Schedule C, Tab 3

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Convention on the Rights of the Child

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Committee on the Rights of the Child
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Consideration of reports submitted by States parties under article 44 of the Convention

Concluding observations: Canada

1. The Committee considered the consolidated third and fourth periodic report of Canada (CRC/C/CAN/3-4) at its 1742nd and 1743rd meetings held on 26 and 27 September 2012, and adopted, at its 1754th meeting, held on 5 October 2012, the following concluding observations.

I. Introduction

2. The Committee welcomes the submission of the consolidated third and fourth periodic report of the State party (CRC/C/CAN/3-4) and the written reply to its list of issues (CRC/C/XCAN/Q/3-4/Add.1), which allowed for a better understanding of the situation in the State party. The Committee expresses appreciation for the constructive dialogue held with the multi-sectorial delegation of the State party.

3. The Committee reminds the State party that the present concluding observations should be read in conjunction with its concluding observations adopted on the State party's initial report under the Optional Protocol on the involvement of children in armed conflict (CRC/C/OPAC/CAN/CO/1, 2006) and under the Optional Protocol on sale of children, child prostitution and child pornography (CRC/CO/OPSC/CAN/CO/1, 2012). The Committee regrets that the reporting guidelines were not followed in the preparation of the State party's report.

II. Follow-up measures undertaken and progress achieved by the State party

4. The Committee welcomes the adoption of the following legislative, measures:

(a) The law amending the Citizenship Act which came into effect on 17 April 2009; and

(b) Bill C-49 in 2005, an Act to amend the Criminal Code (trafficking in persons) (25 November 2005), which creates indictable offences which specifically address trafficking in persons.

5. The Committee also welcomes the ratification of the Convention on the Rights of Persons with Disabilities, in March 2010.

6. The Committee notes as positive the following institutional and policy measures:

(a) National Action Plan to Combat Human Trafficking in June 2012;

(b) Homelessness Partnering Strategy (HPS) in April 2007;

(c) National Plan of Action for children, A Canada Fit for Children, launched in April 2004; and

(d) National Strategy to Protect Children from Sexual Exploitation on the Internet, launched in May 2004.

III. Main areas of concerns and recommendations

A. General measures of implementation (arts. 4, 42 and 44, para. 6 of the Convention)

The Committee"s previous recommendations

7. While welcoming the State party's efforts to implement the Committee's concluding observations of 2003 on the State party's initial report (CRC/C/15/Add.215, 2003), the Committee notes with regret that some of the recommendations contained therein have not been fully addressed.

8. The Committee urges the State party to take all necessary measures to address those recommendations from the concluding observations of the second periodic report under the Convention that have not been implemented or sufficiently implemented, particularly those related to reservations, legislation, coordination, data collection, independent monitoring, non-discrimination, corporal punishment, family environment, adoption, economic exploitation, and administration of juvenile justice.

Reservations

9. While the Committee positively acknowledges the State party"s efforts towards removing its reservations to article 37(c) of the Convention, the Committee strongly reiterates its previous recommendation (CRC/C/15/Add.215, para.7, 2003), for the prompt withdrawal of its reservation to article 37(c).

Legislation

10. While welcoming numerous legislative actions related to the implementation of the Convention, the Committee remains concerned at the absence of legislation that comprehensively covers the full scope of the Convention in national law. In this context, the Committee further notes that given the State party's federal system and dualist legal system, the absence of such overall national legislation has resulted in fragmentation and inconsistencies in the implementation of child rights across the State party, with children in similar situations being subject to disparities in the fulfilment of their rights depending on the province or territory which they reside in.

11. The Committee recommends that the State Party finds the appropriate constitutional path that will allow it to have in the whole territory of the State Party, including its provinces and territories, a comprehensive legal framework which fully incorporates the provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent application.

Comprehensive policy and strategies

12. The Committee notes the adoption of the National Plan of Action for Children, A Canada Fit for Children, in 2004, but is concerned that beyond its broad objectives the Plan lacks clear division of responsibilities, clear priorities, targets and timetables, resource allocation and systematic monitoring as recommended in the Committee's previous concluding observations (CRC/C/15/Add.215, par. 13, 2003) and that it has not been evaluated in order to assess its impact and to guide the next steps.

13. The Committee strongly recommends that the State party adopt a national strategy that provides a comprehensive implementation framework for the federal, provincial and territorial levels of government spelling out as is appropriate the priorities, targets and respective responsibilities for the overall realization of the Convention and that will enable the provinces and territories to adopt accordingly their own specific plans and strategies. The Committee further recommends that the State party allocate adequate human, technical and financial resources for the implementation, monitoring and evaluation of this comprehensive strategy and related provincial and territorial plans. In this context, the Committee encourages the State party to establish a coordinated monitoring mechanism that would enable the submission and review of progress reports by all provinces and territories. It also recommends that children and civil society are consulted.

