Canada:

Inequitable access to essential services for First Nations children

[Articles 1(4), 2(c), 5(a, d & e)]

Ongoing failure to comply with a Canadian Human Rights Tribunal ruling ordering an end to such discrimination

[Article 6]

UN Committee on the Elimination of Racial Discrimination

93rd Session, 31 July - 25 August 2017

Joint statement submitted on behalf of the following organizations:

Amnesty International Canada
Broadbent Institute
Canadian Friends Service Committee
Children First Canada
First Nations Child and Family Caring Society
Justice for Indigenous Women
KAIROS
Oxfam Canada
Oxfam-Québec
Project of Heart
Rideau Institute
United Food and Commercial Workers Canada

> "**The Committee recommends that the State party, in consultation with Aboriginal peoples, implement and reinforce its existing programmes and policies to better realize the economic, social and cultural rights of Aboriginal peoples, in particular through….**
>
> **(d) Facilitating their access to health services…**
>
> **(f) Discontinuing the removal of Aboriginal children from their families and providing family and child care services on reserves with sufficient funding…"**
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> -- UNCERD Concluding Observations Canada, Eightieth Session, 4 April 2012, CERD/C/CAN/CO 19-20

The longstanding failure of the Government of Canada to address well-known and well-documented inequalities in access to basic services for children and families in First Nations communities has meant that 165,000 First Nations children do not have equitable access to the health care and other services they need due to Canada's failure to implement Jordan's Principle[1] while tens of thousands have been needlessly removed from their families, communities and cultures to be placed in state care.

Not only has the federal government failed to end these severe inequalities -- of which it has long been aware -- the federal government actively opposed consideration of this matter before the Canadian Human Rights Tribunal. Additionally, after the Tribunal's ruling that such inequalities are a form of racial discrimination, Canada has been the subject of three non-compliance orders from the Tribunal, with an additional non-compliance complaint before the Tribunal at time of writing. Most recently, the federal government has applied for a judicial review of the May 2017 non-compliance order, asking the court to set aside provisions of the Tribunal's orders intended to prevent delays in access to services.[2]

Under Canada's Constitutional division of powers, social services are generally the responsibility of the provincial and territorial governments while the federal government is uniquely responsible for funding such services in First Nations communities and for all First Nations people in the Yukon. As the Auditor General of Canada has repeatedly noted[3], the federal

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[1] Jordan's Principle is a child first approach to ensuring that First Nations children can access public services without any adverse differentiation or service denials related to their First Nations status. It was unanimously adopted by the House of Commons in 2007 but Canada has failed to implement it in ways that eliminate discrimination on the basis of race.

[2] Attorney General of Canada, *Notice of Application for Judicial Review, Attorney General of Canada and First Nations Child and Family Caring Society of Canada, Assembly of First Nations, Canadian Human Rights Commission, Chiefs of Ontario, Amnesty International and Nishnawbe Aski Nation*, T-918-17, 23 June 2017.

[3] Auditor General of Canada (2008). *First Nations child and family services program-Indian and Northern Affairs Canada. 2008 May: Report of the Auditor General of Canada*. Retrieved October 4, 2009 from http://www.oag-

government's provision of services to First Nations is flawed and inequitable. The federal government has long provided less money per child for First Nations child and family services than is available in other communities and the gap has grown as the federal funding has not kept pace with inflation. The federal funding formula also does not take adequate account of the high costs of delivery of services in small and remote communities or the need for distinct, culturally-relevant programming and associated cultural competency in its delivery.[4]

These inequities and their consequences have been well-documented, including in the Auditor General reports cited above and in studies funded by the federal government.[5] A 2007 government factsheet stated:

> … First Nations Child and Family Service Agencies are unable to deliver a full continuum of services offered by the provinces and territories to other Canadians. 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 the agencies to meet their mandated responsibilities.[6]

