The Struggle for Equal Rights for First Nations Children in Child Welfare

Briefing to the UN committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's fourth and fifth periodic reports

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First Nations Child & Family Caring Society of Canada

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First Nations Children experiencing Child Maltreatment and Neglect: The Struggle for Equal Treatment by the State

As one of the earliest countries to ratify the International Covenant on Economic, Social and Cultural Rights (hereinafter called the Covenant) and one of the richest countries in the world, Canada is in an optimal position to ensure that the rights of First Nations[1] children under the Covenant are upheld. Canada has a surplus budget in the billions of dollars, democratic government, the Charter of Rights and Freedoms and a strong value for human rights and yet as this paper will show the federal government persists with inequitable funding for child welfare services for First Nations children resident on reserve resulting in First Nations children and youth being 15 times more likely to be placed in state child welfare care than their non Aboriginal peers(Blackstock, Prakash, Loxley and Wien, 2005). Importantly, Canada has known about the inequality in child welfare funding for over six years (McDonald & Ladd, 2000), has been presented with a solution to redress the problem which is universally supported by First Nations (Loxley, DeRiviere, Prakash, Blackstock, Wien & Thomas Prokop, 2005), the solution is within the federal government's sole jurisdiction to implement and the full cost would only represents 1.5% of Canada's surplus budget. Despite all these advantages – there was no mention of this issue or any plans to redress it in the Speech from the Throne in April of 2006 which sets out the government's priority areas for action. First Nations children continue to come into child welfare care at disproportionate rates – because of funding decisions made on the basis of their race and residency.

The following summary evidences that inequitable funding, lack of respect for Indigenous laws and ways of caring for children, jurisdictional wrangling between the federal and provincial/territorial governments and Canada's reliance on the Indian Act[2] to define the identity of First Nations, including children, have significant and negative impacts on First Nations children and their families.

The Right of First Nations Children to Define their Own Racial Identity

Perhaps the most essential racial right of people is to define their own culture and race. It is something that Canada, and the Canadian child welfare system, respects for all people - except Aboriginal people[3]. On a federal level, the *Indian Act* (1985) continues to define who is, and who is not, a registered or status Indian [4]according to the act. Canada issues

[1] The term First Nations describes persons identifying as original peoples of the land whose traditional territories typically reside between the 49th and 60th parallels longitude in Canada.
[2] The term Indian Act refers to the federal piece of legislation respecting Indians and lands reserved for Indians.
[3] Aboriginal describes the three groups of Indigenous peoples recognized under the Canadian Charter of Rights and Freedoms – Indians (also known as First Nations), Métis and Inuit
[4] A registered Indian, also known as status Indian, is a person who is an Indian within the meaning of the Indian Act RSC 1985.

identification cards to status Indians and terms those who do not meet the definition non-status Indians to which the federal government believes it has a lower status of legal obligations. Non status children; Indian Status cards; the Indian Act - is this the type of non discrimination that Canada believes so strongly in?

Provincial/territorial child welfare laws embed the tradition of state defined race in that, with few exceptions, provinces and territories continue to either defer to the Indian Act to define which children are Aboriginal for the purposes of the child welfare act and/or empowers the provincial minister overseeing child welfare with the duty to define who is Aboriginal and what an Aboriginal community is.

The UN Committee on Economic, Social and Cultural Rights has commented on certain provisions of the Indian Act in previous periodic reviews of Canada. The fact that the Indian Act exists at all is an affront to the non discrimination principles of the Covenant particularly as the Royal Commission on Aboriginal Peoples (1996) set out recommendations to replace the Indian Act with sustainable self government agreements over 19 years ago. As RCAP noted there is another path – Canada continues to defer to the road of race based legislation and this choice has impacts for First Nations children and young people – including those experiencing child maltreatment or neglect.

