

# Reconciliation means not saying sorry twice:

How inequities in Federal Government child welfare funding, and benefit, on reserves drives First Nations children into foster care

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Submission to:

Standing Committee on the Status of Women



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## INTRODUCTION

***"I went to the Tribunal Hearing [Canadian Human Rights Tribunal on First Nations Child Welfare alleging Canada racially discriminates by providing inequitable child welfare benefits on reserves] because I realized that what is happening isn't right and it's just more assimilation. By being there, it shows that I care and that young people care and take an interest. The government lawyer just talked around the issue. He just said so much stuff that was useless and not worth being said. I felt he was trying to somehow trick people into thinking the issue is just not theirs to worry about. Basically, I felt he was trying to get Canada out of something and that's just not right."***

*Jon Dundas, Elizabeth Wyn Wood student, June 2, 2010, Ottawa. John was one of several non-Aboriginal youth who have pledged to come to the tribunal hearings and report their views.*

It is estimated that there are three times the number of First Nations children in foster care today than there were at the height of the residential schools and the problem is getting worse in many parts of the country. The Auditor General of Canada (2008) estimates that First Nations children are 6-8 times more likely to be removed from their families than other children. The key reason for the over-representation of First Nations children in care is neglect driven by poverty, poor housing and substance misuse. The good news is that the Government of Canada has all the necessary levers to substantially address each issue, the bad news is that the Federal Government provides inequitable benefit for children and families receiving child and family services on reserves severely hampering efforts to keep children safely at home. As Parliamentarians are aware, there are approximately 108 First Nations child and family service agencies delivering statutory child welfare services on reserve. These agencies have won numerous awards of excellence and operate in every province except Prince Edward Island. INAC requires these agencies to follow provincial child welfare laws and the Federal Government is often the exclusive funder of the agencies and exercises significant control over agency operation. For over twenty years, there have been reports from First Nations and experts linking INAC's funding approaches and programs for child welfare with the growing numbers of First Nations children being removed from their families and placed in foster care. INAC apparently agrees. Quoting directly from the *INAC Fact Sheet: First Nations child and family services* (Retrieved December, 2007):

***"A fundamental change in the funding approach of First Nations Child and Family Service agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for agencies to meet their mandated responsibilities."***

As the Auditor General confirmed in her 2008 report, INAC has been aware of significant concerns about its First Nations child and family service program for years but has done little to address the problem. INAC's failure to provide equity in First Nations child and family services has persisted despite there being overwhelming evidence of the inequity, the availability of evidence based solutions to address the problem that were jointly developed with First Nations, and the growing number of Parliamentary, Senate and expert reports citing the harms to children arising from the inequity including the Standing Committee on Public Accounts (2009). The failure to address the issue has not been influenced by the financial situation of the country. INAC has consistently failed to treat First Nations children and families equitably regardless of whether the country was running billions in a surplus budget or spending billions to stimulate the economy.

The Minister of Indian and Northern Affairs' program for First Nations child and family services includes three key policy structures: 1) Directive 20-1, which the Minister's own documents say, creates a "dire situation" 2) the flawed and inequitable enhanced approach and 3) the 45 year old Indian Welfare Agreement in Ontario that the Auditor General has also termed inequitable. Additionally, INAC is before the Canadian Human Rights Tribunal facing allegations that it racially discriminates against First Nations children and families receiving child welfare services by providing inequitable benefit. Instead of addressing the complaint with evidence on the merits, Canada has tried to derail a full and public hearing on the facts using legal loopholes and countless delay tactics. Canada has also opposed efforts to broadcast the tribunal so that all Canadians, particularly First Nations children and families, can follow this historic case and inform themselves on the issue. The other five parties to the Canadian Human Rights Tribunal, including the Canadian Human Rights Commission, all favour a full hearing on the facts and some level of broadcasting. The very low standard of government accountability, shown by the Canadian government at the tribunal, runs counter to Canadian values and Canada's obligation to uphold the rights of children to non-discrimination, grow up with their families, and be involved in matters that affect them pursuant to the United Nations Convention on the Rights of the Child.

This submission briefly outlines INAC's three principle policies in First Nations child and family services and their impacts before providing recommendations to ensure the equitable treatment of First Nations children and families.

