

Federal Government's failure to comply with Three Legal Orders to End Racial Discrimination Against 163,000 First Nations Children and their Families

Submission to the House of Commons
Standing Committee on Finance

Pre-Budget Consultations for the 2017/2018 Federal Budget

September 19, 2016



1. **Reconciliation means not saying sorry twice.** In 2008, the Prime Minister of Canada apologized to First Nations, Métis and Inuit persons for the harms done during the residential schools and acknowledged the inter-generational impacts.¹ However, federal provision of First Nations children’s services continues to be funded at significantly lower levels; these discriminatory policies and practices have endured regardless of available solutions, three legal orders to cease the discrimination and financial situation of the country.² **Prime Minister Trudeau adopted all of the Truth and Reconciliation Commission’s Calls to Action³ of which child welfare equity/reform and full and proper implementation of Jordan’s Principle⁴ are the number one and three calls to action respectively.** They are also among the easiest to implement as there are significant reports dating back two decades providing evidence informed solutions to address the inequities. This submission outlines the three legal orders made by the Canadian Human Rights Tribunal and Canada’s failure to comply before proposing solutions to remedy the most egregious impacts of the discrimination immediately while longer term program reform is pursued. **Although INAC has refused to provide detailed and sufficient costing data to the parties and to the Tribunal, the Caring Society estimates the immediate shortfall in First Nations child welfare funding for 2016/2017 is approximately \$155 million over and above the amounts provided for in Budget 2016 and in addition to costs related to Jordan’s Principle.** It is also vital that the funds allocated in Budget 2016 start to flow as a Bloomberg news report says that **federal officials agree that only 1% of funding for First Nations has been released by the department to date.** The latency in federal provision of funds should not result in end of year fiscal claw backs from under-funded First Nations agencies nor should they be “re-profiled” to offset federal costs. Additional funding will be required to remedy the discrimination and comply with the orders in 2017/2018 and going forward to future fiscal years.

2. **Time to end discriminatory service provision to First Nations children and families.** Canada is currently subject to **THREE legal orders issued by the Canadian Human Rights Tribunal (2016 CHRT 2; 2016 CHRT 10; 2016 CHRT 16) to cease its discriminatory conduct toward First Nations children. Two of these orders considered the contents of Budget 2016.** First Nations children have too often borne the brunt of discriminatory fiscal policies as a cost-saving measure, and the 2017/2018 budget provides Canada with an opportunity to comply with the orders against it and narrow the gap that exists between First Nations and others in Canada.

3. **How do legal orders impact Government?**

¹ Apology by Prime Minister Harper for the Indian Residential Schools system, June 11, 2008 [<https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>].

² *FNCFCs et al v Canada*, 2016 CHRT 2, paras 458-467 [<http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do>].

³ Truth and Reconciliation Commission of Canada. (2015). *Calls to Action* (see numbers one and three) available at http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

⁴ Jordan’s Principle is a child first principle to ensure that First Nations children can access public services normally available to other children on the same terms. See www.jordansprinciple.ca for more information.

Legal orders compel citizens, organizations and governments to act, or cease a prohibited practice. Depending on the statute, legal orders can also impose penalties proportional to the harm resulting from the harmful action. **It is important to fully understand that compliance with legal orders is NOT discretionary nor is it open to the person/organization or is partial compliance lawful.** The expectation under Canadian law is that when an order is issued- it is to be followed and this obligation extends to the Government of Canada. Failure to comply with a Tribunal order could result in a contempt order issued by the Federal Court.

