

*The Panel acknowledges the suffering of First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner.*

*We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.*

*Canadian Human Rights Tribunal Decision 2016 CHRT 2 para. 467*

A year ago the Truth and Reconciliation Commission released its Calls to Action. Ensuring culturally based equity in child welfare and full implementation of Jordan's Principle were at the top of the list. In January of this year, the Canadian Human Rights Tribunal (2016 CHRT 2) found that the federal government's flawed, inequitable and unlawful provision of child welfare services was driving First Nations children into child welfare care unnecessarily and widening the harm from residential schools. The Tribunal also found that the federal government had defined Jordan's Principle out of existence by denying First Nations children the opportunity to access public services on the same terms as other children. Most disturbingly of all, the Canadian Human Rights Tribunal decision maps out a long and destructive pattern where the federal government is repeatedly made aware of the inequalities First Nations children experience, is aware of the associated grave harms (including unnecessary removals of children from their families), and has solutions to address it and fails to do so. In keeping with the Prime Minister's commitments on the United Nations Declaration on the Rights of Indigenous Peoples and to implement the Truth and Reconciliation Commission's Calls to Action, it is essential that this government pattern of knowing better and not doing better is disrupted to ensure sustainable and positive change for First Nations children.

The Canadian Human Rights Tribunal ordered the federal government to cease its discriminatory practices and to implement Jordan's Principle in its full meaning so First Nations children can access public services on the same terms as other children. As the Canadian Human Rights Tribunal noted in its follow up ruling of April 26, 2016 (2016 CHRT 10), the federal government's progress in implementing the order has been unreasonably slow and First Nations children, therefore, continue to experience racial discrimination and Canada continues to use racial discrimination against children as fiscal policy. In the words of the Tribunal "The Season of Reconciliation is here and the time for change is now."

### **What is the relationship between Residential Schools, INAC's First Nations Child and Family Services Program and Youth Suicide?**

There are two key relationships to discuss: 1) the compounding effect of discriminatory government service provision in education, child welfare, health and basics like water and housing on the overall safety and wellbeing of children across their lifespan and 2) the effect of

the discriminatory government service provision on the availability of mental health and other wellness services to prevent and respond to child and youth mental health.

### *The Compounding Effect of Discriminatory Government Service Provision*

Federal government documents filed at the Tribunal show that federal officials have been aware of what they call “woefully inadequate funding<sup>1</sup>” that creates “circumstances that are dire<sup>2</sup>” and leads to “growing numbers of children in care<sup>3</sup>” for close to two decades<sup>4</sup>. As the federal documents show, consequences of the discriminatory funding are indeed “dire.” Between 1989-2012, First Nations children on reserve and in the Yukon spent over 166 million nights, or 167, 000 years of childhood<sup>5</sup>, in foster care. There are more First Nations children in child welfare care than during the height of residential schools and the Canadian Human Rights Tribunal found that Canada’s discriminatory provision of First Nations child welfare incentivizes the removal of First Nations children from their families<sup>6</sup>. In this way, the federal government continues the tragic and unconscionable residential school pattern of placing itself between First Nations children and their families resulting in multi-generational trauma for this generation of First Nations children. Indeed, the Tribunal noted that adverse impacts related to Canada’s discriminatory provision of First Nations child and family services “perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential School system.”<sup>7</sup>

Dr. Amy Bombay, PhD in neuropsychology and an expert witness before the Tribunal, spoke to the cumulative and multi-generational impacts of residential schools and the connection to the experiences of First Nations children served by INAC’s First Nations Child and Family Services Program. Dr. Bombay referred to the term “historical trauma” coined by Dr. Maria Yellow Horse Brave Heart, Director of Native American and Disparities Research Centre at the University of New Mexico School of Medicine. As the Tribunal noted, historical trauma is “...the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma<sup>8</sup>.” The relationship between historical trauma, over-representation of children in foster care and depression is well documented and studies have repeatedly shown that multiple adverse childhood experiences too often predict multiple

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<sup>1</sup> AANDC, untitled document, CHRC Tab 234, p.2.