Coordination

14. While noting as positive the work of the Council of Ministers of Education and the Joint Consortium for School Health, both with representation from all levels of government, as well as other sectorial coordination bodies, the Committee remains concerned that overall coordination of the implementation of the Convention assigned to the Interdepartmental Working Group on Children's Rights (2007) has not been effective in practice. Furthermore, the Committee notes the challenges presented by the federal system of the State party and is concerned that the absence of overall coordination results in significant disparities in the implementation of the Convention across the State party´s provinces and territories.

15. The Committee strongly reiterates its recommendation for the State party to establish a coordinating body for the implementation of the Convention and the national strategy (recommended in paragraph 13 above) with the stature and authority as well as the human, technical and financial resources to effectively coordinate actions for children"s rights across sectors and among all provinces and territories. Furthermore, the Committee encourages the State party to consider strengthening the Interdepartmental Working Group on Children´s Rights accordingly thus ensuring coordination, consistency and equitability in overall implementation of the Convention. The Committee also recommends that civil society, including all minority groups, and children be invited to form part of the coordination body.

Allocation of resources

16. Bearing in mind that the State party is one of the most affluent economies of the world and that it invests sizeable amounts of resources in child-related programmes, the

Committee notes that the State party does not use a child-specific approach for budget planning and allocation in the national and provinces/territories level budgets, thus making it practically impossible to identify, monitor, report and evaluate the impact of investments in children and the overall application of the Convention in budgetary terms. Furthermore, the Committee also notes that while the State party report contained information about various programs and their overall budget the Committee regrets that the report lacked information on the impact of such investments.

17. In light of the Committee's Day of General Discussion in 2007 on "Resources for the Rights of the Child - Responsibility of States" and with emphasis on articles 2, 3, 4 and 6 of the Convention, the Committee recommends that the State party establish a budgeting process which adequately takes into account children's needs at the national, provincial and territorial levels, with clear allocations to children in the relevant sectors and agencies, specific indicators and a tracking system. In addition, the Committee recommends that the State party establish mechanisms to monitor and evaluate the efficacy, adequacy and equitability of the distribution of resources allocated to the implementation of the Convention. Furthermore, the Committee recommends that the State party define strategic budgetary lines for children in disadvantaged or vulnerable situations that may require affirmative social measures (for example, children of Aboriginal, African Canadian, or other minorities and children with disabilities) and make sure that those budgetary lines are protected even in situations of economic crisis, natural disasters or other emergencies.

International Cooperation

18. The Committee welcomes the international cooperation carried out through the Canada International Development Assistance (CIDA) program and particularly appreciates that approximately 30% of the State party's aid goes to health, education, and population. However, the Committee notes with concern that ODA for 2010-2011 is 0.33% of GNI and is projected to decline, which would bring it even further below the OECD/DAC average and below the percentage recommended in the Monterrey Consensus.

19. The Committee encourages the State Party to focus on children in its assistance programs and to increase its level of funding in order to meet the recommended aid target of 0.7% of GNI.

Data collection

20. The Committee notes with concern the limited progress made to establish a national, comprehensive data collection system covering all areas of the Convention. The Committee notes that the complex data collection systems utilize different definitions, concepts, approaches, and structures across provinces and territories which therefore makes it difficult to assess progress to strengthen the implementation of the Convention. In particular, the Committee notes that the State party report lacked data on the number of children aged 14 to 18 years old placed into alternative care facilities.

21. The Committee reiterates its recommendation for the State party to set up a national and comprehensive data collection system and to analyse the data collected as a basis for consistently assessing progress achieved in the realization of child rights and to help design policies and programmes to strengthen the implementation of the Convention. Data should be disaggregated by age, sex, geographic location, ethnicity and socio-economic background to facilitate analysis on the situation of all children. More specifically, the Committee recommends that appropriate data on children in special situations of vulnerability be collected and analysed to inform policy decisions and programs at different levels.

Independent monitoring

22. While noting that most Canadian provinces have an Ombudsman for Children, the Committee reiterates its concern (CRC/C/15/Add.215, para. 14, 2003) about the absence of an independent Ombudsman for Children at the federal level. Furthermore, the Committee is concerned that their mandates are limited and that not all children may be aware of the complaints procedure. While noting that the Canadian Human Rights Commission operates at the federal level and has the mandate to receive complaints, the Committee regrets that the Commission only hears complaints based on discrimination and therefore does not afford all children the possibility to pursue meaningful remedies for breaches of all rights under the Convention.

23. The Committee recommends that the State party take the necessary measures to establish a federal Children"s Ombudsman in full accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), to ensure comprehensive and systematic monitoring of all children"s rights at the federal level. Furthermore, the Committee encourages the State party to raise awareness among children concerning the existing children"s Ombudsman in their respective provinces and territories. Drawing attention to its General Comment No. 2 (CRC/GC/2, 2002), the Committee also calls upon the State party to ensure that this national mechanism be provided with the necessary human, technical and financial resources in order to secure its independence and efficacy.

Dissemination and awareness-raising

24. The Committee appreciates the State party's efforts to promote awareness and understanding of the Convention, particularly by supporting non-governmental organizations' efforts. Nevertheless, the Committee is concerned that awareness and knowledge of the Convention remains limited amongst children, professionals working with children, parents, and the general public. The Committee is especially concerned that there has been little effort to systematically disseminate information on the Convention and integrate child rights education into the school system.