4. Summary of CHRT orders and Canada's failure to comply to end discrimination against First Nations children

- a. **2016 CHRT 2 (January 26, 2016).** In January 2016, the Canadian Human Rights Tribunal ("CHRT or the Tribunal") ruled in favour of First Nations children, living on-reserve, finding that Indigenous and Northern Affairs Canada's ("INAC") First Nation Child and Family Services Program ("FNCFS Program") and its related funding models and federal-provincial agreements is discriminatory contrary to section 5 of the *Canadian Human Rights Act*.⁵ The federal government has known about the inequalities and has repeatedly failed to act on recommended solutions to correct fundamental flaws in INAC's FNCFS program.⁶ In an August 2012 presentation, INAC's Director of the Children and Family Services Directorate identified at least \$108 million (2012 dollars) in additional funding required to remediate some of the inadequacies in the FNCFS Program.⁷ This amount remains insufficient; however, it defeats any contentions that the program as it exists now is adequately funded. As the Tribunal found in its decision, **"[d]espite being aware of the adverse impacts resulting from the FNCFS Program for many years, [INAC] has not significantly modified the program since its inception in 1990. [...] Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, [INAC] has sparingly implemented the findings of those reports."**⁸
- b. The Tribunal further found that the federal government's implementation of Jordan's Principle, a measure to ensure First Nations children can access public services on the same terms as other children) was discriminatory on the basis of

⁵ *Ibid*, paras 458-467.

⁶ MacDonald & Ladd et al., *FNCFS Joint National Policy Review Final Report*:

[https://fncaringsociety.com/sites/default/files/docs/FNCFCFS_JointPolicyReview_Final_2000.pdf];

Blackstock et al., *Wen:De We Are Coming to the Light of Day*:

[<https://fncaringsociety.com/sites/default/files/Wen.de%20We%20are%20Coming%20to%20the%20Light%20of%20Day.pdf>]; Auditor General of Canada (OAG), *May 2008 Report [...] Chapter 4, First Nations Child and Family*

Service Program— INAC: [https://fncaringsociety.com/sites/default/files/docs/402_PACP_Rpt07-e.pdf], and

Auditor General of Canada, *2011 Status Report [...] Chapter 4, Programs for First Nations on Reserves*:

[http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html].

⁷ *FNCFCFS et al v Canada*, 2016 CHRT 2, paras 298 and 302.

⁸ *Ibid*, para 386.

race and national ethnic origin. Parliamentarians may recall that the House of Commons unanimously passed motion 296 in 2007 in support of Jordan's Principle; however, federal officials narrowed it so severely that no child in the country ever qualified despite the government documenting numerous cases of service denials, disruptions and delays related to children's First Nations status.

- c. **The Tribunal ordered Canada to immediately fully and properly implement Jordan's Principle and to immediately cease its discriminatory practices in First Nations child and Family Services paying particular attention to a series of reforms such as providing adequate prevention services, restoring lost purchasing power due to inflation losses dating back to 1995, paying for legal services required by child welfare laws including band representatives, ensuring agency buildings met building and fire codes, ensuring prevention funding was not reduced by requirements to cover child in care expenses.**
- d. In order to set specific orders, the Tribunal set out a three phase process for relief: 1) immediate relief (act on evidence based recommendations to alleviate the most egregious impacts of the discrimination); 2) mid-term relief (act on recommendations that require some, but not substantive research or consultation and 3) long term reform (to overhaul the program). The Tribunal retained jurisdiction over the case to ensure Canada's compliance with the orders.

Canada did not judicially review (appeal) this decision so by default it accepted the judgement and is obligated to fulfill the legal orders.

Compliance Report post-decision:

The Caring Society presented the Federal government with detailed immediate relief reforms based on recommendations agreed to by the Department arising from expert reports dating back two decades. The federal government did not respond to these proposals and instead unilaterally passed Budget 2016 allocating only \$71 million in fiscal 2016/2017 for First Nations child and family services despite federal documents from 2012 noting that at least 108 million was needed. The federal government included no funds in Budget 2016 for Jordan's Principle and by March of 2016, the federal government's only progress on complying with the Jordan's Principle element of the January legal order was to begin "discussions" with the provinces/territories.