Evidence of the Over-representation of First Nations Children in Child Welfare Care

In contrast to the lives experienced by other Canadian children and youth, First Nations children are more likely to be born into poverty, to suffer health problems, maltreatment, incarceration, and placement in the child welfare system (Blackstock, Clarke, Cullen, D'Hondt and Formsma, 2004). A study conducted in 2005, reviewed child in care data from three sample provinces found that as of May of 2005, 0.67% of non Aboriginal children were in child welfare care compared to 3.31% of Métis children and 10.67% of Status Indian children (Blackstock, Prakash, Loxley and Wien, 2005). The Canadian Incidence Study on Reported Child Abuse and Neglect confirmed that First Nations children are two and one half times more likely to be placed in out of home care than non Aboriginal children (Trocme, Knoke and Blackstock, 2004; Trocme, Knoke, Shangreaux, Fallon, and MacLaurin, 2005). The primary reason why Aboriginal children come to the attention of child welfare is neglect with the key drivers being poverty, poor housing and substance misuse (Trocme, Knoke, and Blackstock, 2004.)

Overall, best estimates are that there are currently between 22,500 and 28,000 Aboriginal children in the child welfare system – three times the highest enrollment figures of residential school[5] in the 1940s (Blackstock, 2003.) In terms of First Nations children on-reserve, the numbers of children entering into care are tragically rising. Department

[5] Residential schools were operated by Christian churches and funded by the federal government under the authority of the Indian Act – their principle aim was to assimilate Indian children using education as a medium for achieving this. Residential schools operated in Canada from the 1870's to 1996.

of Indian Affairs and Northern Development (INAC) data confirms that between the years of 1995 and 2001 the number of registered Indian children entering into care rose an astonishing 71.5% nationally (McKenzie, 2002). This gap in life chances has been noted by the UN Committee on the Rights of the Child which specifically references Aboriginal children in approximately one third of its concluding remarks for Canada (UNCRC, 2003).

First Nations Child and Family Service Agencies: Jurisdiction and Funding

First Nations peoples are aware of these problems and are actively working to establish and operate First Nations Child and Family Service Agencies (FNCFSA) in Canada to support First Nations families to safely care for their children. With the support of the federal and provincial governments there are now over 100 of these agencies across the country, the vast majority of which receive their statutory authority to deliver child welfare programs through the provincial/territorial child welfare statutes. FNCFSA support the provisions of the United Nations Convention on the Rights of the Child and Article 10 of the International Covenant on Economic, Social and Cultural Rights including the state's obligation to support families in caring for their children. **The importance of FNCFSA work in supporting First Nations families to safely care for First Nations children was recognized by the United Nations Committee on the Rights of the Child in its concluding remarks for Canada in 2003 (UNCRC, 2003)**. Despite their success in keeping larger numbers of First Nations children in care in their communities, the requirement to use provincial/territorial child welfare statutes poses a significant challenge to ensuring culturally based child welfare services.

The provinces and territories also fund child welfare services for all Canadian children – except if the child is a Status Indian the provinces look to the federal government to fund the child welfare services according to a national funding formula known as Directive 20-1. **If the federal government funding levels are inadequate to meet provincial legislation the provinces typically do not provide any additional resources[6] resulting in First Nations children receiving a lower standard and range of services than their non Aboriginal peers.**

The Evidence Base Demonstrating Inequitable Child Welfare Funding on Reserve by the Federal Government

Directive 20-1 was studied in a joint review conducted by the Department of Indian Affairs and Northern Development (INAC) and the Assembly of First Nations in 2000. This review, known as the *Joint National Policy Review on First Nations Child and Family Services* (NPR) provides some insight into the reasons why there has been such

[6] With the exception of child welfare services to status Indian children in Ontario which are funded under a separate funding agreement.