## **DIRECTIVE 20-1**

*“Lack of in-home family support for children at risk and inequitable access to services have been identified by First Nations Child and Family Services Agencies, and INAC, as important contributing factors to the over representation of Aboriginal children in the Canadian child*

***welfare system... provincial governments have written to Ministers of INAC and intergovernmental affairs indicating that INAC is not providing sufficient funding to permit First Nations child and family services agencies to meet their statutory obligations under provincial legislation.”***

*INAC internal document dated 2004 obtained under access to information  
(Document number 2372)*

This “dire” and flawed INAC program policy for child and family services continues to impact the lives of First Nations children and families in British Columbia and New Brunswick. Repeated reports commissioned by the Department of Indian and Northern Affairs Canada have found that the Directive is flawed in structure and inequitable in the amount of funding provided (MacDonald & Ladd, 2000; Loxley, DeRiviere, Prakash, Blackstock, Wien, & Thomas Prokop, 2005). Directive 20-1 was also reviewed by the Auditor General of Canada (2008) and the Standing Committee on Public Accounts (2009) and both found that Directive 20-1 was inequitable and not based on the needs of First Nations children and families. INAC’s own internal documents confirm that the impacts of the inequities in the Directive are “dire” for First Nations child and family service agencies and are linked to growing numbers of First Nations children going into care because their families are not receiving the family support and prevention services they need. INAC’s fact sheet dated 2007 links the Directive to growing numbers of First Nations children in care and the inability of First Nations child and family service agencies to meet mandated responsibilities.

INAC had the solutions to address the problems with Directive 20-1 for at least 11 years but has consistently failed to ensure equity for First Nations children regardless of the financial situation of the country (McDonald & Ladd, 2000). The inequity for First Nations children has persisted across two different governing parties, both of which had billions of surplus budgets; and now the current government is spending billions on the stimulus and other projects, but the damaging Directive continues to contribute to First Nations children in these two provinces going needlessly into child welfare care.

First Nations child and family service agencies in British Columbia have been advised that INAC plans on eliminating the current approach for funding maintenance in that province as of April of 2011 and replacing it with reimbursement at actuals. This change, in the absence of any significant adjustments to the Directive or enhanced funding models, to support the operations of agencies serving less than 1000 Status Indian children on reserves, will result in even more hardship for First Nations child and family service agencies and the families they serve. Some agencies may be forced to close.

## **ENHANCED FUNDING APPROACH (AKA TRIPARTITE FUNDING)**

***“4.64 However, we also found that the new formula does not address the inequities we have noted under the current formula. It still assumes that a fixed percentage of First Nations***

*children and families in all the First Nations served by an agency need child welfare services. Consequently, in our view, the new formula will not address differing needs among First Nations. Pressures on INAC to fund exceptions will likely continue to exist under the new formula.”*

Auditor General of Canada (May, 2008)

The Enhanced Prevention Focused Approach is currently applied by INAC in Alberta, Saskatchewan, Manitoba and Quebec. INAC unilaterally developed the enhanced funding approach also known as the tripartite funding arrangement and then imposed it on First Nations as the EXCLUSIVE option to Directive 20-1. It is important to note that INAC continually implies First Nations have choice as part of the design of the tripartite approach and INAC’s own records indicate they have an inflexible national template to guide implementation in the regions and their documents emphasize that INAC is only mandated to **DISCUSS** the enhanced approach with provinces and First Nations **not NEGOTIATE**. Although the Auditor General of Canada found enhanced funding to be an improvement over Directive 20-1, it continues to be inequitable and incorporates some of the fundamental flaws of Directive 20-1 such as not basing funding on the actual needs of First Nations children and families.

