

THE ASSEMBLY OF FIRST NATIONS Submission to the United Nations Human Rights Council Universal Periodic Review of Canada's Human Rights Obligations, October 2012

I. Introduction

The AFN is the national political organization for First Nations/Indigenous peoples in Canada. First Nations peoples (over 800,000 Status Indians) are recognized under the *Constitution Act, 1982*. This document provides updated information relating to recommendations accepted by Canada in connection with the Human Rights Council Working Group Report, 11th Session, October 5, 2009 which included matters related to education, citizen empowerment, land claims, governance/self-government, violence against women, and children.

Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples in November 2010 has been met with scepticism, as our Indigenous leaders continue to advocate for equality and equity in the administration of education, child welfare, housing, economic opportunities, recognition of Aboriginal and Treaty rights to our lands and resources and self-determination.

On December 13, 2011 the Assistant Auditor General of Canada delivered the message that conditions have worsened to the Senate of Canada in his opening statement:

Over the past 10 years, the Office of the Auditor General has audited a broad range of services and federal activities affecting First Nations. Earlier this year, we published our most recent report on Programs for First Nations on Reserves. In this audit, we followed up on the government's progress toward achieving the commitments it made to address significant observations and recommendations from seven of our previous reports, issued between 2002 and 2008. We focused on the areas of education; water quality; housing; child and family services; land claim agreements; and reporting requirements.

We noted in our recent follow-up report that some progress has been made in implementing some of our recommendations. Overall, however, we concluded that Aboriginal Affairs and Northern Development Canada, the Canada Mortgage and Housing Corporation, and Health Canada have not made satisfactory progress in implementing our recommendations. In some cases, conditions have worsened since our earlier audits. For example: the education gap has widened; the shortage of adequate housing on reserves has become more acute; the presence of mould on reserves remains a serious problem; and administrative reporting requirements have become more onerous.

2. Indigenous Women and Girls

The Native Women's Association of Canada estimates that around 600 Indigenous women in Canada have gone missing or have been murdered over the last two decades. Unfortunately, the majority of these cases remain unsolved, and, arguably, the justice system is allowing this

violence to persist. There have been many reports of Canadian law enforcement services across the country displaying apathetic attitude towards reports of missing or murdered Indigenous women.

In 2010, Canada announced a \$10 million fund to address Violence Against Aboriginal Women. The majority of funds are targeted at existing police services to improve investigations, database, wiretapping and victim services with very little targeted to community based interventions that could better serve Indigenous women and girls. There is no sustained level of funding and there is a lack of coordination between different federal government agencies and different levels of governments to address violence against Indigenous women and girls. There was no consultation or partnership with Indigenous people in the allocation and distribution of these funds, and it is not clear how this funding will effectively address the issues of violence.

Denial of funding by the British Columbia provincial government for legal representation for indigenous parties that secured intervener status at the current Missing Women Commission of Inquiry in British Columbia have deprived families and organizations from adequately addressing police investigations and prosecutorial assessments into murdered Indigenous women. The active participation of indigenous interveners would have provided valuable insight into the circumstances that may lead to violence against Indigenous women and girls as well as recommendations to improve the safety and security of Indigenous women and girls.

Recommendations

That a national inquiry into murdered and missing indigenous women be undertake.

That Canada's Federal/Provincial and Territorial mechanisms be utilized to apply a meaningful, coordinated and results oriented approach to addressing the rights of indigenous women and girls in Canada. The involvement of indigenous women and girls is absolutely critical as well as indigenous communities and their leadership.

3. Children's Well-Being

With respect to education, the central issue facing all First Nation schools on reserve is the lack of adequate and sustainable funding for language teachers, Elders, curriculum development, and in-service and professional development for teachers and teacher aides – resources that are readily available in French and English-language schools in Canada. We estimate that there may be as many as 45,000 eligible children and youth between the ages of 4-21 years old that are not attending school in Canada. There are a myriad of reasons for the drop-out, push-out or disconnect with education, one of which may be the absence of seeing their culture, histories and

languages reflected in the curriculum or being taught by teachers and professors who lack cultural competency.

In relations to health the following are some statistics from different sources that present the landscape of First Nations children health: teen fertility is seven times higher than other Canadian youth, and early parenting compromises access to education, employment, and formal child care; First Nations infant mortality is 3 to 7 times higher the national average and the leading causes of infant death are upper respiratory tract infections and sudden infant death syndrome (SIDS); Immunization rates are 20 per cent below the general population, leading to high prevalence rates of preventable diseases; close to 50% of children with chronic condition(s) on reserve, have difficulty accessing health services due to lack of availability of services, facility or doctor/nurse within their area; lack of access to appropriate resources has made it challenging for First Nations children to have food security, thus, unbalanced diets and the deterioration of traditional foods have fueled an obesity epidemic, as 62% of First Nations children living on reserve are either overweight or obese. Unhealthy weight is known to be a precursor for type 2 diabetes among children, and other chronic diseases once they reach adulthood; another implication of lack of access to a nutritional diet and proper health care services is tooth decay. 91% of Aboriginal children are affected by dental decay with children averaging 7.8 decayed teeth by the age of six.