<sup>2</sup> AANDC, Government Q and A’s, CHRC Tab 233, p.1.

<sup>3</sup> AANDC, First Nations Child and Family Services Fact Sheet, CHRC Tab 78, p.2.

<sup>4</sup> First Nations Child and Family Caring Society of Canada, Closing Submissions: is there a link?

<sup>5</sup> Aboriginal Affairs and Northern Development Canada (2013). First Nations Child and Family Services (FNCFS) TOTAL number of children in care (includes CFS, CSS and Provincial Data).

<sup>6</sup> 2016 CHRT 2, para. 386.

<sup>7</sup> 2016 CHRT 2, para 459.

<sup>8</sup> 2016 CHRT 2, para 149.

hardships across the lifespan<sup>9</sup>. Indeed, a recent study conducted with 44 active patients at the Vancouver Native Health Society found that 67% had been in foster care as children.<sup>10</sup>

Federal government documents filed at the Tribunal confirm that First Nations children receive less funding for education, health care, child welfare and basics like water, sewer and housing. In fact, documents showed that the federal government was transferring 98 million dollars per year (or over ½ billion dollars over 5 years) from the already strained “infrastructure budget” dedicated to building new schools, housing and water to cover shortfalls in the child and family services program, income assistance and education, despite the fact that INAC agreed with the Auditor General of Canada’s 2008 recommendation to cease this practice. To contextualize the perils of these transfers for children, it is important to recall that poor housing and poverty are two of the biggest predictors of First Nations children coming into child welfare care. It is thus no surprise that transferring funding dedicated to building safer homes and communities for children does little to promote their safety and wellbeing. It is vital these transfers cease. If the practice of transferring money from infrastructure continues at the rate of 98 million per year, it could represent a loss of the following amounts announced in Budget 2016:

- 52% of the planned education infrastructure funding over 5 years;
- 28% of the planned spending on water;
- 69% of the planned spending on housing; and
- Double the amount planned for fire protection and disaster relief.

The federal government’s response to funding inequities in children’s services should be immediate and include full action to redress the shortfalls with new funds - not shifting funds from one underfunded INAC program to another. This simply displaces the discrimination experienced by First Nations children and will not lead to equal outcomes for them. Ending program transfers as a means of addressing shortfalls must be done with dispatch given the developmental vulnerability of children and the unconscionable nature of giving First Nations children less than all other children receive. Doing nothing, or using an “incremental approach”, to redress the discriminatory inequalities poses grave, and in many cases irrevocable, harms to children and youth. The impacts of these multiple inequities exacerbate the adverse experiences First Nations children experience that are correlated to poor mental health outcomes throughout the life experience.

### *Access to Mental Health and Wellness Services*

Specific to the availability of mental health services on reserve, federal government evidence presented at the Tribunal confirms that First Nations children are often denied

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<sup>9</sup> See for example, the Adverse Childhood Experiences Study from the Centers for Disease Control and Prevention.

<sup>10</sup> Tu, D., Price, R, et al., Partnering with Elders to Improve Mental Health Outcomes of the Indigenous People Living in a Canadian Inner City (2016)

services, including mental health services, which are available to other children. For example, child and family services on reserve in Ontario are funded through a bi-lateral agreement signed between Ontario and Canada in 1965 that is known as the “65 Agreement.” Evidence from federal documents and government officials who testified before the Tribunal confirmed that the schedule relating to child welfare was last updated in the late 1970’s and has not been updated to reflect advances in the Ontario child welfare legislation that includes the provision of mental health services. Federal officials acknowledged that they do not fund mental health services even though they are included in the *Child and Family Services Act*, RSO 1990 c.11 and they are also aware that Ontario is not funding these services. This means that First Nations children, who are often most in need of mental health services, are not receiving them. Similarly, a federal government document, describing the “first hand” observations of INAC staff, provincial child welfare officials and First Nations in BC, stated that “HC (Health Canada) funded Mental Health Services is for short term mental health crisis however CIC’s (Children in Care) have ongoing mental health needs and receive limited funding/support from the Province, and services are not always available to FN children and families<sup>11</sup>.” Despite being aware of these inequities in mental health services for many years, Canada has taken little action to address these inequities.