INAC undertook an internal evaluation of the implementation of the Enhanced Funding Formula in Alberta and summarizes the findings in a presentation deck entitled “*Implementation Evaluation of the Enhanced Prevention Focused Approach (EPFA) in Alberta: preliminary findings, May 14, 2010.*” The findings are summarized on presentation slides 18 and 19 respectively and read as follows:

- *Overall the EPFA model is seen to be a move in the right direction with potential for positive outcomes.*
- *Considerable variability of results across agencies, some clearly making progress and others struggling.*
- *HR [human resource] shortages affect DFNA’s [Delegated First Nations Agencies] ability to fully implement*
- *Some DFNA’s report wanting more support from INAC in IT [information technology] capacity and planning/implementation*
- ***75% of DFNA interviewees reported not enough funds for full implementation (emphasis added)***
- *Scarcity of supportive programming for referrals affects ability to fully implement in some DFNA’s*
- *Funding formula still variable in application and some issues need resolution*
- *Recognize this is a long term approach that takes time to implement, and needing time in initial stages to change community attitudes to child welfare program*
- *Attribution of results to EPFA challenging because of reporting and data gaps and confounding factors (e.g.: strong leadership/skills in director position; community capacity)*
- *INAC needs more information (business plans with baselines; reporting outcomes; provincial data) in order to fully assess results.”*

Clearly, this evaluation demonstrates some significant shortcomings in the enhanced prevention based approach. INAC, however, continues to offer the enhanced approach with all of its flaws as the exclusive funding alternative. It does not appear that INAC has taken any meaningful steps to redress the flaws of the enhanced approach identified by the Auditor General in 2008.

The need for equity in child welfare services was echoed in a report by the Honourable Yvonne Fritz, Minister of Children and Youth Services in Alberta (2010) on Aboriginal child welfare which includes this statement:

*“Repeated a number of times by different participants were the need for the following: (a) equity in funding; (b) same access to services; (c) cultural training and sensitivity to Aboriginal issues and concerns; and greater communication, collaboration and cooperation among all those who provide services to Aboriginal children in care.”*

There is a critical need to remedy the shortcomings of the enhanced approach in provinces where it is being implemented and for INAC to be open to alternatives to the enhanced approach in regions where enhanced is currently being provided and in regions where enhanced is being considered. Viable alternatives to enhanced include the Wen:de approach which was jointly developed by First Nations and the Department in 2005.

## **1965 INDIAN CHILD WELFARE AGREEMENT**

This bilateral agreement between INAC and the Province of Ontario drives First Nations child and family service delivery on reserves in Ontario. It is now over 45 years old and has not kept pace with advances in First Nations child and family services nor has it invited First Nations to participate fully in the development of the policy. In 2000, a report commissioned by INAC on First Nations child and family services funding included a recommendation that INAC partner with First Nations child and family service agencies in Ontario to conduct a special review of the 1965 Indian Welfare Agreement in Ontario. Close to 11 years later, INAC has not implemented this recommendation. The Auditor General of Canada reviewed the 1965 Indian Child Welfare Agreement in Ontario as part of her omnibus review of INAC's First Nations child and family services program in 2008 and she found it to be inequitable. There has been no apparent movement by INAC to conduct the review or redress the inequities identified by the Auditor General of Canada.

## **FIRST NATIONS CHILD AND FAMILY SERVICES IN THE TERRITORIES**

There are currently no First Nations child and family service agencies in the Yukon or Northwest Territories. The Minister of Indian Affairs transfers funds for child welfare to territorial authorities to deliver the services. First Nations have expressed a desire to enter into negotiations with Canada and the Territories to reassert authority for child welfare and to ensure adequate resourcing for the services. For example, the Carcross Tagish First Nation has created its own family act and as recently as November of 2010, but is reporting that neither INAC nor the Territory are prepared to negotiate proper funding for community controlled child welfare in the region.

INAC appears to have no plan to address the lack of First Nations child and family service agencies in the Territories despite the fact that First Nations children are dramatically over-represented in the Yukon Territory and the Northwest Territory.

## **JORDAN'S PRINCIPLE (WWW.JORDANSPRINCIPLE.CA)**

***Although we have not found a good analysis of those situations where the federal government has been found liable because of child fatalities or critical incidents relating to failure to provide necessary medical services, we believe that they exist and that, unless solutions are found, they will continue to occur. The government is also at risk from being cited as in Breach of Article 14 of the Convention [Convention on the Rights of the Child] as mentioned above."***

*INAC document obtained through Access to Information (002474) (undated –last date referenced in the document is 2006 suggesting it was written after that year)*