Regrettably, the intended spirit and adequate implementation of Jordan's Principle has faced a variety of challenges, including Canada's adoption of a startlingly narrow definition of JP, which has failed other First Nations children. The current definition of the policy limits the application of JP to Status Indian children who reside on-reserve, have multiple special needs diagnosed by medical professionals, and require the services of multiple health providers. While this attempts to address the prevalent vacuum of care for First Nations children, various critical concerns remain. It is not clear whether Canada's narrow interpretation and application of JP will allow children to obtain a proper initial diagnosis, whether children with only one special need will be able to access care, or whether children residing off-reserve with acute special needs will be able to access care, and finally, the discriminatory principle of limiting access to needed health services based on a set of conditions that other Canadian children are not required to fulfill to access care. Consequently, families are left with the predicament of considering placing their children into the welfare system in order to access services - a quandary not faced by non-indigenous families. To ensure the removal of prevalent discrimination against First Nations children in accessing health care, Canada must address these issues and adopt a definition and application of JP that will ensure that same standard of care for all Canadian children.

These statistics provide further evidence that the government of Canada's investment in the health of First Nations children has been insufficient to protect their rights. Similarly, there are other areas in which First Nations children are receiving significantly inferior funding than their non-First Nations peers. For example, funding for the First Nation and Inuit Child Care Initiative

has not been increased in the last 14 years and is based on outdated statistics from 1996 which do not reflect current needs. Funding for on-reserve First Nations children is capped at \$6000.00 per child, while Manitoba provides for children off-reserve at a base amount of \$15,376 per child.

The disintegration of Indigenous families continues to be a concern, as Indigenous children are overrepresented within the child welfare system. Specifically, the rate of out-of-home placements in the Indigenous population is more than 10 times the rate of out-of-home placements in the non-Indigenous population in four provinces (i.e. British Columbia -12.5 times, Alberta - 14.6 times, Saskatchewan - 12 times, and Manitoba- 19 times). In Manitoba, First Nations children represent 15.7% of the child population; yet they represent 69.7% of children in care. Unfortunately, this is an issue that has burdened Indigenous families since colonization, and Government of Canada policies and programs have fallen short in efficiency and effectiveness to address the situation.

In 2007, the AFN and the First Nations Child and Family Caring Society of Canada (FNCFC) launched a human rights complaint against the Government of Canada alleging that Canada is racially discriminating against First Nations children by applying inequitable child welfare funding. The Canadian Human Rights Commission (CHRC) investigated the complaint initially and referred it to the Canadian Human Rights Tribunal (CHRT), essentially finding in favour of the AFN and FNCFC position regarding the discriminatory treatment of First Nations children on reserve. Canada objected to the referral and challenged the jurisdiction of the Tribunal to hear the complaint. The federal government is simply using the legal process to avoid dealing with the fact that it is underfunding program and service delivery to First Nations children. The case is on-going and it was reported in the media, based on documentation obtained from the Government of Canada through Freedom of Information legislation, that the Government of Canada has expended in excess of 3 million dollars to resist the jurisdiction of the Canadian Human Rights Tribunal to hear the case.

Recommendations

That the Government of Canada provide adequate and sustainable funding for education and health with current population information and with full and meaningful participation of First Nations' governments. Furthermore, current successful programs should be expanded to benefit all First Nations children across Canada.

That extensive and methodologically sound research be conducted to determine the outcomes of the current child welfare system; create a First Nations child welfare data management system; and, take the necessary steps to bring the standards of the current welfare system to in the general Canadian child welfare system. Also, ensure that First Nations governments actively participate in all stages of the aforementioned processes and ultimately, First Nations government jurisdiction should be achieved in these matters.

On matters concerning youth justice, despite objections from many sectors including First Nations peoples, Canada recently enacted legislation through the *Safe Communities Act* that made sweeping amendments to the *Criminal Code*, radically reduced sentencing options through the imposition of mandatory minimums for serious offenses and made several amendments to the *Youth Criminal Justice Act*.

According to the Canadian Centre for Justice Statistics, overall crime has been falling since the early 1990s and violent youth crime has remained stable for several years. Every province and territory has experienced reductions in youth court caseloads since the introduction of the *Young Offenders Act* and fewer youth cases are resulting in custodial sentences being imposed. In its creation, the *Youth Criminal Justice Act* recognized that most youths come in contact with the law as a result of fairly minor and isolated incidents. It recognized the importance of not unnecessarily drawing those youths into the criminal justice system, but rather taking advantage of extra-judicial measures, such as warnings, cautions and referrals, mediation and family conferencing as appropriate sanctions.

However, as a contrast to these overall trends, incarceration of First Nation youth increases. First Nations youth are criminalized and jailed at earlier ages and for longer periods of time than other youth. Indigenous peoples are generally over-represented in prisons (approximately 17% v. 4% of the Canadian adult population) and almost half of the Indigenous offender population are under the age of 30. The Office of the Correctional Investigator has noted that the Indigenous offender population differs in a number of ways: they tend to be younger; to be more likely to have served previous youth and/or adult sentences; to be incarcerated more often for a violent offence; to have higher risk ratings; to have higher need ratings, (particularly in the areas of substance abuse and employment); to be more inclined to have gang affiliations, and to have more health problems, including FASD and mental health issues.