- e. **2016 CHRT 10 (April 26, 2016).** The Tribunal reviewed Canada's information on Budget 2016 and Jordan's Principle and noted that Canada has the burden to prove Budget 2016 was sufficient to alleviate the discrimination at the level of the children failed to do so. The Tribunal ordered INAC to provide more detailed financial reports linking their actions to remedying the discrimination for children. The Tribunal further found that Canada's progress on Jordan's Principle

did not comply with the January order requiring the federal government to **IMPLEMENT** Jordan's Principle –not just discuss it with the provinces. The Tribunal ordered Canada to apply Jordan's Principle across ALL First Nations children; across all jurisdictional disputes ensuring its processes resulted in no service denials, delays or disruptions for children. Canada was to confirm its compliance with this order by May 10, 2016. **Canada did not judicially review (appeal) this decision so by default it accepted the judgement and is obligated to fulfill the legal orders.**

Compliance Report post-decision:

Canada issued a compliance order on May 10, 2016 **but failed to confirm it is applying it to all children.** Instead the federal government said it was no longer applying Jordan's Principle to "children with multiple disabilities and multiple service providers." **It also failed to confirm it was applying Jordan's Principle in ways that resulted in no service delays, denials or disruptions for First Nations children.** Instead, Canada would only say cases would be managed in a "timely manner." The Tribunal directed the parties to provide submissions on Canada's compliance to 2016 CHRT 10 and noted it retained the right to make further compliance orders against the Government of Canada if required. The Parties filed their submissions.

The day before, Canada was required to file its final submission in compliance with 2016 CHRT 10, Canada made a unilateral announcement of 382 million dollars allegedly for Jordan's Principle. In this announcement, Canada said it was applying Jordan's Principle to children with disabilities and short term illnesses on reserve despite the Tribunal's order to apply Jordan's Principle to ALL First Nations children. The federal government has refused to answer questions as to: 1) what children are eligible to access this funding; 2) what fiscal years this funding applies to; 3) what amounts will be released each year; 4) the purpose of the funding; 5) how the public accesses the funding; 6) what process will the government use to assess reported Jordan's Principle cases; and 7) what appeal mechanism is available to the public. Basically, Canadians, and most importantly First Nations children and families affected by this announcement, have no specific information on what this announcement means for them or how they can access it.

- f. **2016 CHRT 16 (September 15, 2016).** Upon reviewing Canada's compliance reports regarding 2016 CHRT 10, the Tribunal found Canada's compliance to be in violation of 2016 CHRT 2 and 2016 CHRT10. Specifically the Tribunal found:
 - i. **"The Panel is concerned to read in INAC's submissions much for the same type of statements and reasoning that it has seen from the organization in the past.** For example, that it is up to each FNCFS Agency to determine how they allocate their funding for such things as prevention

and cultural programming (see Decision at paras. 187-198, 311, 313, and 314). This prompts the same question as at the time of the hearing: what if funding is not sufficient to allow for this flexibility. How has INAC determined that each agency has sufficient funding to comply with provincial child welfare standards and is still able to deliver necessary prevention and cultural services? **The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination.**"

The Tribunal issued orders for Canada to apply Jordan's Principle to all First Nations children on and off reserve and to provide a detailed explanation as to why INAC's new approach of only applying Jordan's Principle to children with disabilities and short term illnesses complies with previous CHRT orders. Below are further orders for **immediate actions for Canada** to remedy the inequalities in First Nations child and family services funding:

- INAC will not decrease or further restrict funding for First Nations family and children's services and Jordan's Principles (see paras. 121-123);
- INAC will determine budgets for each individual FNCFS agency based on an evaluation of its distinct needs and circumstances including an evaluation of how remoteness may affect the FNCFS's agency to provide services (see paras. 33, 37, 40 and 47 above).
- In determining funding for FNCFS Agencies, INAC is to establish the assumptions of 6% of children in care and 20% of families in needs of services as minimum standards only. INAC will not reduce funding to FNCFS Agencies because the number of children in care they serve is below 6% or where the number of families in need of services is below 20% (see para. 38 above).
- In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined based on the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above).
- INAC is to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and/or operations funding streams (see paras, 56-61 above); and

- INAC is to immediately apply Jordan’s Principle to all First Nations children (not only those resident on reserve) (see paras 117-118 above).

The Tribunal further ordered Canada to produce a list of all individuals and organizations consulted in the process of addressing its response to the decisions including names, meeting agendas and minutes. It is also ordered to produce detailed reports on how its various announcements (Budget 2016 and the 382 million for Jordan’s Principle) satisfy the order. The Tribunal further ordered an in person case conference to review Canada’s compliance reports and progress on implementing the order.