Jordan's Principle says that where a government service is available to all other children and a jurisdictional dispute between Canada (including INAC) and the province/territory occurs regarding payment for services to a First Nations child, the government of first contact pays for the services and can later seek reimbursement from the other level of government. In this way, First Nations children can access public services on the same terms as other children while payment issues between levels of government get resolved as a secondary consideration. Parliament unanimously passed Motion 296 put forward by Member of Parliament, Jean Crowder, on December 12, 2007. Tragically, Canada (including INAC) has tried to narrow Jordan's Principle suggesting it need only be applied on an inefficient "case by case" basis for children with complex medical needs with multiple service providers. This narrowing is completely distasteful as Jordan's Principle is named after Jordan River Anderson who languished in hospital unnecessarily for over two years while INAC, Health Canada and the Province of Manitoba argued over payment for at home care services that would otherwise be provided to non-Aboriginal children. Jordan died in the hospital never having spent a day in a family home while government officials continued to argue over who should pay. The case by case resolution approach was in place for Jordan and resulted in devastating consequences for Jordan and his family.

**Jordan's Principle is supported by over 3500 leading Canadians and organizations including the Canadian Medical Association, the Canadian Teachers Federation, the Red Cross, UNICEF and the Assembly of First Nations.**

Canada must fully implement Jordan's Principle across all government services immediately ensuring that First Nations children are in no way fettered or delayed access to services available to all other children. The narrowing of Jordan's Principle has the effect of perpetuating discrimination against First Nations children and families in other Government of Canada children's services.

## THE CANADIAN HUMAN RIGHTS TRIBUNAL ON FIRST NATIONS CHILD AND FAMILY SERVICES (WWW.FNWITNESS.CA)

*“Canada's lawyer has to come up with a good reason as to why the Tribunal should be dismissed and really there is no reason except for the fact that the government is scared, and does not want justice to be done. It's no wonder the government doesn't want this to be public. It is quite embarrassing and sad to think that our government is trying to get out of its responsibility to provide the same quality of services to First Nations children in the child welfare system as they do to non-Native children. I am a student and I am aware and I am going to make sure other youth are aware. Cindy is speaking for others who cannot speak and that is amazing. So I am going to speak for others who cannot be here today and make sure they're aware.”*

Summer Bisson, student, Elizabeth Wyn Wood Secondary who came to watch the Canadian Human Rights Tribunal (June 2, 3, 2010) and report her views.

After INAC failed to implement the recommendations of two expert reports commissioned by INAC and conducted jointly with First Nations to redress the inequities in First Nations child and family services, the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada filed a historic complaint with the Canadian Human Rights Commission in February of 2007 alleging that Canada is racially discriminating against First Nations children by providing less child welfare benefit on reserves than other children enjoy. The case was referred to the Canadian Human Rights Tribunal for full hearing in September of 2008 and Canada has been vigorously attempting to avoid a full hearing on the facts.

This is the first time in history that Canada has been held to account before a judicial body with the power to make orders for its current and systemic treatment of First Nations children. Canada has been trying to derail this important public hearing on the merits by raising legal loopholes. The most consistent legal loophole advanced by Canada is their idea that “funding is not a service.” In this argument, Canada wrongly suggests that it only funds First Nations child and family services and that First Nations child and family service agencies provide the service to the public so if there are any claims of discrimination by children they should be absorbed by the service provider, not by Canada. This is splitting hairs as it is not possible for First Nations child and family service agencies to provide a service they are not funded for and the whole strategy smacks of government downloading its responsibility for ensuring the non-discrimination of children. It is important to note that INAC has an entire program manual for First Nations child and family services that outlines a net of control over First Nations child and family services that includes INAC holding the right to read child in care files – far beyond what a solely funder-recipient relationship should entail.

Canada brought two motions before the Federal Court to try to derail a hearing on the merits and was unsuccessful on both occasions. Curiously, instead of appealing the Federal Court motion to the Federal



Court of Appeal, Canada decided to bring a motion to dismiss on the same substantive grounds to the Canadian Human Rights Tribunal which is a lower level judicial body.