an increase in the numbers of Registered Indian children entering into care (McDonald & Ladd, 2000.) **The review found that INAC provides 22% less funding per child to First Nations child and family service agencies than the average province (McDonald & Ladd, 2000). A key area of inadequate funding is a statutory range of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment so that they can remain safely in their homes.** First Nations agencies report that the numbers of children in care could be reduced if adequate and sustained funding for least disruptive measures was provided by the Department of Indian Affairs and Northern Development (Shangreaux, 2004). The National Policy Review also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for First Nations Child and Family Service Agencies since 1995. **Economic analysis indicates that First Nations child and family service agencies should have received an additional 21 million in funding from 1999-2005 alone to simply keep pace with inflation (Blackstock, Prakash, Loxley and Wien, 2005).**

In total, the *Joint National Policy Review on First Nations Child and Family Services* (MacDonald & Ladd, 2000) included seventeen recommendations to improve the funding formula. **It has been over six years since the completion of NPR and the federal government has failed to implement any of the recommendations which would have directly benefited First Nations children on reserve.** As INAC documents obtained through access to information in 2002 demonstrate, the lack of action by the federal government was not due to lack of awareness of the problem or of the solution. Documents sent between senior INAC officials confirm that the current level of funding provided by INAC is insufficient for FNCFSA to meet their statutory obligations under provincial child welfare laws – particularly with regard to least disruptive measures resulting in higher numbers of First Nations children entering child welfare care (INAC, 2002.)

Despite having apparently been convinced of the merits of the problem and the need for least disruptive measures, INAC commissioned a second review of the Directive in 2004. This three part research project which was completed in 2005 involved over 20 researchers representing some of the most respected experts in a variety of disciplines including: economics, law, First Nations child welfare, management information systems, community development, and sociology. This review is documented in three volumes: 1) *Bridging Econometrics with First Nations Child and Family Service Agency Funding* 2) *Wen:de: We are Coming to the Light of Day* 3) *Wen:de: the Journey Continues* which are publicly available on line at www.fncfcs.com.

These reports confirmed that First Nations child and family service agencies are drastically under funded across the administrative, policy and practice domains. **Detailed economic analysis determined that an additional 109 million dollars per year in federal child welfare funding is needed to ensure a very basic level of equivalency to provincial funding levels** (Loxley, DeRiviere, Prakash, Blackstock, Wien & Thomas Prokop, 2005). The key area of under funding was Least Disruptive Measures services to First Nations families to keep their children safely at home resulting in larger numbers of

First Nations children resident on reserve entering child welfare care than was necessary (Blackstock, Prakash, Loxley & Wien, 2005).

Another key problem identified in the Wen:de reports that negatively impacted the well being of First Nations children in care on reserve is jurisdictional disputes. A recent survey of 12 First Nations child and family service agencies indicated that the **12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident.** The most frequent types of disputes were between two or more federal government departments (36%), between two or more provincial departments (27%) and between federal and provincial governments (14%). Examples of the most problematic disputes were with regard to children with complex medical and educational needs, reimbursement of maintenance, and lack of recognition of First Nations jurisdiction. Findings further indicated that jurisdictional disputes have significant impacts on the lived experiences of First Nations children – particularly those with special needs. Although both the federal and provincial governments embrace the principle that the safety and well being of the child is a paramount consideration, in practice jurisdictional disputes often supersede the interests of children. **The lived experience of this situation is saliently outlined in the case of Jordan, a young child in Manitoba who remained in hospital for a prolonged period of time due to jurisdictional wrangling between federal government departments as to which department was responsible for paying at home care costs. A sad update is that Jordan passed away before the jurisdictional dispute could be resolved and never had a chance to live in a family environment – the only home he ever knew was a hospital (Lavalee, 2005).** Recommendations have been forwarded to the federal government to implement a child first policy for resolving jurisdictional disputes. Under this principle, the government that first receives a request to pay for services for a status Indian child that are otherwise available to other Canadian children will pay for that service without delay or disruption. The matter can then be referred to a jurisdictional dispute resolution process for consideration. **In honor of Jordan and with the support of his family, we recommend that the child first principle to resolving governmental jurisdictional disputes in child welfare be termed Jordan's principle.**

Overall the outdated funding mechanism results in First Nations children resident on reserve receiving far less in terms of child welfare supports (particularly in the area of services to keep them safely at home) and are far more likely to be denied or delayed receipt of services due to intergovernmental jurisdictional disputes. The Wen:de reports provide detailed recommendations which are universally supported by First Nations in Canada for policy reform and increased investment to ensure that First Nations children receive equitable child welfare services. Canada has not acted to redress the inequity – nor did it identify any intention to do so in the 2006 Speech from the Throne.

