



WHY THE WORLD NEEDS TO WATCH: THE CANADIAN
GOVERNMENT HELD TO ACCOUNT FOR RACIAL DISCRIMINATION
AGAINST INDIGENOUS CHILDREN BEFORE THE CANADIAN HUMAN
RIGHTS TRIBUNAL

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INTRODUCTION

Two years after Canada apologized for the forced assimilation of First Nations children in residential schools while voting against the United Nations Declaration on the Rights of Indigenous Peoples, the Canadian government continues to create a perfect storm of disadvantage for First Nations children by consciously denying them equitable and culturally based child welfare and education services on reserves. The Canadian government knows about the inequality and yet has done little to address it and this resulted in the Assembly of First Nations (AFN – www.afn.ca) and the First Nations Child and Family Caring Society of Canada (Caring Society- www.fncaringsociety.com) filing a complaint with the Canadian Human Rights Commission against the federal government in 2007. This historic case marks the first time in history that the Canadian government is being held to account for its discriminatory treatment of a current generation of First Nations children. Evidence before the tribunal is taken under oath and the tribunal has the power to make enforceable orders so it provides an excellent and uncensored example Canada's actions when confronted with a well founded complaint of racial discrimination against Indigenous children. This submission maps out the evidence of Canada's discrimination, the international and domestic law guiding the proceedings and Canada's actions during the tribunal which have focused on fighting to preserve the inequality instead of dealing with it. It ends with a recommendation that the Permanent Forum on Indigenous Issues appoint a special observer to follow the Canadian Human Rights Tribunal and report publically on its implications for Canada's international human rights obligations to Indigenous Peoples.

EVIDENCE OF RACIAL DISCRIMINATION AGAINST INDIGENOUS CHILDREN BY THE CANADIAN GOVERNMENT

Provincial/territorial child welfare, education and health laws apply on and off reserves in Canada. The province/territory pays for this essential life saving and life wellness services off reserves but expects the federal government to provide equitable funding for services on reserves. When the federal government does not, or does so inadequately, the provincial/territorial governments typically do not top up the funding resulting in a two tiered public service system for children where First Nations children get less (First Nations Child and Family Caring Society of Canada, 2009). The evidence of the inequality is overwhelming (United Nations Committee on the Rights of the Child, 2003; Senate Standing Committee on Human Rights, 2007; Standing Committee on Public Accounts, 2009) and yet the federal government has done little to address the problem.

The most flagrant example of discrimination arising from federal funding regimes is with regard to First Nations child welfare services on reserves. There are more First Nations children in child welfare care today than there were at the height of residential schools by a factor of three. First Nations children are not more likely to be reported to child welfare for abuse – it is neglect fueled by poverty, poor housing, substance misuse that drives so many First Nations children into foster care (Trocme, Knoke & Blackstock, 2004). All of these factors are responsive to services but the federal government provides less child welfare funding on reserves than other children receive even though First Nations children have higher child welfare needs (McDonald & Ladd, 2000;

McKenzie, 2002; Loxley et al., 2005; Auditor General of Canada, 2008; Standing Committee on Public Accounts, 2009.

Child welfare services are statutory in nature and the goal is to protect children from child abuse and neglect by offering interventions that, whenever possible, allow the child to remain safely in their family home. The child welfare laws are provincial/territorial in nature but the federal government funds child welfare services on reserves. The federal government has a number of funding regimes for its child welfare funding service on reserves. The Auditor General of Canada (2008) reviewed INAC's child welfare funding regimes and found them to be inequitable. A key area of underfunding is in services intended to keep First Nations children safely at home and INAC itself has publically stated that its funding formula needs to be improved in order to reverse the growing numbers of First Nations children in care (Indian Affairs and Northern Development Canada, 2006).

First Nations worked with the federal government for over ten years to develop two joint, and evidence based, solutions to address the inequalities in child welfare funding on reserves (McDonald & Ladd, 2000; Loxley et al., 2005) but the federal government walked away from both proposals. Studies have shown that placing children in foster care has been linked with many of the same tragic outcomes as children who attended residential schools such as cultural and linguistic erosion, poorer educational outcomes, over-representation in justice systems, and higher incidence of substance misuse and sexual exploitation. Although some children need to be in foster care, government's have a legal and moral responsibility to give each child an equitable opportunity to live safely at home. Federal government under-funding of child welfare and other services undermine the safety and well being of First Nations children on reserves.