25. The Committee urges the State party to take more active measures to systematically disseminate and promote the Convention, raising awareness in the public at large, among professionals working with or for children, and among children. In particular, the Committee urges the State party to expand the development and use of curriculum resources on children"s rights, especially through the State party"s extensive availability of free Internet and web access providers, as well as education initiatives that integrate knowledge and exercise of children"s rights into curricula, policies, and practices in schools.

Training

26. Despite information on some training provided for professionals, such as immigration officers and government lawyers on the Convention, the Committee is concerned that there is no systematic training on children's rights and the Convention for all professional groups working for or with children. In particular, the Committee is concerned that personnel involved in juvenile justice, such as law enforcement officers, prosecutors, judges, and lawyers, lack understanding and training on the Convention.

27. The Committee urges the State party to develop an integrated strategy for training on children"s rights for all professionals, including, government officials, judicial authorities, and professionals who work with children in health and social services. In developing such training programs, the Committee urges the State party

to focus the training on the use of the Convention in legislation and public policy, program development, advocacy, and decision making processes and accountability.

Child rights and the business sector

28. The Committee joins the concern expressed by the Committee on the Elimination of Racial Discrimination that the State has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples in territories outside Canada, (CERD/C/CAN/CO/19-20, para. 14, 2012), in particular gas, oil, and mining companies. The Committee is particularly concerned that the State party lacks a regulatory framework to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.

29. The Committee recommends that the State Party establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights, and in light of Human Rights Council resolutions 8/7 of 18 June 2008 (para. 4(d)) and resolution 17/4 of 16 June 2011 (para. 6(f)). In particular, it recommends that the State party ensure the:

(a) Establishment of a clear regulatory framework for, among others, the gas, mining, and oil companies operating in territories outside Canada ensure that their activities do not impact on human rights or endanger environment and other standards, especially those related to children"s rights;

(b) The monitoring of implementation by companies at home and abroad of international and national environmental and health and human rights standards and that appropriate sanctions and remedies are provided when violations occur with a particular focus on the impact on children;

(c) Assessments, consultations with and disclosure to the public by companies on plans to address environmental and health pollution and the human rights impact of their activities; and

(d) In doing so, take into account the UN Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council.

B. Definition of the child (art. 1 of the Convention)

30. The Committee is concerned that not all children under the age of 18 are benefiting from the full protection under the Convention, in particular children who in some provinces and territories, can be tried as adults and children between the ages of 16 and 18 who are not appropriately protected against sexual exploitation in some provinces and territories.

31. The Committee urges the state party to ensure the full compliance of all national provisions on the definition of the child with article 1 of the Convention, in particular to ensure that all children under18 cannot be tried as adults and all children under 18 who are victims of sexual exploitation receive appropriate protection.

C. General principles (arts. 2, 3, 6 and 12 of the Convention)

Non-discrimination

32. While welcoming the State party's efforts to address discrimination and promote intercultural understanding, such as the Stop Racism national video contest, the Committee is nevertheless concerned at the continued prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin and other grounds. In particular, the Committee is concerned at:

(a) The significant overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care;

(b) The serious and widespread discrimination in terms of access to basic services faced by children in vulnerable situations, including minority children, immigrants, and children with disabilities;

(c) The lack of a gender perspective in the development and implementation of programs aimed at improving the situation for marginalized and disadvantaged communities, such as programs to combat poverty or the incidence of violence, especially in light of the fact that girls in vulnerable situations are disproportionately affected;

(d) The lack of action following the Auditor General's finding that less financial resources are provided for child welfare services to Aboriginal children than to non-Aboriginal children; and

(e) Economic discrimination directly or indirectly resulting from social transfer schemes and other social/tax benefits, such as the authorization given to provinces and territories to deduct the amount of the child benefit under the National Child Benefit Scheme from the amount of social assistance received by parents on welfare.

33. The Committee recommends that the State party include information in its next periodic report on measures and programs relevant to the Convention on the Rights of the Child undertaken by the State party in follow-up to the Declaration and Program of Action adopted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as the outcome document adopted at the 2009 Durban Review Conference. The Committee also recommends that the State party:

(a) Take urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care;

(b) Address disparities in access to services by all children facing situations of vulnerability, including ethnic minorities, children with disabilities, immigrants and others;

(c) Ensure the incorporation of a gender perspective in the development and implementation of any programme or stimulus package, especially programs related to combatting violence,poverty, and redressing other vulnerabilities;

(d) Take immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination; and

(e) Undertake a detailed assessment of the direct or indirect impact of the reduction of social transfer schemes and other social/tax benefit schemes on the standard of living of people depending on social welfare, including the reduction of social welfare benefits linked to the National Child Benefit Scheme, with particular

attention to women, children, older persons, persons with disabilities, Aboriginal people, African Canadians and members of other minorities.

Best interests of the child

34. The Committee is concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programs and projects relevant to and with an impact on children. In particular, the Committee is concerned that the best interest of the child is not appropriately applied in asylum-seeking, refugee and/or immigration detention situations.