As Prime Minister Harper acknowledged in his residential school apology, Canada’s residential schools “sowed the seeds for generations to follow.” The tragedy of the seeds of multi-generational trauma resulting from residential schools and Canada’s ongoing discriminatory provision of child and family services requires Canada to take positive and full measures to ensure First Nations children receive culturally based services including mental health promotion and response services that take into full account historical and systemic trauma.

### **Budget 2016 and the Canadian Human Rights Tribunal Decisions**

Federal government officials testifying before the Canadian Human Rights Tribunal confirmed that federal government internal documents dated 2012 indicate that the funding shortfall for First Nations Child and Family Services was 108.13 million dollars a year plus an annual 3 percent inflation driver going forward<sup>12</sup>. Evidence at the Tribunal indicates that this amount falls short of what was actually needed. For example, the 108.13 million does not include costs for:

- the development and implementation of culturally based programs and operating standards as ordered by the Tribunal;
- funds to account for the historical disadvantage related to residential schools as ordered by the Tribunal;

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<sup>11</sup> CHRC Tab 78, INAC and Health Canada First Nations Programs: Gaps in Service Delivery to First Nations Children and Families in BC.

<sup>12</sup> CHRT Tab 248: The First Nations Child and Family Services Program (FNCFS): The Way Forward, presentation to Francine Ducros, ADM ESDPPS, August 29, 2012

- Restoration of full purchasing power due to lack of annual inflation adjustments which have not been applied for as long as 20 years as ordered by the Tribunal;
- to ensure First Nations child and family service agencies and the equipment they use meet health and safety standards as ordered by the Tribunal;
- adequate adjustments for services provided to children in remote communities.

The Caring Society provided INAC with calculations and supporting evidence indicating that an additional \$216.21 million was needed for immediate relief pending long term program reform to account for the real needs of children requiring further investments.<sup>13</sup> Budget 2016 does not approach the 108.13 million per annum plus 3 percent inflation INAC reported was required in 2012 let alone the 216.21 the Caring Society identified.

### What was the Federal Government’s Response to the CHRT in Budget 2016?

The Honourable Ministers of Justice and Indigenous and Northern Affairs welcomed the decision by the Canadian Human Rights Tribunal on January 26, 2016. Unfortunately, INAC then unilaterally developed the federal budget submissions for the First Nations Child and Family Services Program without consulting with the parties to the CHRT, First Nations child and family services experts, and First Nations or First Nations child and family services agencies in order to ensure that its funding decisions met the real needs and promoted the best interest of children.

Budget 2016 announced \$71.1 million for the First Nations Child and Family Services Program. However, in later submissions to the Tribunal, INAC confirmed that only \$60.38 million of this amount is for services for children and families<sup>14</sup>. INAC has allocated the remaining \$10.62 million for regular INAC business related to ongoing increases in children in care including hiring more INAC staff and an information technology project INAC unilaterally prioritized for funding.

Table 2: Budget 2016 allocations for First Nations Child and Family Services

Year	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
Amount	60.38 million is allocated to improve services	99*	126*	162*	177*
Annual Amount as a Percentage of 5 year	9.5%	15.5%	19.8%	25.5%**	27.8%**

<sup>13</sup> FNCFS Immediate Relief Investment Estimates 2016/2017, March 31, 2016.

<sup>14</sup> Attorney General of Canada Further Submissions on Immediate Relief dated May 24, 2016.

total of \$634 million (rounded)					
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\*budget figures not adjusted downward to exclude INAC operating costs and maintenance for children in care.

\*\*55.3% of the funding allocated in Budget 2016 will not be provided to children until the year of the next federal election and the year following.