The inequality in child and family services directly funded by the federal/provincial/territorial governments is compounded by the deficits in publically funded voluntary sector services (i.e.: food banks, literacy programs, recreational clubs, shelters) on reserve. The voluntary sector in Canada employs over 1 million people and takes in about 115 billion dollars in annual revenue of which 60 percent is funded by the federal/provincial/territorial governments (Canadian Council on Social Development, 2003). A study done in 2003 found that First Nations children get negligible benefit from the voluntary sector even though it is funded using public money targeted to the public good (Nadjiwan & Blackstock, 2003).

This tragic pattern of inequality is echoed across other children's programs on reserve. The Auditor General of Canada (2004) found elementary and secondary funding on reserves to be inequitable. The Assembly of First Nations estimates that at the current rate of federal investment it will take 28 years to achieve equity with non-Aboriginal education systems (Assembly of First Nations, n.d.). There are also severe shortages of schools on reserves with 53 First Nations communities not having schools and schools in many other communities are in need of substantial renovations or expansion. Only three out of ten First Nations children on reserves graduate from high school (Assembly of First Nations, n.d.). All of these service deficits are magnified by housing shortages and inadequacies on reserve and the water and food security challenges (Loppie-Reading & Wien, 2009).

The impacts of this disadvantage are profound for children, families and their communities and this disadvantage often translates into higher risk for youth suicide, sexual exploitation, juvenile justice and substance misuse. That is why equity in federal service provision is so essential to the reduction of a broad range of poor social and economic outcomes.

CAN CANADA AFFORD EQUALITY FOR VULNERABLE CHILDREN?

When First Nations child welfare experts completed the first two reports to remedy inequalities in First Nations child welfare funding (McDonald & Ladd, 2000; Loxley et al., 2005), the federal government was running a surplus budget in the billions of dollars. Despite having billions in the bank the federal government did not take the action needed to ensure equitable treatment of First Nations children.

Today, the federal government is spending billions of dollars to stimulate the economy and thousands of dollars to fight the case before the Canadian Human Rights Tribunal and yet the 2008 federal budget announcement on First Nations child welfare funding (Department of Finance, 2008) provided only 23 percent of what was needed. In the 2009 budget the government announced an additional 20 million over two years (Department of Finance, 2009). If you add the amount provided in both budgets it only represents one third of what was recommended per year in the Wen:de reports (excluding Ontario and the territories) to achieve basic levels of culturally based equity in child welfare.

It is important to add, that Canada paid a significant portion of the 6 billion dollar bill to host the winter Olympics in Vancouver in 2010. Non-discrimination is engrained into the Olympic Charter and yet Canada did nothing to ensure full equity for First Nations children.

HOLDING CANADA ACCOUNTABLE FOR RACIAL DISCRIMINATION BEFORE THE CANADIAN HUMAN RIGHTS TRIBUNAL ON FIRST NATIONS CHILD WELFARE

In 2007, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) filed a historic complaint with the Canadian Human Rights Commission against the Government of Canada alleging that the federal government is discriminating against First Nations children by providing them with inequitable child welfare funding and narrowing the definition of Jordan's Principle. The Canadian Human Rights Act pertains to complaints of discrimination relevant to services, goods or accommodations. The complaint alleged that the Canadian government's funding regimes for child welfare were a discriminatory service on the basis of race (in this case First Nations children).

Instead of allowing this case to be heard on its merits, the Canadian government has repeatedly tried to derail the public tribunal by raising a series of legal technicalities. For example, Canada questions the jurisdiction of the Canadian Human Rights Commission suggesting that federal funding, assumingly no matter how inequitable, is not a service as defined in the Canadian Human Rights Act (CHRA) and thus the complaint falls outside of the jurisdiction of the CHRA.

When the Canadian Human Rights Commission referred the case to the Canadian Human Rights Tribunal in September of 2008, the federal government immediately filed a judicial review in federal court to derail the tribunal. The federal court ruled against the government so the government tried this same strategy at the tribunal. The tribunal began on September 14, 2009 was to resume with evidentiary hearings in November however the federal government appointed a new tribunal chair who cancelled all of the hearing dates and decided to hear Canada's motion to dismiss the tribunal even though the federal government had already tried, and lost, this argument

in federal court. The new tribunal chair ordered that submissions on Canada's motion to dismiss had to be filed by affidavit and cross examination on the affidavits will occur on February 22-March 3, 2010. All witnesses who oppose Canada's application have agreed to have their cross examination open to the public but Canada wants its witness to testify in private.