35. The Committee urges the State party to strengthen its efforts to ensure that the principle of the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programs and projects relevant to and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to the public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgements and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child.

Respect for the views of the child

36. The Committee welcomes the State Party's Yukon Supreme Court decision in 2010 which ruled that all children have the right to be heard in custody cases. Nevertheless, the Committee is concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative processes that impact children.

37. The Committee draws the State party"s attention to its general comment No. 12 General Comment No. 12 (CRC/C/GC/12, 2009), and recommends that it continue to ensure the implementation of the right of the child to be heard in accordance with article 12 of the Convention. In doing so, it recommends that the State party promote the meaningful and empowered participation of all children, within the family, community, and schools, and develop and share good practices. Specifically, the Committee recommends that the views of the child be a requirement for all official decision-making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment. The Committee also urges the State party to ensure that children have the possibility to voice their complaints if the their right to be heard is violated with regard to judicial and administrative proceedings and that children have access to an appeals procedures.

D. Civil rights and freedoms (arts. 7, 8, 13-17, 19 and 37 (a) of the Convention) Birth registration

38. While the Committee notes as positive that birth registration is almost universal in the State party, it is seriously concerned that some children have been deprived of their identity due to the illegal removal of the father's name on original birth certificates by governmental authorities, especially in cases of unwed parents.

39. The Committee recommends that the State party review legislation and practices in the provinces and territories where birth registrations have been illegally

altered or the names of parents have been removed. The Committee urges the State party to ensure that the names on such birth certificates are restored and change legislation if necessary to achieve this.

Nationality and Citizenship

40. While welcoming the positive aspects of the April 2009 amendment to the Citizenship Act, the Committee is nevertheless concerned about some provisions of the amendment which place significant limitations on acquiring Canadian citizenship for children born to Canadian parents abroad. The Committee is concerned that such restrictions, can in some circumstances, lead to statelessness. Furthermore, the Committee is concerned that children born abroad to government officials or military personnel are exempted from such limitations on acquiring Canadian citizenship.

41. The Committee recommends the State party to review the provisions of the amendment to the Citizenship Act that are not in line with the Convention with a view to removing restrictions on acquiring Canadian citizenship for children born abroad to Canadian parents. The Committee also urges the State party to consider ratifying the 1954 Convention relating to the Status of Stateless Persons.

Preservation of identity

42. The Committee is concerned that vulnerable children, including Aboriginal and African Canadian children, who are greatly over-represented in the child welfare system often lose their connections to their families, community, and culture due to lack of education on their culture and heritage. The Committee is also concerned that under federal legislation, Aboriginal men are legally entitled to pass their Aboriginal status to two generations while Aboriginal women do not have the right to pass their Aboriginal status to their grandchildren.

43. The Committee urges the State party to ensure full respect for the preservation of identity for all children, and to take effective measures so as to ensure that Aboriginal children in the child welfare system are able to preserve their identity. To this end, the Committee urges the State party to adopt legislative and administrative measures to account for the rights, such as name, culture and language, of children belonging to minority and indigenous populations and ensure that the large number of children in the child welfare system receive an education on their cultural background and do not lose their identity. The Committee also recommends that the State party revise its legislation to ensure that women and men are equally legally entitled to pass their Aboriginal status to their grandchildren.

E. Violence against children ((arts 19, 37 (a), 34 and 39 of the Convention)

Corporal punishment

44. The Committee is gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code. Furthermore, the Committee notes with regret that the 2004 Supreme Court decision Canadian Foundation for Children, Youth and the Law v. Canada, while stipulating that corporal punishment is only justified in cases of "minor corrective force of a transitory and trifling nature," upheld the law. Furthermore, the Committee is concerned that the legalization of corporal punishment can lead to other forms of violence.

45. The Committee urges the State party to repeal Section 43 of the Criminal Code to remove existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against all age groups of children,

however light, within the family, in schools and in other institutions where children may be placed. Additionally, the Committee recommends that the State party:

(a) Strengthen and expand awareness-raising for parents, the public, children, and professionals on alternative forms of discipline and to promote respect for children"s rights, with the involvement of children, while raising awareness about the adverse consequences of corporal punishment; and

(b) Ensure the training of all professionals working with children, including judges, law enforcement, health, social and child welfare, and education professionals to promptly identity, address and report all cases of violence against children.

Abuse and neglect

46. While the Committee notes initiatives such as *the Family Violence Prevention Program,* the Committee is concerned about the high levels of violence and maltreatment against children evidenced by the *Canadian Incidence Study of Reported Child Abuse and Neglect 2008*. The Committee is especially concerned about:

(a) The lack of a national comprehensive strategy to prevent violence against all children;

(b) That women and girls in vulnerable situations are particularly affected, including Aboriginal, African Canadian, and those with disabilities;

(c) The low number of interventions in cases of family violence, including restraining orders; and

(d) The lack of counselling for child victims and perpetrators and inadequate programs for the reintegration of child victims of domestic violence.