**A Case Study on why the 60.38 million is insufficient to even provide immediate relief from the discrimination:**

The federal government’s budget allocation for First Nations child welfare in British Columbia is a good illustration the inadequacies of the federal government’s funding. According to INAC, there are over 17,000 First Nations children living in British Columbia. These children and their families have received child welfare services pursuant to the federal government’s most discriminatory, and least generous, funding regime known as Directive 20-1. Developed in the late 1980’s, Directive 20-1 has not been updated significantly since it was put in place. For example, prevention funds have not been increased for 25 years and there has been no annual inflation adjustment for 20 years.

Federal government document (The Way Forward Presentation, p. 15) pegged the funding shortfall in BC at 21 million dollars as of 2012. Federal government submissions filed with the Canadian Human Rights Tribunal on May 24, 2016 note that INAC will only provide an additional 5.38 million for this year for the entire province rising to 13.4 million four years from now. That means that First Nations children will only get 25% of the funding that federal officials said was necessary in 2012 this year and by 2019 the funding will only represent 64% of what was needed as of 2012. The federal government has no answer as to why this amount falls so significantly short of the 2012 figures nor does it provide any evidence that this amount meets the requirements of the Tribunal to cease its discriminatory practices. Similar deficiencies in funding are reported by other regions.

**Why Incremental Equality Does not Work for Children**

The Canadian Human Rights Tribunal ordered Canada to end its discriminatory and unlawful conduct immediately - not over a five-year budget cycle. The incremental approach fails to reflect Canada’s legal obligations under the *Canadian Human Rights Act*, the Tribunal order, or account for the developmental sensitivity of children. For example, a baby born this year will be in kindergarten before the full benefit of Budget 2016 is realized, meaning the child will be deprived of an equal start in life during a key developmental period. The consequences of experiencing discrimination during these crucial years of development, for a quarter of a child would likely negatively impact the child for the rest of their lives.

Budget 2016 projects education and child welfare funding over a five -year cycle with over 50% of both funding envelopes coming the year of the next federal election or the year

after. While this approach may be appropriate for some government programs, it is counter to the interests of children who are in a vulnerable stage of development. This is particularly true for young children. Neuroscience has shown that the first five years of life are critical for healthy brain development and functioning throughout their life span.

Table 1: Child Development Markers During a Five -Year Projected Budget Cycle

Years	2016/2017	2017/2018	2018/2019	2019/2020	2020/2021
Child Development markers <sup>15</sup>	0-1 yrs Discovers feet/hands Recognizes name Sits alone Says first meaningful words	1-2 yrs Speaks and understands ideas Walk/run Develops friendships Solves problems	2-3 yrs Learn language rapidly Acts more independently Better motor control	3-4 yrs Longer attention span Talks- a lot and asks questions Sings Tests physical skills and courage	4-5 yrs Likes to play with friends Learns cooperation Pre-writing and reading.

Beyond the obvious disconnect between incremental investments and child development there is another significant problem with an incremental equality approach-equality has never been achieved using this approach.

In 1967, the Government of Canada commissioned Alex Sims to write a report on First Nations education. Mr. Sims makes a series of recommendations including restoring First Nations control over education, including First Nations content in curriculum and teaching methods and ensuring equity in education and he asks an important question. He wrote:

Knowing how much lag can be expected between the formulation of new policies, including the staging of exciting new pilot projects and the general adoption of these principles into the whole system,\* a key question immediately comes to mind. Taking into account the Indian question in this province, can Ontario afford to wait for this type of glacial change? School board, outlook, supervision, teacher training, textbooks must all be modified. Let someone hazard a guess as to what year or what century significant changes toward real equality will be noted in the achievement of the children.

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<sup>15</sup> UNICEF, Early Childhood Development: the Key to a Full and Productive Life. Available on line at: <http://www.unicef.org/dprk/ecd.pdf>

At the time Mr. Sims wrote this in 1967, I was a three -year old toddler- a child who could have benefited from his pleas for equity and reform. I am now 51 years old and the pleas for equity in First Nations education and other children’s programs continue. The problem with incremental equality is that it never comes. Equality must be achieved in a leap – not in a shuffle.