Canada's efforts to derail the tribunal on legal technicalities can likely be explained by the overwhelming evidence against them on the merits of the case. Government internal documents confirm that the under-funding of child welfare on reserves is "dire" resulting in growing numbers of First Nations children in care. AFN and the Caring Society identified six expert witnesses to testify on their behalf over a year ago and yet the federal government has been unable to identify even one expert social work witness to testify on their behalf even though there are 17,000 social workers in Canada. The only expert witness declared by Canada is the accounting firm KPMG which Canada commissioned to review an expert report authored by recognized experts with PhD qualifications in fields as diverse as child welfare, economics and community development. Canada has identified the KPMG as a person qualified as a chartered general accountant. It is still unclear how Canada will make the case as to how a chartered general accountant can be considered an expert in child welfare, economics and community development.

The case is still underway and our view is that if the case is decided on the merits – First Nations children will win. If it is decided on the legal technicality that funding is not a service then the Canadian government will effectively immunize itself from being held accountable for human rights violations under the Canadian Human Rights Act arising from discriminatory federal government funding policies.

It is important to note that the Canadian government mentions its First Nations child welfare program in its report to the United Nations Human Rights Council in 2009 and to the United Nations Committee on the Rights of the Child in 2009 but it failed to mention it was being held to account for its discriminatory treatment of First Nations children before the Canadian Human Rights Tribunal. Furthermore, in its periodic report to the United Nations Human Rights Council (2009), Canada makes specific mention of how it has expanded the range of human rights protections afforded under the Canadian Human Rights Act by repealing an article that protected against complaints relating to the Indian Act. It does not mention, however, that it is actively pursuing a legal strategy before the Canadian Human Rights Tribunal to avoid accountability under the Canadian Human Rights Act for its own inequitable and discriminatory funding regimes. This raises important questions about Canada's reporting on its international human rights obligations.

THE WORLD IS WATCHING THE TRIBUNAL AND SO ARE CANADIAN VOTERS

Along with proceeding with the legal case, the First Nations Child and Family Caring Society of Canada has launched a public engagement campaign called "I am a witness" for the Canadian Human Rights Tribunal (see www.fnwitness.ca). Under this campaign, people of all ages and organizations are invited to register as a witness to the tribunal meaning that witnesses agree to follow the tribunal in person, over the web, or in the media and listen to both sides of the case. Once they have heard the evidence, witnesses are invited to make up their own mind as to whether or not Canada is treating First Nations children fairly. To date, over 3400 witnesses from at least nine countries in the world are watching the tribunal. Signing up to be a witness is open to people of all ages and organizations from any part of the world. It is free and takes under two minutes at www.fnwitness.ca

**WHY THE WORLD NEEDS TO WATCH: A RECOMMENDATION FOR ACTION BY
THE PERMANENT FORUM ON INDIGENOUS ISSUES**

Principles of equality are so fundamental to the health and well being of children that non-discrimination measures are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Rights of the Child, the United Nations Committee on the Rights of the Child General Comment 11 on the rights of Indigenous children (United Nations Committee on the Rights of the Child, 2009), provincial/territorial child welfare and education statutes and the Canadian Charter of Rights and Freedoms. The United Nations Committee on the Rights of the Child called on Canada to close the gaps in life chances between Aboriginal and non-Aboriginal children in their last periodic report on Canada (United Nations Committee on the Rights of the Child, 2003).

Canada was one of four countries in the world that voted against the United Nations Declaration on the Rights of Indigenous Peoples. In doing so, Canada cited the protections already afforded under the Canadian Human Rights Act for Indigenous peoples. Canada's legal strategy in the Canadian Human Rights Tribunal on First Nations child welfare are geared toward avoiding accountability for its actions under domestic law thus further eroding the human rights protections of Indigenous peoples in Canada. Canada's actions also set a very poor standard on the fulfillment of its international human rights obligations.

Given the gravity of the Canadian Human Rights Tribunal for First Nations children and its broad implications for Canada's international and domestic human rights obligations, the Caring Society officially requests that the Permanent Forum on Indigenous Issues appoints a special observer to follow the tribunal and report publically to the international community on Canada's fulfillment of its international human rights obligations to Indigenous peoples.

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