47. The Committee recommends that the State party take into account the Committee"s General Comment No. 13 (CRC/C/GC/13, 2011) and urges the State party to:

(a) Develop and implement a national strategy for the prevention of all forms of violence against all children, and allocate the necessary resources to this strategy and ensure that there is a monitoring mechanism;

(b) Ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and province/territory plans;

(c) Ensure that all child victims of violence have immediate means of redress and protection, including protection or restraining orders; and

(d) Establish mechanisms for ensuring effective follow-up support for all child victims of domestic violence upon their family reintegration.

Sexual exploitation and abuse

48. The Committee notes with appreciation the launching of the National Strategy for the Protection of Children from Sexual Exploitation on the Internet in 2004 and the significant amount of resources allocated to the implementation of this program by the State party. The Committee further notes as positive that the State party has demonstrated considerable political will to coordinate law enforcement agencies to combat sexual exploitation of children on the internet. Nevertheless, the Committee is concerned that the State party has not taken sufficient action to address other forms of sexual exploitation, such as child prostitution and child sexual abuse. The Committee is also concerned about the lack of attention to prevention of child sexual exploitation and the low number of

investigations and prosecutions for sexual exploitation of children as well as inadequate sentencing for those convicted. In particular, the Committee is gravely concerned about cases of Aboriginal girls who were victims of child prostitution and have gone missing or were murdered and have not been fully investigated with the perpetrators going unpunished.

49. The Committee urges the State party to:

(a) Expand existing government strategies and programs to include all forms of sexual exploitation;

(b) Establish a plan of action to coordinate and strengthen law enforcement investigation practices on cases of child prostitution and to vigorously ensure that all cases of missing girls are investigated and prosecuted to the full extent of the law;

(c) Impose sentencing requirements for those convicted of crimes under the Optional Protocol to ensure that the punishment is commensurate with the crime; and

(d) Establish programs for those convicted of sexual exploitation abuse, including rehabilitation programs and federal monitoring systems to track former perpetrators.

Harmful Practices

50. The Committee is concerned that there is inadequate protection against forced child marriages, especially among immigrant communities and certain religious communities such as the polygamous communities in Bountiful, British Columbia.

51. The Committee recommends that the State party take all necessary measures, including legislative measures and targeted improvement of investigations and law enforcement, to protect all children from underage forced marriages and to enforce the legal prohibition against polygamy.

Freedom of the child from all forms of violence

52. Recalling the recommendations of the United Nations Study on violence against children (A/61/299), the Committee recommends that the State party prioritize the elimination of all forms of violence against children. The Committee further recommends that the State Party take into account General Comment No 13 on „The right of the child to freedom from all forms of violence" (CRC/C/GC/13, 2011), and in particular:

(a) Develop a comprehensive national strategy to prevent and address all forms of violence against children;

(b) Adopt a national coordinating framework to address all forms of violence against children;

(c) Pay particular attention to the gender dimension of violence; and

(d) Cooperate with the Special Representative of the Secretary-General on violence against children and relevant United Nations institutions.

F. Family environment and alternative care (arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention)

Family environment

53. The Committee welcomes the State party's efforts to better support families through, inter alia, legislative and institutional changes. However, the Committee is concerned that families in some disadvantaged communities lack adequate assistance in the performance of their child-rearing responsibilities, notably those families in a crisis situation due to poverty. In particular, the Committee is concerned about the number of pregnant girls and teenage mothers who drop out of school, which leads to poorer outcomes for their children.

54. The Committee recommends that the State party intensify its efforts to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities with timely responses at the local level, including services to parents who need counselling in child-rearing, and, in the case of Aboriginal and African Canadian populations, culturally appropriate services to enable them to fulfil their parental role. The Committee further encourages the State party to provide education opportunities for pregnant girls and teenage mothers so that they can complete their education.

Children deprived of a family environment

55. The Committee is deeply concerned at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability. The Committee is also seriously concerned about inadequacies and abuses committed within the alternative care system of the State party, including:

(a) Inappropriate placements of children because of poorly researched and ill-defined reasons for placement;

(b) Poorer outcomes for young people in care than for the general population in terms of health, education, well-being and development;

(c) Abuse and neglect of children in care;

(d) Inadequate preparation provided to children leaving care when they turn 18;

(e) Inadequate screening, training, support and assessment of care givers; and

(f) Aboriginal and African Canadian children often placed outside their communities.

56. The Committee urges the State party to take immediate preventive measures to avoid the separation of children from their family environment by providing appropriate assistance and support services to parents and legal guardians in performance of child-rearing responsibilities, including through education, counselling and community-based programmes for parents, and reduce the number of children living in institutions. Furthermore, the Committee calls upon the State party to:

(a) Ensure that the need for placement of each child in institutional care is always assessed by competent, multidisciplinary teams of professionals and that the initial decision of placement is done for the shortest period of time and subject to judicial review by a civil court, and is further reviewed in accordance with the Convention;

(b) Develop criteria for the selection, training and support of childcare workers and out-of-home carers and ensure their regular evaluation;

(c) Ensure equal access to health care and education for children in care;

(d) Establish accessible and effective child-friendly mechanisms for reporting cases of neglect and abuse and commensurate sanctions for perpetrators;

(e) Adequately prepare and support young people prior to their leaving care by providing for their early involvement in the planning of transition as well as by making assistance available to them following their departure; and

(f) Intensify cooperation with all minority community leaders and communities to find suitable solutions for children from these communities in need of alternative care, such as for example, kinship care.