Important to this Committee, in May of 2010, Odette Johnston, INAC's senior official on First Nations child and family services testified under oath before the Tribunal in support of Canada's motion to dismiss the tribunal on the funding is not a service issue. Transcripts of her testimony are available in the public domain. Ms. Johnston offers the following comments in response to questions posed by Paul Champ, legal counsel, for the First Nations Child and Family Caring Society of Canada regarding the report by the Auditor General of Canada on First Nations child and family services completed in May of 2008:

*Q (Paul Champ - Caring Society legal Counsel). Okay. And you're aware that the Auditor General of Canada had reviewed both of these funding models, Directive 21 and the Enhanced Funding Model, in her review of your programme in 2008?*

*A.(Ms. Johnston) Yes.*

*Q (Mr. Champ). And the Auditor General had concerns with respect to both models, correct? If you're not sure, that's fine?*

*A. (Ms. Johnston) Yes, I am not sure.*

*Q. (Mr. Champ) Okay. Do you know what types of recommendations the Auditor General made with respect to 3 those models and the delivery of child prevention 4 services on reserves generally?*

*A. (Ms. Johnston) I can't recall off the top what exactly those recommendations were.*

*Q. (Mr. Champ) And I appreciate that report was released in '08, so you'd only been a year in at that point at the department. But are you aware of any steps that INAC or your programme is taking to address any of the concerns raised by the Auditor General's report? Like does it ever come up with new policies or recommendations, or, I don't know, things that you are working on or planning where the driver is, you know, people refer to the Auditor General's report?*

*A. (Ms. Johnston) Specifically, no. I mean any direction we're taking will take that into consideration, but it's not necessarily the driver for change.*

*Q. (Mr. Champ) So there is some things that you're doing where that is taken into consideration?*

*A. (Ms. Johnston) Yes*

*Q. (Mr. Champ) Can you give me examples?*

*A. (Ms. Johnston) I'm trying to remember. I think she asked that we have a better grasp of the results that are being achieved as a result of the funding that is being provided. And we're working on developing an information management system to assist in that regard."*

(Johnston, 2010)

It is curious that the senior official at INAC on First Nations child and family services claims to be unaware if the Auditor General of Canada (2008) had concerns about INAC's funding for First Nations child and family services particularly as she headed the division in charge of preparing the responses to the Auditor General of Canada's report. Nonetheless, the lack of knowledge about the report and its associated recommendations does not bode well for ensuring flaws in existing INAC funding programs are fixed.

It is also concerning that of all the recommendations in the Auditor General of Canada's May 2008 report, particularly the ones that have a direct impact on improving services for children such as addressing the flaws in Directive 20-1, the enhanced approach and the 1965 Indian Welfare Agreement, INAC appears to have prioritized developing a management information system.

## PUBLIC ACCOUNTABILITY?

The fact that Canada is trying to escape a hearing on the merits using legal loopholes raises important moral and public accountability concerns. Surely, if INAC was confident that it is providing culturally based equity for First Nations children and families served by its First Nations child and family services program then it should have no problem marshaling enough evidence to support its position before the Canadian public and Canadian courts.

The Canadian Human Rights Tribunal is now being followed by over 7000 individuals and organizations registered with the "I am a witness campaign" ([www.fnwitness.ca](http://www.fnwitness.ca)) which invites caring Canadians of all ages and organizations to make a commitment to follow the tribunal. The website contains court documents and transcripts. We encourage the public to listen carefully to the Government of Canada and then to First Nations and the other parties before making up their own minds about whether or not the Federal Government is treating First Nations children fairly. The Canadian Human Rights Tribunal on First Nations child welfare is now one of the most formally watched legal case in Canadian history.

## CONCLUSION

In the early 1900's, the Auditor General of Canada did a review of residential schools and pointed to significant problems with the funding and Dr. Peter Henderson Bryce investigated the health of First Nations children in the school and found that 24 percent were dying each year from preventable causes of disease. "Medical science knows just what to do" Dr. Bryce said and he urged Canada to take action. Canada did not fully implement Bryce's measures and the children continued to die. In 2008, there were three times the numbers of First Nations children in child welfare care than at the height of residential schools. The Auditor General of Canada cited significant problems with the federal funding of First Nations child and family

services. Canada's own documents link its flawed approaches with growing numbers of children being placed in care. Canada has not fully implemented the measures and we are now seeing the multi-generational impacts of child welfare while First Nations are still dealing with the multi-generational impacts of residential schools. The impacts are particularly felt by women who take on a primary role in caring for families. An important test of reconciliation is whether Canada's approach to addressing known harms to First Nations children arising from its actions have changed since the residential school era. There is little reason for encouragement.