### **Jordan’s Principle**

Jordan’s Principle is a child first principle to resolving jurisdictional disputes within and between governments to ensure First Nations children can access public services on the same terms as other children. The House of Commons unanimously passed a Private Members Motion (M-296) supporting Jordan’s Principle in December of 2007 but, as the Canadian Human Rights Tribunal found, it was never properly implemented by the federal government resulting in First Nations children experiencing service denials, delays and disruptions. The Tribunal found that this was discriminatory and contrary to the *Canadian Human Rights Act*.

The Tribunal will recall that the federal government was required to “immediately” implement Jordan’s Principle as of January 26, 2016. As of April of 2016 the federal government had only begun discussions on Jordan’s Principle. As the Canadian Human Rights Tribunal noted in a follow up ruling dated April 26, 2016, this fell far short of what was required and ordered the federal government to implement Jordan’s Principle immediately across all children and all types of jurisdictional disputes and to ensure First Nations children can access public services on the same terms as other children.

The federal government was to confirm it met the terms of the order by May 10, 2016. The federal government’s response raises significant questions about its compliance with the order. For example, while it confirms that it no longer restricts the definition of Jordan’s Principle cases to children with complex medical needs and multiple service providers it fails to state that whether it now applies to all children. In addition, while the order makes clear that there should be no bureaucratic delays in service delivery to First Nations children, the federal response only says that cases will be managed so that children will receive services in a “timely” manner. There is no information on how those cases will be managed or what timely means. The Caring Society wrote to the Department of Justice to receive clarification on these points. The Department of Justice refused to answer. Hours after receiving the refusal from the Department of Justice, the Canadian Human Rights Tribunal coincidentally issued a direction to the parties to provide submissions on Canada’s position on Jordan’s Principle. The Caring Society filed its submissions on June 9, 2016 (available on [www.fnwitness.ca](http://www.fnwitness.ca)).

The Canadian Human Rights Tribunal remains seized of the case and wants the federal government to regularly report on its progress implementing its orders. A case conference on the sufficiency of Canada’s immediate redress of its discriminatory First Nations Child and Family Services Program and Canada’s response to Jordan’s Principle will be held on June 23 and 24, 2016. The Tribunal makes clear that further orders may be made if the federal government’s progress is insufficient.



## Recommendations:

- 1) Canada immediately and fully comply with the Canadian Human Rights Tribunal orders 2016 CHRT 2 and 2016 CHRT 10 and any further orders. This includes full and proper implementation of Jordan's Principle ensuring First Nations children can access government services on the same terms as other children (for example, ensuring First Nations children in Ontario receive equal benefit from the mental health provisions of the Ontario *Child and Family Services Act*).
- 2) The Committee on Indigenous Affairs conduct public hearings to review the equity and inequity of INAC and FNIB programs for First Nations children and youth with a view toward developing and implementing a comprehensive plan across all programs with time frames and performance targets to ensure First Nations children and youth receive an equitable opportunity to succeed and live the lives they wish to have.
- 3) Canada to immediately end the inequities in First Nations children's services and to establish, in consultation with First Nations including First Nations young people, an independent process to prevent its resurgence. Canada review and publically report on the compliance of federal programs, polices and fiscal allocations relevant to First Nations children and youth pursuant to: the Truth and Reconciliation Commission's Calls for Action, legal rulings including the decisions rendered by the Canadian Human Rights Tribunal relevant to First Nations children and youth, the *United Nations Declaration on the Rights of Indigenous Peoples*, the *Charter of Rights and Freedoms*, and the *United Nations Convention on the Rights of the Child*.
- 4) Canada take immediate and positive measures to ensure First Nations children and young people have access to culturally and developmentally appropriate mental health programs including suicide prevention, detection and response programs.

Respectfully submitted



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