Adoption

57. The Committee notes as positive the recent court decision in Ontario v. Marchland which ruled that children have the right to know the identity of both biological parents. However, the Committee is concerned that domestic adoption legislation, policy, and practice are set by each of the provinces and territories and vary considerably from jurisdiction to jurisdiction and as a result, Canada has no national adoption legislation, national standards, national database on children in care or adoption, and little known research on adoption outcomes. The Committee is also concerned that adoption disclosure legislation has not been amended to ensure that birth information is made available to adoptees as recommended in previous concluding observations (CRC/C/25/Add.215, para. 31, 2003). The Committee also regrets the lack of information provided in the State party on inter-country adoption.

58. The Committee recommends that the State party:

(a) Adopt legislation, including at the federal, provincial and territorial levels, where necessary, to ensure compliance with the Convention and the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption;

(b) Amend its legislation without delay to ensure that information about the date and place of birth of adopted children and their biological parents are preserved; and

(c) Provide detailed information and disaggregated data on domestic and international adoptions in its next periodic report.

G. Disability, basic health and welfare (arts. 6, 18 (para. 3), 23, 24, 26, 27 (paras. 1-3) of the Convention)

Children with disabilities

59. The Committee welcomes the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2010. While recognizing that progress has been made on the inclusion of children with disabilities within the State party, the Committee is deeply concerned that:

(a) The *PALS (Participation and Activity Limitation Survey)* was last conducted by the State party in 2006 without it having been substituted to date by any other data collection effort on children with disabilities. As a result, there are no global or

disaggregated data since 2006 on which to base a policy on inclusion and equal access for children with disabilities.

(b) There is great disparity among the different provinces and territories of the State Party in access to inclusive education, with education in several provinces and territories being mostly in segregated schools;

(c) The cost of caring for children with disabilities often has a negative economic impact on household incomes and parental employment and some children do not have access to the necessary support and services; and

(d) Children with disabilities are more than twice as vulnerable to violence and abuse as other children and despite an overall drop in homicide rates among the general population, there appears to be an increase in homicide and filicide rates against people with disabilities.

60. The Committee recommends that the State party implement the provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and in light of its General Comment No. 9 (CRC/C/GC/9, 2006), the Committee urges the State party to:

(a) Establish as soon as possible a system of global and disaggregated data collection on children with disabilities, which will enable the State party and all its provinces and territories to establish inclusive policies and equal opportunities for all children with disabilities;

(b) Ensure that all children with disabilities have access, in all provinces and territories, to inclusive education and are not forced to attend segregated schools only designed for children with disabilities;

(c) Ensure that children with disabilities, and their families, are provided with all necessary support and services in order to ensure that financial constraints are not an obstacle in accessing services and that household incomes and parental employment are not negatively affected; and

(d) Take all the necessary measures to protect children with disabilities from all forms of violence.

Breastfeeding

61. While welcoming programs such as *Canada's Prenatal Nutrition Program (CPNP),* the Committee is nevertheless concerned at the low rates of breastfeeding in the State party, especially among women in disadvantaged situations and the lack of corresponding programs to help encourage breastfeeding among all mothers in the State party. The Committee also regrets that despite adopting the International Code of Marketing of Breastmilk Substitutes, the State party has not integrated the various articles of the International Code into its regulatory framework and as a result, formula companies have routinely violated the Code and related World Health Assembly resolutions with impunity.

62. The Committee recommends that the State party:

(a) Establish a program to promote and enable all mothers to successfully breastfeed exclusively for the first six months of the infant"s life and sustain breastfeeding for two years or more as recommended by the Global strategy for Infant and Young Child Feeding; and

(b) Strengthen the promotion of breast-feeding and enforce the International Code of Marketing of Breast-milk Substitutes, and undertake appropriate action to investigate and sanction violations.

Health

63. The Committee notes as positive the free and widespread access to high-quality healthcare within the State party. However, the Committee notes with concern the high incidence of obesity among children in the State party and is concerned by the lack of regulations on the production and marketing of fast foods and other unhealthy foods, especially as targeted at children.

64. The Committee recommends that the State party address the incidence of obesity in children, by inter alia promoting a healthy lifestyle among children, including physical activity and ensuring greater regulatory controls over the production and advertisement of fast food and unhealthy foods, especially those targeted at children.

Mental health

65. The Committee notes with appreciation that the State party provided significant resources to implement the National Aboriginal Youth Suicide Prevention Strategy over a five year period. Despite such programs, the Committee is concerned about:

(a) The continued high rate of suicidal deaths among young people throughout the State party, particularly among youth belonging to the Aboriginal community;

(b) The increasingly high rates of children diagnosed with behavioural problems and the over-medication of children without expressly examining root causes or providing parents and children with alternative support and therapy. In this context, it is of concern to the Committee that educational resources and funding systems for practitioners are geared toward a "quick fix;" and

(c) The violation of both children's and parents' informed consent based on adequate information provided by health practitioners.