This ten-year-old public acknowledgement of the problem by the Government of Canada highlights one tragic consequence of inadequate access to supports and services: as reported by researchers from the Canadian Incidence Study on Child Abuse and Neglect, First Nations children are 12.4 times more likely than other children to be removed from their families and placed in state care. Factors contributing to the over-representation of First Nations children in state care include impoverishment, poor housing, and substance misuse related to the devastating legacy of Canada's colonial policies such as the Indian Residential Schools Programme. Underfunding of child and family services denies First Nations families the supports needed to ensure that children's needs are meet despite such challenges. As the Canadian Human Rights Tribunal ruled, the inadequacy of supports to First Nations families

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bvg.gc.ca/internet/English/aud_ch_oag_200805_04_e_30700; Auditor General of Canada (2011). *Programs for First Nations on Reserves, June 2011 Status Report of the Auditor General of Canada*. Retrieved January 5, 2012 at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html

[4] Canadian Human Rights Commission (2014). *Closing submissions of the Canadian Human Rights Commission submitted to the Canadian Human Rights Tribunal in First Nations Child and Family Caring Society et al. v. Attorney General of Canada*: T1340/7008; First Nations Child and Family Caring Society of Canada (2014). *Memorandum of Fact and Law of the Complainant First Nations Child and Family Caring Society submitted to the Canadian Human Rights Tribunal in First Nations Child and Family Caring Society et al. v. Attorney General of Canada*: T1340/7008.

[5] Loxley, J. et. al. (2005). *Wen:de the Journey Continues*. Ottawa: First Nations Child and Family Caring Society of Canada; McDonald, D. & Ladd, P. (2000). *Joint National Policy Review on First Nations Child and Family Servivces: Final Report*. Ottawa: Assembly of First Nations.

[6] Indian and Northern Affairs Canada (2007). Fact Sheet: First Nations Child and Family Services. Retrieved: http://www.ainc-inac.gc.ca/pr/info/fnsoccc/fncfs_e.html.

creates an "incentive" to remove children from their families and place them in the separately funded system of state care.[7]

The discrimination faced by First Nations children and families is further compounded by the confusion and uncertainty that exists when First Nations families go outside their communities to seek services not available on reserve. All too often, access to such services is delayed, or denied altogether due to disputes between the federal and provincial governments over which level of government should fund the services. In 2007, the Canadian Parliament adopted Jordan's Principle, a child first principle intended to ensure that inter-governmental disputes do not prevent or delay First Nations children accessing the services they need.

In its 2016 ruling, the Canadian Human Rights Tribunal concluded that despite this commitment by the Canadian Parliament the federal government has adopted an overly narrow and restrictive definition of Jordan's Principle that has resulted in continued delay and denial of many services. The Tribunal ordered Canada to immediately implement the full scope and meaning of Jordan's Principle. It is noted that the definition of Jordan's Principle used by Canada in its report to this committee, which is limited to children with multiple disabilities requiring multiple service providers, was deemed to be discriminatory in the Tribunal ruling.

The discrimination complaint was filed with the Canadian Human Rights Tribunal in 2007 but a ruling was not issued until January 2016. Much of this time was spent not in hearing and reviewing evidence, but in legal proceedings resulting from the federal government's efforts to have the case dismissed on the basis of technicalities and an effort to narrowly reinterpret the Canadian Human Rights Act. After the January 2016 ruling, the federal government announced that it would comply with the ruling and not launch any further legal appeals. Canada, however, has not complied with the ruling and this has had the same effect of continuing to perpetrate racial discrimination against First Nations children. As noted above, in June 2017, the federal government initiated a legal challenge to the Tribunal's latest non-compliance order.[8]

The federal government has claimed that increased funding to First Nations child and family services in its 2016 budget comply with its obligations under the Tribunal ruling. However, the Tribunal itself has determined that the federal government's actions are insufficient. The Tribunal has issued three follow-up rulings, all after Budget 2016 was released and the federal government submitted it to the Tribunal, and each time concluded that the federal government has failed to comply with the initial ruling. The new money budgeted for First Nations child and family services continues to fall far short of what is actually needed to meet the urgent needs of First Nations children and families. Canada continues to deploy a funding approach known as

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[7] Canadian Human Rights Tribunal, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* (Index: 2016 CHRT 11), 5 May 2016, available at decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/143898/index.do

