada shall modify its processes surrounding Jordan's Principle to reflect the following standards:
  - i. The government department of first contact will evaluate the individual needs of the child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.
  - ii. The initial evaluation will be made within 12-48 hours of its receipt.
  - iii. Canada shall cease imposing service delays due to administrative procedures before funding is provided.
  - iv. If the request is granted, the government department of first contact shall pay for the service without engaging in administrative procedures before funding is provided.
  - v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of their right to appeal the decision and instructions on how to do this.
6. By June 28, 2017, Canada shall implement processes to ensure that all possible Jordan's Principle cases are identified and addressed.
7. By July 27, 2017, Canada shall develop internal systems to track the number of Jordan's Principle cases received and all aspects of the case (e.g., reason for application, service provided, etc.).
8. By November 15, 2017 (and every 6 months thereafter), Canada shall provide a report and affidavit materials to the Tribunal in regards to the internal tracking system.

*Publicizing the compliant definition and approach to Jordan's Principle*

9. By June 09, 2017, Canada shall post a clear link to information on Jordan's Principle.
10. By June 28, 2017, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network about Jordan's Principle.
11. By June 09, 2017, Canada shall contact all stakeholders who received communications regarding Jordan's Principle (since January 26, 2016) and advise them in writing of the findings and orders in this ruling.
12. By July 27, 2017, Canada shall ensure agreements with third-party service providers to provide services under the Child First Initiative's Service Coordination Function reflect the full and proper definition of Jordan's Principle.
13. By July 27, 2017, Canada shall fund and consult with the Complainants, the Canadian Human Rights Commission, and the Interested Parties to develop training and public education materials relating to Jordan's Principle.

*Retention of jurisdiction and reporting*

14. By November 15, 2017, Canada will serve and file a report and affidavit materials detailing its compliance with each of the above orders



## **Canada continues to fight First Nations children in court**

On June 23, 2017, Canada commenced a proceeding before the Federal Court of Canada seeking to challenge the Tribunal's most recent order.<sup>13</sup> Though in its statement to the media, the ministers responsible stated that they were only seeking to "clarify" the Tribunal's decision, the notice of application for judicial review clearly states that Canada is seeking to quash orders made by the Tribunal. In particular, Canada is challenging the Tribunal's jurisdiction to make orders seeking to remedy discrimination. Its legal action attacks the core function of the Tribunal and its crucial role of ensuring compliance with Canada's quasi-constitutional anti-discrimination legislation.

Unfortunately, this is not the only case in which Canada is fighting in court First Nations children who are seeking to assert their equality rights. For example, INAC spent more than \$32,000 fighting a First Nations teenager in need of medical care in court rather than providing the \$6,000 required for her medical treatment. On June 26, 2017, Canada filed a notice of appearance with the Federal Court of Appeal of Canada confirming its intention to continue its legal battle against the teenager and her mother.<sup>14</sup> Likewise, Canada unsuccessfully sought to have the racial discrimination complaint filed by Ms. Carolyn Buffalo dismissed by the Canadian Human Rights Commission. The complaint seeks to assert the equality rights of First Nations children with disabilities to have equal access to transportation to and from schools. This complaint will be adjudicated in the Canadian Human Rights Tribunal in the coming months.

### **The Tribunal's findings and the Convention**

The Caring Society submits that the Tribunal's findings and orders are consistent with Canada's international human rights law obligations, particularly with regards to racial minorities and Indigenous Peoples. In particular, the Caring Society submits that Canada's ongoing racial discrimination against First Nations children in the context of child welfare and through jurisdictional disputes are:

- contrary to Article 2 of the *Convention* and
- contrary to Articles 2 of the *Declaration*.

The Caring Society is particularly concerned regarding the tragic consequences of these violations. As concluded by the Tribunal, Canada's FNCFS Program funding structures are discriminatory and promote negative outcomes for First Nations children and families, namely the incentive to take children into care. This is also contrary to Article 7 of the *Declaration*, namely the right of Indigenous Peoples to security and the right not to be subjected to forced removals of their children.

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<sup>13</sup> Application for judicial review, file number T-918-17, dated June 23, 2017.

<sup>14</sup> Notice of appearance, Attorney General of Canada, file A-188-17, Federal Court of Canada, dated June 26, 2017.

**Proposed Recommendations:**

- 1) Urge Canada to withdraw its application to judicially review the May, 2017, decision of the Canadian Human Rights Tribunal before the Federal Court of Canada;**
- 2) Urge Canada to implement all of the decisions of the Canadian Human Rights Tribunal expeditiously, 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;****
- 3) Urge Canada to report back annually on its compliance with the January, 2016, Canadian Human Rights Tribunal Decision and subsequent remedial orders and support Civil Society to provide shadow reports;**
- 4) 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 and, in particular, Article 7 of the Convention and Article 8 of the Declaration; and**
- 5) Urge Canada to immediately cease challenging legal proceedings which seek to assert the substantive equality rights of First Nations children in court or before human rights bodies.**

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