66. The Committee recommends that the State party:

(a) Strengthen and expand the quality of interventions to prevent suicide among children with particular attention to early detection, and expand access to confidential psychological and counselling services in all schools, including social work support in the home;

(b) Establish a system of expert monitoring of the excessive use of psycho stimulants to children, and take action to understand the root causes and improve the accuracy of diagnoses while improving access to behavioural and psychological interventions; and

(c) Consider the establishment of a monitoring mechanism in each province and territory, under the ministries of health, to monitor and audit the practice of informed consent by health professionals in relation to the use of psycho-tropic drugs on children.

Standard of living

67. While the Committee appreciates that the basic needs of the majority of children in the State party are met, the Committee is concerned that income inequality is widespread and growing and that no national strategy has been developed to comprehensively address child poverty despite a commitment by Parliament to end child poverty by 2000. The Committee is especially concerned about the inequitable distribution of tax benefits and social transfers for children. Furthermore, the Committee is concerned that the provision of welfare services to Aboriginal children, African Canadian and children of other minorities

is not comparable in quality and accessibility to services provided to other children in the State party and is not adequate to meet their needs.

68. The Committee recommends that the State party:

(a) Develop and implement a national, coordinated strategy to eliminate child poverty as part of the broader national poverty reduction strategy, which should include annual targets to reduce child poverty;

(b) Assess the impact of tax benefits and social transfers for and ensure that they give priority to children in the most vulnerable and disadvantaged situations; and

(c) Ensure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs.

H. Education, leisure and cultural activities (arts. 28, 29 and 31 of the Convention)

Education, including vocational training and guidance

69. While welcoming the State party's various initiatives to improve educational outcomes for children in vulnerable situations, the Committee is concerned about the following:

(a) The need for user fees at the compulsory education level for required materials and activities that are part of the basic public school service for children;

(b) The high dropout rate of Aboriginal and African-Canadian children;

(c) The inappropriate and excessive use of disciplinary measures applied to Aboriginal and African Canadian children in school, such as resorting to suspension and referring children to the police, as well as the overrepresentation of these groups in alternative schools;

(d) The high number of segregated schools primarily for minority and disabled children, which leads to discrimination; and

(e) The widespread incidence of bullying in schools.

70. The Committee recommends that the State party:

(a) Take measures to abolish the need for user fees at the level of compulsory education;

(b) Develop a national strategy, in partnership with Aboriginal and African Canadian communities, to address the high dropout rate of Aboriginal and African Canadian children;

(c) Take measures to prevent and avoid suspension and the referral of children to police as a disciplinary measure for Aboriginal and African Canadian children and prevent their reassignment to alternative schools while at the same time ensuring that professionals are provided with the necessary skills and knowledge to tackle the problems;

(d) Ensure integration of minority and disabled children in educational settings in order to prevent segregation and discrimination; and

(e) Enhance the measures undertaken to combat all forms of bullying and harassment, such as improving the capacity of teachers and all those working at schools and of students to accept diversity at school and in care institutions, and improve conflict resolution skills of children, parents, and professionals.

Early childhood education and care

71. The Committee is concerned that despite the State party's significant resources, there has been a lack of funding directed towards the improvement of early childhood development and affordable and accessible early childhood care and services. The Committee is also concerned by the high cost of child-care, the lack of available places for children, the absence of uniform training requirements for all child-care staff and of standards of quality care. The Committee notes that early childhood care and education continues to be inadequate for children under four years of age. Furthermore, the Committee is concerned that the majority of early childhood care and education services in the State party are provided by private, profit-driven institutions, resulting in such services being unaffordable for most families.

72. Referring to General Comment No. 7 (CRC/C/GC/7/Rev.1, 2005), the Committee recommends that the State party further improve the quality and coverage of its early childhood care and education, including by:

(a) Prioritizing the provision of such care to children between the age of 0 and 3 years, with a view to ensuring that it is provided in a holistic manner that includes overall child development and the strengthening of parental capacity;

(b) Increasing the availability of early childhood care and education for all children, by considering providing free or affordable early childhood care whether through State-run or private facilities;

(c) Establishing minimum requirements for training of child care workers and for improvement of their working conditions; and

(d) Conducting a study to provide an equity impact analysis of current expenditures on early childhood policies and programs, including all child benefits and transfers, with a focus on children with higher vulnerability in the early years.

I. Special protection measures (arts. 22, 30, 38, 39, 40, 37 (b)-(d), 32-36 of the Convention)

Asylum-seeking and refugee children

73. The Committee welcomes the State party's progressive policy on economic migration. Nevertheless, the Committee is gravely concerned at the recent passage of the law entitled, Protecting Canada's Immigration System Act, in June 2012 authorizing the detention of children from ages 16 to 18 for up to one year due to their irregular migrant status. Furthermore, the Committee regrets that notwithstanding its previous recommendation (CRC/C/15/Add.215, para. 47, 2003), the State party has not adopted a national policy on unaccompanied and asylum-seeking children and is concerned that the Immigration and Refugee Protection Act makes no distinction between accompanied and unaccompanied children and does not take into account the best interests of the child. The Committee is also deeply concerned about the frequent detention of asylum-seeking children it being done without consideration for the best interests of the child. Furthermore, while acknowledging that a representative is appointed for unaccompanied children, the Committee notes with concern that they are not provided with a guardian on a regular basis. Additionally, the Committee is concerned about the deportation of Roma and other migrant

children who previous to that decision often await, in a certain status, for prolonged periods of time, even years, such decision.

