

# WHAT ARE CANADA'S LEGAL OBLIGATIONS TO PROTECT FIRST NATIONS CHILDREN?

## Canadian Human Rights Tribunal on First Nations Child Welfare

### Child Welfare Tribunal

In 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a complaint against the federal government of Canada, alleging that child welfare services provided to First Nations children and families on-reserve were flawed, inequitable and discriminatory. They ask that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies. The government countered this, stating that its services cannot be compared to those provided by the provinces/territories and that they do not offer a service in accordance with the Canadian Human Rights Act. Accordingly, the government asks that the case be dismissed. The Tribunal began hearing evidence in 2013 and a ruling is expected in mid-2015.

### What are Canada's obligations to First Nations children under national and international law and agreements?

The Canadian Human Rights Act (the Act) is part of a framework of constitutional, statutory and international instruments designed to ensure the protection of human rights.<sup>1</sup> Enacted to align Canada's laws with its international commitments, it is now buffered by the UN Declaration on the Rights of Indigenous Peoples, the UN Convention on the Rights of the Child, and other laws/agreements (*see box on next page*). According to Amnesty International, discrimination against First Nations children based on their identity as Indigenous peoples violates numerous international standards, laws and norms, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. This national and international legal framework protects Indigenous children from discrimination, and Canada has legal obligations to

### What is the Canadian Human Rights Act?

The Canadian Human Rights Act (the Act) is a federal statute that states:

*"...all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."*

Passed by Parliament in 1977, the Act applies to federally regulated activities; the provinces have their own laws and policies pertaining to human rights.

### What does the Canadian Human Rights Act say about services?

Section 5 of the Act states that it is discriminatory to deny an individual, or differentiate adversely in relation to an individual, in the provision of goods, services, facilities or accommodations customarily available to the general public.

The complaint put forward by the First Nations Child and Family Caring Society states that the federal government discriminates against First Nations children living on-reserve based on Section 5 of the Act, resulting in differential or poor provision of child and family services, compared to the services available off-reserve.\*

## What is the UNCRC?

The United Nations Convention on the Rights of the Child is a legally binding human rights treaty. It was enacted in 1990 and signed and ratified by Canada by 1991. The UNCRC outlines the civil, political, economic, social, health and cultural rights of all children under the age of 18. Once ratified, nations are bound to comply under international law. Relevant articles to the Tribunal include:

- Article 2: non-discrimination, the right for all children to be treated fairly and protected from discrimination.
- Article 3: best interests of the child are the primary concern in decisions that affect children.
- Article 8: preservation of a child's identity, including name, nationality and family ties.
- Article 30: minorities and Indigenous children have the right to practice their culture, language and religion.

## What is the UNDRIP?

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly in 2007 and by Canada in 2010. Although not legally binding, it reflects international legal norms and sets a standard for the treatment of Indigenous peoples. Covering both individual and collective rights, the Declaration addresses rights related to culture, identity, education, health, employment, language, and other areas. The UNDRIP is a tool to help Indigenous peoples eliminate discrimination, marginalization and other human rights abuses.

uphold its international commitments.<sup>2</sup>

## The honour of the Crown and fiduciary duty

According to the First Nations Child and Family Caring Society (Caring Society), honour of the Crown is the main legal principle through which reconciliation of First Nations and non-Aboriginal peoples' respective claims and interests is given effect. This leads directly to the government's fiduciary relationship and, in some cases, responsibility to First Nations peoples. The Caring Society maintains that the government's duty to treat First Nations peoples in an honourable manner emerged from its "*assertion of sovereignty over an Aboriginal people and the de facto control of land and resources that were formerly in control of that people.*"<sup>3</sup> This duty, as argued by the Caring Society, covers First Nations issues, particularly culture and language. They maintain that the residential schools, the sixties scoop, the present high rate of removal of First Nations children from their homes by the child welfare system, and the placement of First Nations children in non-Aboriginal foster homes, deny First Nations children the right to their culture and language. Amnesty International asserts that the removal of First Nations children from their homes in cases where it is not in their best interest, and the removal of First Nations children at higher rates than non-Aboriginal children due to differences in the degree and structure of funding and resources, constitute a clear case of discrimination.<sup>4</sup>

## Canadian constitutional law, jurisdiction and the provision of services

According to the Caring Society, the federal government has the jurisdiction to legislate First Nations child and family services under section 91(24) of the Constitution Act (1867). They argue that under Canadian constitutional law, if the government has legislative jurisdiction, it also has the responsibility to assume the associated costs. The Caring Society argues that Canadian federalism includes the provision of services as part of the welfare state, and that child and family services are regarded as a fundamental public service.<sup>5</sup> According to the Caring Society and Amnesty International, neither the lack of legislation on First Nations child and family services, nor the involvement of the provinces in the provision of services, remove the government's jurisdiction or the accompanying responsibility.<sup>6</sup> In contrast, the federal government maintains that child welfare services fall within the jurisdiction of the provinces. They state that the provinces were not providing the full range of child welfare services and that there were growing concerns about the safety of First Nations children on-reserve during the 1950s. As a result, the federal government's Aboriginal Affairs and Northern Development Canada

(AANDC) engaged the provinces in discussions about federal cost-sharing for on-reserve services, and only Ontario entered into an agreement. Under the authority of Cabinet, the federal government then entered into funding agreements with First Nations communities. The government attests that its role is to ensure that public funds are used for child welfare expenditures, in accordance with applicable funding authorities, and it is not involved in the decisions related to programs and services offered by First Nations Child and Family Service agencies.<sup>7</sup>

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To view the final submissions to the Canadian Human Rights Tribunal on First Nations Child Welfare in full, please visit: <http://www.fncaringsociety.com/final-arguments>.

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<sup>1</sup> Summarized from the First Nations Child and Family Caring Society Factum.

<sup>2</sup> Summarized from the Amnesty International Factum.

<sup>3</sup> Summarized from the First Nations Child and Family Caring Society Factum, including quote from *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 2 SCR 511 at paras 16-18, 32 [Haida Nation], #31 page 15.

<sup>4</sup> Summarized from the Amnesty International Factum.

<sup>5</sup> Summarized from the First Nations Child and Family Caring Society Factum.

<sup>6</sup> Summarized from the Amnesty International Factum.

<sup>7</sup> Summarized from the Aboriginal Affairs and Northern Development Canada Factum.

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