Inequitable Access to Domestic Rights Violation Redress Systems

Another complication for First Nations children, youth and families resident on reserves experiencing rights violations is inequitable access to rights redress systems under domestic law. Unlike other Canadian children, First Nations children on reserve cannot appeal to provincial child advocates to redress rights violation that have any connection with the federal government such as the inequitable child welfare funding issue as the provincial advocates do not have jurisdiction over the federal government. They cannot appeal to provincial human rights tribunals as they too have no jurisdiction over the federal government. There is no federal children's commissioner or advocate or ombudsman to invigilate federal government policies respecting children in Canada and the Federal Human Rights Commission specifically excludes any matters relating to the Indian Act. First Nations children and families could theoretically access the courts but as 53% of Aboriginal families live below the poverty line and thus can hardly afford to finance a legal action, the pragmatic availability of this option is limited. **So not only do First Nations children face significantly less access to services as a result of federal funding policies – they are also effectively denied access to human rights redress systems under domestic law and regulations.** This means they must rely more heavily on international invigilation – which has been limited by the view by many international NGO's and UN bodies that the rights of Indigenous children in developed nations do not require their specific attention.

Canada: A Chance to Do the Right Thing for First Nations Children, Youth and Families

There are more First Nations children in the care of the state than at any time in the history of this country (Blackstock, 2003). More importantly, Canada is in an excellent position to implement the changes recommended in the Wen:de reports, including Jordan's Principle, to maximize the number of First Nations children who can stay safely at home in the care of their families and communities. **With a surplus budget measuring in the billions of dollars, and progressive policy solutions identified in the Wen:de reports already developed, it is simply a matter of what Canada believes are its priorities. First Nations children and young people experiencing child maltreatment and neglect are amongst the most vulnerable and marginalized in our society. Surely they should place first in the interests of a wealthy nation that has signed so many human rights conventions – including the Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child and the Universal Declaration on Human Rights.**

ANNEX 1: Recommendations

1) Consistent with Article 2, 10,12 and 15 of the Covenant, Canada should immediately end the inequity in child welfare for First Nations children and young people resident on reserve by fully implementing the recommendations for policy reform and funding increases (109 million per annum) contained in the Wen:de: We are Coming to the Light of Day and Wen:de: the Journey Continues reports.

2) Canada should immediately adopt Jordan's Principle to resolving inter-governmental or intra- governmental jurisdictional disputes ensuring that Status Indian children are not denied or delayed receipt of services otherwise available to Canadian children in keeping with Article 2 and 10 of the Covenant.

3) In keeping with Article 2 of the Covenant, Canada must support, and adequately resource, an independent monitoring body to ensure the rights of First Nations children and youth resident on reserves are upheld. This body should be designed and controlled by First Nations paying specific attention to ensuring an equitable distribution of state resources, the recognition of the right of Indigenous peoples to make the best decisions for First Nations children and young people and access to rights redress systems under domestic law or procedure.

4) International NGOs and UN bodies relevant to child rights and Indigenous peoples' rights must step up their roles in monitoring the rights of Indigenous children and young people worldwide, including in developed nations.

5) Consistent with Article 1 and 2 of the Covenant, Canada must fully recognize the right of Indigenous peoples, including children, to self-identify as Indigenous peoples thus affirming their right to be connected to their cultural, racial and spiritual identity. The Indian Act provisions identifying registered or status Indians should be abolished whilst preserving existing Aboriginal rights and title.