[8] Attorney General of Canada, *Notice of Application for Judicial Review, Attorney General of Canada and First Nations Child and Family Caring Society of Canada, Assembly of First Nations, Canadian Human Rights Commission, Chiefs of Ontario, Amnesty International and Nishnawbe Aski Nation*, T-918-17, 23 June 2017.

the Enhanced Prevention Focus Approach which was ruled discriminatory by the Tribunal. Although Canada initially argued that Budget 2016 was a response to the Tribunal's January 2016 decision, it has admitted that Budget 2016 was developed months before the Tribunal released its ruling and the allocations to First Nations child and Family Services was never altered since. Fundamentally, Canada took the approach of trying to squeeze the ruling into its business as usual budget versus making a serious attempt to comply with the ruling.

After taking into account Budget 2016 and Canada's other actions since the Tribunal, the BC Representative for Children and Youth released a report in 2017 noting that First Nations child and family services continues to be under-funded by the federal government and the funding that is provided is structured in ways that continues to incentivize the removals of First Nations children.[9] UNICEF Canada has also issued statement expressing its concern about the impacts of Canada's non-compliance to end discrimination against First Nations children and the related impacts on their health and well-being.[10]

The Government of Manitoba was so concerned about the impact of Canada's non-compliance on First Nations children in that province that the legislature passed a unanimous motion condemning the federal government in November of 2016. Days later, a New Democrat Party motion was tabled in Canada's House of Commons requiring full compliance with the Canadian Human Rights Tribunal decisions which would include, but not be limited to, the immediate provision of an extra 155 million dollars and full implementation of Jordan's Principle. The House of Commons passed the motion unanimously but there has been no implementation, even though the Prime Minister of Canada voted in favour of the motion.

The Tribunal's most recent non-compliance decision released in May 2017 demonstrates the life and death consequences of Canada's non-compliance and ongoing excuses for inaction. The Tribunal linked Canada's non-compliance with the deaths of two 12 year old girls from the Wapekeka First Nations. As the Tribunal noted, the Wapekeka First Nations submitted an urgent funding request to Canada in July 2016 citing an emerging suicide pact among young girls in the community. Canada was still reviewing the decision six months later in January 2017 when the two girls died of suicide. Following the deaths, a federal government official noted the funding proposal had come "at an awkward" time in Canada's funding cycle. While the Tribunal noted that Canada provided funding after the deaths of the girls, it found that Canada repeatedly puts its administrative conveniences ahead of the best interests of children.

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[9] BC Representative for Children and Youth, *Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery*, March 2017, https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/rcy-daa-2017.pdf

[10] UNICEF Canada, "Ten years and four rulings later, First Nations children still waiting for equity," 21 June 2017, http://www.unicef.ca/en/blog/ten-years-and-four-rulings-later-first-nations-children-still-waiting-equity

In its decision, the Tribunal ordered Canada to cease applying a narrow definition of Jordan's Principle that restricted the equality rights of First Nations children caught in jurisdictional disputes between and within federal, provincial and territorial governments.

RECOMMENDATIONS

The government of Canada must act immediately to fully comply with the January 2016 ruling and subsequent non-compliance orders of the Canadian Human Rights Tribunal, including by ending the discriminatory underfunding of First Nations child and family services and ensuring that all First Nations children, on and off reserve, have access to all services available to other children in Canada and that access to these services is never delayed or denied by disputes between the federal, provincial and territorial governments over their respective responsibilities.

Moreover, due to Canada's longstanding discrimination toward First Nations children, Canada must base service decisions on the goal of achieving substantive equity in keeping with the best interests of the child, meaning that the distinct needs of First Nations children must be met even when such a service may not be available to other children.

That Canada undertake an independent review of its conduct in respect to the Canadian Human Rights Tribunal with the purpose of recommending internal government reforms to guarantee that the Government of Canada meets its domestic and international obligations to ensure Indigenous peoples, including children, live free of discrimination and have access to justice.

That Canada report back to the Committee within one year on all measures taken to implement the Canadian Human Rights Tribunal rulings, as well as on any litigation strategies employed by government in respect to current non-compliance orders and any such orders that are subsequently issued.