Compliance Report post-decision:

Canada has said it is studying the decision and is committed to long term reform but falls short of acknowledging it is out of compliance with the orders and does not spell out a plan to come into compliance. Canada has 30 days from the date of the order to file for a judicial review.

Health Canada documents intended to educate health professionals about Jordan’s Principle dated after the release of 2016 CHRT 16 show that the Department is continuing 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.⁹ This conduct is in clear contradiction and violation of the order and must cease immediately.

The Caring Society is taking the legal measures necessary to file a contempt order against the federal government if its non-compliance continues.

5. What will it cost to address immediate relief and come into compliance with the orders?

While the overall cost of coming into full compliance with the Tribunal’s orders will be higher, the Caring Society estimates that a minimum of \$216 million dollars was required for immediate relief. **Budget 2016 announced \$71 million of which the Department allocated \$10 million to cover its own costs leaving the net benefit for children at \$61 million. This means that an additional \$155 million is required for immediate relief plus additional funds for Jordan’s Principle.**

INAC documents prepared by senior officials estimated the shortfall in First Nations child and family service funding in 2012 to be 108.3 million.¹⁰ This amount was shown to be far short of

⁹ See Health Canada. (September 21-22, 2016). Jordan’s Principle - Child First Initiative. Presentation to the: Public Health and Primary Care Committee, Non-insured Health Benefits Committee, and Atlantic First Nations Health Partnership; and Evergreen. (September 15, 2016). Jordan’s Principle – Child First Initiative: Guidance Document for Establishing Regionally-based Enhanced Service Coordination.

¹⁰ *FNCFCs et al v Canada*, 2016 CHRT 2, paras 294 and 298.

what was needed during the Canadian Human Rights Tribunal hearings as it failed to include items like child in care related legal, sufficient prevention funding and capital expenditures to ensure agencies met fire/safety and building codes. Nonetheless, **Budget 2016 falls over \$37 million short of what the previous federal government estimated was needed four years ago.**

Budget 2016 included NO funding for Jordan’s Principle. On the eve of a deadline to issue a compliance report to the Tribunal, the **federal government announced it will provide “up to” 382 million for Jordan’s Principle but provided no details as to: how families could access the fund, what it was intended to cover, over what time period and how such measures would comply with the Canadian Human Rights Tribunal order to apply Jordan’s Principle to ALL First Nations children, to ALL jurisdictional disputes and how they would ensure First Nations children do not face additional red tape in accessing public services.** The Tribunal also ruled Jordan’s Principle applies on and off reserve. Despite these legal rulings, **Health Canada and INAC continue to rely on a narrow definition of Jordan’s Principle applying only to children on reserve (contrary to the CHRT order) and only to children with “disabilities and short term illnesses.”** **The Tribunal has ordered Canada to explain how its approach squares with the legal orders and makes clear further orders may be forthcoming against Canada.**

6. What are the impacts of Canada’s racial discrimination on First Nations children?

Government of Canada documents show that between **1989-2012 First Nations children on reserve and in the Yukon spent over 66 million nights away from their families**¹¹. This translates into 167,000 years of childhood. Government documents and the decision by the Canadian Human Rights Tribunal show that **INAC’s failure to provide equitable child welfare services on reserves, prevention services in particular, was incentivizing the removal of First Nations children.** The impacts of separating First Nations children from their families unnecessarily are well documented in the tragedies of the residential schools and echoed in the **Canadian Human Rights Tribunal decision (2016 CHRT 2) found “that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.”**¹²

Credible studies such as the Adverse Childhood Experiences Study (ACE) show adverse experiences in childhood actually changes neurological structures and bodily functioning in ways that greatly increase the risk for adverse experiences in adulthood. Dr. Amy Bombay’s research demonstrates that the multi-generational impacts of residential school trauma and contemporary hardships related to under-funded services on reserves places First Nations children at much higher risk for adverse childhood experiences setting a pathway for much more difficulty throughout their lives. For these reasons, **the World Health Organization estimates for every dollar a state spends on a child in childhood, \$20 USD are saved downstream as healthy children are less likely to require the array of social and economic supports that struggling adults need.**

¹¹ INAC, *Child and Family Services: Total Number of Children in Care and Related Expenditures*.