It is important to underscore, that the type of discrimination detailed in this report is not experienced by non-Aboriginal Canadians. If Jordan was non-Aboriginal, he would have gone to a family home instead of living his whole life in a hospital and dying there. The thousands of First Nations children in child welfare care would be given a better chance of staying safely at home if they were non-Aboriginal and Shannen Koostachin (founder of Shannen's Dream – [www.shannensdream.ca](http://www.shannensdream.ca)) would have never had to fight for safe schools and equitable education if she was not a First Nations child.

It seems that INAC prioritizes implementing actions related to reducing federal costs, and thus the wellbeing of children, even when multiple expert reports, and its departmental records, indicate that MORE investment is needed to ensure child safety and wellbeing in these regions. There are also reports that indicate that by providing more investment in the short term, significant savings will be realized by Canadian tax payers over the longer run. This is consistent with the World Health Organizations projections that for every dollar a government spends on a child it saves seven dollars down the line. More importantly, doing the right thing for First Nations children is an important moral test of the conscience of the Nation. Canada has the opportunity to do the right thing for First Nations children by providing equitable services in ways that respect and honour their cultures and languages. Please do – a generation of children and thousands of Canadians are depending on you to do what past Parliamentarians have failed to do.

## RECOMMENDATIONS:

- 1) INAC must take immediate steps to fully redress the inequities and structural problems with the Directive 20-1, enhanced funding approach and the 1965 Indian Welfare Agreement that have been identified in expert reports and by the Auditor General of Canada in full partnership with First Nations. There is no acceptable rationalization for ongoing inequities affecting First Nations children given the range of solutions available to the Department to redress the problems and the wealth of the country.
- 2) INAC must support other funding and policy options proposed by First Nations for First Nations child and family services other than the enhanced approach, Directive 20-1 and the 1965 Indian Welfare Agreement since the Auditor General has found all of these INAC driven initiatives to be inequitable.
- 3) INAC must immediately resource a comprehensive review of the 1965 Indian Welfare Agreement in full partnership with First Nations and First Nations child and family service agencies in Ontario to determine whether the formula achieves culturally based equity for First Nations children and families in Ontario.
- 4) Canada must fully and immediately implement Jordan's Principle across all government services to ensure that no First Nations child is denied or fettered access to government services available to all other children. It must be systemically implemented avoiding the inefficient and ineffective case by case approach currently being advanced by INAC and other Federal Government departments.
- 5) INAC must develop in partnership with First Nations in the Northwest Territory and Yukon Territory strategic measures to support the full and proper operation of First Nations child and family service agencies in the territories including, but not limited to, supporting culturally based and community based child welfare and the provision of adequate and flexible financial resources.
- 6) INAC must not implement the plan to place BC First Nations child and family service agencies or agencies in New Brunswick on actual reimbursement for maintenance costs until a viable plan has been developed in partnership with First Nations that ensures the full and proper operation of agencies serving less than 1000 First Nations children on reserve also known as "small agencies". This plan should be reviewed by independent expert(s) selected in partnership with First Nations before implementation and should be evaluated over time to inform possible adjustments.
- 7) INAC must immediately provide training to INAC staff, particularly at the senior levels, so they are fully briefed on all reports, including the reports by the Auditor General of Canada, on INAC's First Nations child and family services program so they are in a better position to implement outstanding recommendations.
- 8) INAC must direct its legal counsel to allow the Canadian Human Rights Tribunal to decide the case on First Nations child and family services on the merits – not on legal loopholes. The case must be made fully available to the public across Canada including allowing broadcasting in the Tribunal so that all children and families can hold First Nations and Canada accountable.

- 9) In light of the particular vulnerability of First Nations children and families served by child welfare on reserves and the ongoing concerns regarding INAC's management of the First Nations child and family services program, INAC should be required to report regularly to The Standing Committee on the Status of Women on its implementation of the recommendations of the Auditor General of Canada's report on First Nations child and family services.

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