6) Consistent with the recommendations of the Permanent Forum on Indigenous Issues, State Parties must support Indigenous communities to collect disaggregated data on the diverse cultural groups of Indigenous children at the international, national, regional and community levels to support improved policy and practice responses to separated children and their families.

7) Poverty, inadequate housing and substance misuse are key concerns affecting the welfare of First Nations children and young people. Consistent with Articles 9, 10, and 11 of the Covenant, Canada must invest in sustainable First Nations designed measures to redress these factors.

8) Consistent with recommendations arising from the Committee on the Rights of the Child Day of General Discussion on Indigenous Children, a worldwide study on separated children is encouraged with specific and focused attention to the experience of Indigenous children.

REFERENCES

Aboriginal Justice Inquiry- Child Welfare Initiative (AJI-CWI) (2001). Winnipeg, Manitoba: Executive Committee of the AJI-CWI. Available on line at www.aji-cwi.mb.ca/pdfs/promiseofhope.pdf

Blackstock, C. (2003) First Nations child and family services: Restoring peace and harmony in First Nations communities. In Kathleen Kufeldt & Brad McKenzie (Eds.) *Child Welfare: Connecting Research Policy and Practice* (pp331-343) . Waterloo: Wilfrid Laurier University Press.

Blackstock, C., Clarke, S., Cullen, J., D'Hondt, J., & Formsma, J. (2004) *Keeping the promise: The Convention on the Rights of the Child and the lived experiences of First Nations children and youth.* Ottawa: First Nations Child and Family Caring Society of Canada.

Blackstock, C., Prakash, T., Loxley, J., & Wien, F. (2005) *Wen:de – we are coming to the light of day.* Ottawa: First Nations Child and Family Caring Society of Canada.

Chandler, M & Lalonde, C. (1998). Cultural continuity as a hedge against suicide in Canada's First Nations. *Trans-cultural Psychiatry,* 35(2): 191-219.

Cornell, S., & Kalt, J. (2002). *Reloading the dice: Improving the chances for economic development on American Indian reservations.*

Indian Act, RSC, 1985.

INAC (2002) Internal document obtained under Access to Information.

Lavalee, T. (2005) Federally funded First Nation Children with complex medical needs. *Paediatrics and Child Health 10(9), 527-529.* Oakville: Pulsus Group Inc.

McDonald, R.J., & Ladd, P. (June 2000). *First Nations Child and Family Services Joint National Policy Review: Draft final report.* Prepared for the Assembly of First Nations with First Nations Child and Family Service Agency Representatives in Partnership with the Department of Indian Affairs and Northern Development. Ottawa, ON: AFN and DIAND.

McKenzie, B. (2002, February). *Block funding child maintenance in First Nations child and family services: A policy review* Report prepared for Kahnawake Shakotiia'takehnhas Community Services. Winnipeg, MB.

Royal Commission on Aboriginal Peoples (1996). *The report on the Royal Commission on Aboriginal Peoples.* Available on line at http://www.ainc-inac.gc.ca/ch/rcap/rpt/lk_e.html 1996.

Shangreaux, C. (2004) *Staying at home: examining the implications of least disruptive measures in First Nations child and family service agencies.* Ottawa: First Nations Child and Family Caring Society of Canada.

Trocme, N., Knoke, D. & Blackstock, C. (2004) Pathways to over-representation of Aboriginal children in Canada's child welfare system. *Social Services Review December 2004, 78 (4), 577-600*. Chicago: Sage Publications

Trocme, Knoke, Shangreaux, Fallon & MacLaurin (2005) *The experience of First Nations children coming into contact with the child welfare system in Canada: The Canadian incidence study on reported abuse and neglect.* In Wen:de: we are coming to the light of day, pp. 60-86. Ottawa: First Nations Child and Family Caring Society of Canada.

United Nations Committee on the Rights of the Child (2003). Concluding observations of the Committee on the Rights of the Child: Canada. United Nations Office of the High Commissioner for Human Rights: Geneva, Switzerland.