¹² *Ibid*, para 404.

7. **What did First Nations children and compliance with the Canadian Human Rights Tribunal orders lose to in Canada's Budget?**

There are some who will say governments have to balance priorities and that it simply costs too much money to ensure equity for First Nations children across all services. The question then becomes what did First Nations children lose to? What were the priorities that the government chose to fund over compliance with three legal orders to end discrimination against children? A recent report published by the **National Post notes that over the summer of 2016, the federal government announced over 7 billion dollars in projects such as building tennis courts and buying flag poles.** None of these expenditures were to our knowledge, compelled by a legal order and thus were discretionary funding.

One case particularly exemplifies the weakness of the "federal government cannot afford it" argument. **A young First Nations teenager required medical intervention so that she could eat and talk properly without chronic pain. The cost to the government would have been \$8,000. The federal government denied her treatment and instead, fought her application to get the needed care in court. Government legal fees in the case now exceed \$32,000 and the case is ongoing. This means the government spent four times as much money fighting a child in need of medical care than it would have spent providing the care in the first instance.** Some may argue that fighting such cases is required so as to not set a precedent where other children in need get the care they require. **I know of few Canadian taxpayers who would protest against children receiving medical care so they can eat and talk properly without chronic pain; indeed for many Canadians these are the types of causes that we hope our taxpayer dollars are used for.**

As the **Honourable Senator Murray Sinclair notes, the failure of the Canadian Government to comply with the legal orders cannot be reasonably explained by a lack of federal money.** Regardless of motivation, Parliament's conscious decision to place First Nations children below other funding priorities and to perpetuate discrimination against children as a means of funding other projects is unlawful and contributes to irrevocable harm.

8. **Equal is not equity.** Canada's longstanding discrimination against First Nations children requires special measures so that First Nations children are assured of an equal opportunity to live the lives they wish to have. Child and family service supports must account for the historical and contemporary disadvantage First Nations families face.

9. **Racial Discrimination against First Nations children echoes across all federal services**

The child welfare and Jordan's Principle cases are a case study on the gravity of Canada's racial discrimination against children. Sadly, as INAC documents show, the inequities also exist in education (including school construction), child care, and basics like fire protection, water, sanitation and housing.

10. **Actions Needed:**

- 1) **The Government of Canada must prohibit the use of racial discrimination in all federal programs and services affecting First Nations and other Indigenous peoples to ensure non-discrimination consistent with the Charter of Rights and Freedoms and the Canadian Human Rights Act.** Consistent with the Canadian Human Rights Tribunal decisions, such provisions must take full account of the unique cultures, needs and historic and ongoing disadvantage faced by First Nations.
- 2) **The Government of Canada must immediately comply with all orders issued by the Canadian Human Rights Tribunal and release all funds allocated in Budget 2016 and increase that funding by a minimum of \$155 million this year whilst providing sufficient funding for Jordan's Principle across all children, all jurisdictional disputes and all services immediately.**
- 3) **Treasury Board to authorize the delivery of mandatory training on the Truth and Reconciliation Commission, the Royal Commission on Aboriginal Peoples, and the United Nations Declaration on the Rights of Indigenous Peoples for all federal officials and employees.** In addition, administrators and staff working on First Nations child welfare require training on child development, Federal policy toward First Nations children historically and in contemporary times and all relevant reviews and orders made relevant to the program.
- 4) **Where the Government of Canada has chosen not to judicially review an order, the Government of Canada must cease using and promoting budgets, policies and actions that are in breach of the orders.** For example, Health Canada and INAC and other Government of Canada entities must immediately cease using and promoting definitions of Jordan's Principle that are not in compliance with the Canadian Human Rights Tribunal orders.
- 5) **The Government of Canada must immediately provide all data and information to the Canadian Human Rights Tribunal pursuant to 2016 CHRT 2; 2016 CHRT 10 and 2016 CHRT 16.**
- 6) **The Government of Canada must cease the use of unilateralism in public policy regarding First Nations children such as those used in Budget 2016 and the Jordan's Principle announcement. This action reflects a colonial mindset and must be changed if real progress is to be made on ensuring the best interests of First Nations children.**