The new law seeks to reduce reliance on extra judicial measures through expanding the applicable sentencing principles to make them more punitive, narrow, and favouring incarceration. These changes will have very serious consequences for young persons, resulting in more youths going to jail and going to jail for longer periods. Given the current overrepresentation of First Nations youth in the criminal justice system, the AFN asserts that First Nation youth will be unfairly targeted by these changes.

Recommendation

Canada should move towards a restorative and rehabilitative model of youth justice. The proposed punitive model will result in too many young people going to jail.

Citizen Empowerment

The *Canadian Human Rights Act* (CHRA) was introduced in 1977. Section 67 exempted its application to the *Indian Act*. This exemption was used by successive governments as a basis to ignore governance and infrastructure standards in First Nations communities regarding compliance to human rights. There are no funding enhancements for First Nations programs and services pursuant to the *Indian Act*, residents of reserves will be able to file discrimination complaints against First Nations governments as well as the Canadian government concerning the delivery of those services.

Currently, First Nations lack the capacity and resources to effectively implement the required changes. After all, most programs, policies and community infrastructure in First Nation communities were put in place by the Department of Indian Affairs prior to 2008. Many of these do not stand up to the scrutiny of the CHRA and First Nation governments have inherited the responsibility for these. For example, public buildings and housing constructed by First Nations through government of Canada service and program funding are now required to meet the needs of the physically disabled citizens. As of this point, no funding has been provided or is available for First Nation communities to retrofit current buildings to accommodate the needs of individuals with physical disabilities.

Furthermore, it is the *Indian Act* and colonial control asserted by the federal government and its Indian Affairs bureaucracy that has suppressed the ability of First Nations governments to evolve with respect to good governance and capacity. With respect to various social programs, the criteria, eligibility requirements, funding levels, and service standards are all currently dictated by Ottawa.

Recommendation

That funding requirements be addressed to ensure equality in program and service delivery and governance requirements.

Self-Determination and Reconciliation

On January 24, 2012, the Crown-First Nations Gathering was held in Ottawa. The Government of Canada committed to:

The Government of Canada and First Nations will work to develop solutions to remove barriers that hinder First Nations governance.

The Government of Canada and First Nations commit to respect and honour our treaty relationship and advance approaches to find common ground on Treaty implementation. ...commit to ensuring federal negotiation policies reflect the principles of recognition and affirmation mandated by Section 35 of the Constitution Act, 1982 and advance certainty, expeditious resolution, and self-sufficiency.

First Nations leaders believe that dramatic change based on a joint approach in a timely manner guided by existing treaty relationships, recognition of aboriginal and treaty rights in the Canadian constitution and the UN Declaration on the Rights of Indigenous Peoples is required. Unfortunately, it appears that the visions and expectations expressed in the Joint Action Plan have different meaning and priority as between Canada and the First Nations. The discussions and approaches to date have not generated progress. Instead, the Government of Canada has announced intentions to proceed with the same legislative agenda on the imposition of legislation for safe water, matrimonial property rights on reserve, education, private property rights on reserve consistent with the "...practical and incremental..." approach for change.

In June 2012, the Standing Senate Committee on Aboriginal Peoples issued a report on Comprehensive Claims negotiations which pointed out that in 20 years of negotiations in British Columbia only two agreements have been concluded while at the same time enormous amounts of money has been spent and debt created by the First Nations participants.

September 2012 will mark 20 years since the establishment of the British Columbia (B.C.) treaty process. In that time, significant efforts have been made to come to a just and equitable settlement of the land question in B.C. Collective efforts have culminated, to date, in the ratification of two comprehensive treaties, with several more expected to follow in the coming months and years. While progress has been made, the parties to the process have also faced and continue to face significant challenges in connection with the negotiation, ratification and implementation of treaties within the process. Focused attention and a renewal of efforts are required, at this stage, to address and overcome these challenges.

*The level of costs remains, however, a significant barrier to First Nations' entry and continued participation in the process. Chief Commissioner Pierre told the Committee that **First Nations have, to date, invested approximately half a billion dollars to participate in the B.C treaty process, with 80 per cent in loans and 20 per cent in contributions.** Minister Polak further indicated that some First Nations are reluctant to participate in the treaty process, given the huge costs and the often uncertain outcome. While the money borrowed by First Nations to participate in the treaty process is taken out of the capital transfer that the federal government would eventually put forward at the end of a final agreement, Minister Polak explained, some First Nations are "reaching debt levels that might indeed surpass what their eventual capital transfer might be, or at least reduce it significantly."³⁰ In addition to the financial costs, Chief White stressed, are the significant investments in the form of time, effort and opportunity costs associated with participation in negotiations, some of which have been ongoing since the treaty process was created.*

Recommendation

Canada must engage in a serious process of establishing relations with First Nations peoples in a manner consistent with the UN Declaration on the Rights of Indigenous Peoples.