74. The Committee urges the State party to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards and reiterates its previous recommendations (CRC/C/15/Add.215, para 47, 2003). In doing so, the State party is urged to take into account the Committee's General Comment No. 6 on the "Treatment of unaccompanied and separated children outside their country of origin" (CRC/GC/2005/6, 2005). In addition, the Committee urges the State party to:

(a) Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and ensure that detention is only used in exceptional circumstances, in keeping with the best interests of the child, and subject to judicial review;

(b) Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes, that determination of the best interests is consistently conducted by professionals who have been adequately such procedures;

(c) Expeditiously establish the institution of independent guardianships for unaccompanied migrant children;

(d) Ensure that cases of asylum-seeking children progress quickly so as to prevent children from waiting long periods of time for the decisions; and

(d) Consider implementing the United Nations High Commission for Refugees Guidelines on International Protection No.8: Child Asylum Claims under articles 1(A)2 and 1(F) of the 1951 Convention. In implementing this recommendation, the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child and that immigration authorities be trained on the principle and procedures of the best interest of the child.

Children in armed conflict

75. While noting with appreciation oral responses provided by the delegation during the dialogue, the Committee seriously regrets the absence of information to the follow up on implementation of the OPAC pursuant to Article 8(2). The Committee expresses deep concern that despite the recommendation provided in its concluding observations (CRC/OPAC/CAN/C0/1, para. 9, 2006) to give priority, in the process of voluntary recruitment, to those who are oldest and to consider increasing the age of voluntary recruitment, the State party has not considered measures to this effect. The Committee additionally expresses concern that recruitment strategies may in fact actively target Aboriginal youth and are conducted at high school premises.

76. The Committee reiterates its previous recommendations provided in CRC/OPAC/CAN/C0/1 and recommends to the State party to include their implementation and follow up to OPAC in its next periodic report to the CRC. The Committee further recommends the State Party to consider raising the age of voluntary recruitment to 18, and in the meantime give priority to those who are oldest in the process of voluntary recruitment. The Committee further recommends that Aboriginal, or any other children in vulnerable situations are not actively targeted for recruitment and to reconsider conducting these programs at high school premises.

77. The Committee welcomes the recent return of Omar Kadr to the custody of the State party. However, the Committee is concerned that as a former child soldier, Omar Kadr has not been accorded the rights and appropriate treatment under the Convention. In particular, the Committee is concerned that he experienced grave violations of his human rights, which the Canadian Supreme Court recognized, including his maltreatment during his years of detention in Guantanamo, and that he has not been afforded appropriate redress and remedies for such violations.

78. The Committee urges the State party to promptly provide a rehabilitation program for Omar Kadr that is consistent with the Paris Principles for the rehabilitation of former child soldiers and ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada ruled he experienced.

Economic exploitation, including child labour

79. The Committee regrets the lack of information provided in the State party report regarding of child labour and exploitation, and notes with concern that data on child labour is not systematically collected in all provinces and territories.. The Committee is also concerned that the State party lacks federal legislation establishing the minimum age of employment within the provinces and territories. The Committee also expresses concern that in some provinces and territories, children of 16 years of age are permitted to perform certain types of hazardous and dangerous work.

80. The Committee recommends that the State party:

(a) Establish a national minimum age of 16 for employment, which is consistent with the age of compulsory education;

(b) Harmonize province and territory legislation to ensure adequate protection for all children under the age of 18 from hazardous and unsafe working environments;

(c) Take steps to establish a unified mechanism for systematic data collection on incidences of hazardous child labour and working conditions, disaggregated by age, sex, geographical location and socio-economic background as a form of public accountability for protection of the rights of children; and

(d) Consider ratifying the ILO Convention No. 138 on the minimum age for admission to employment.

Sale, trafficking and abduction

81. The Committee welcomes the passage of Bill C-268 in 2010, which requires minimum mandatory sentences for persons convicted of child trafficking. However, the Committee is concerned about the weak capacity of law enforcement organizations to identify and subsequently protect child victims of trafficking and the low number of investigations and prosecutions in this respect. The Committee is also concerned that due to the complexity of most child trafficking cases, law enforcement officials and prosecutors do not have clear guidelines for investigation and are not always aware of how to best lay charges.

82. The Committee urges the State party to provide systematic and adequate training to law enforcement officials and prosecutors with the view of protecting all child victims of trafficking and improving enforcement of existing legislation. The Committee recommends that such training include awareness-raising on the applicable sections of the Criminal Code criminalizing child trafficking, best practices for investigation procedures, and specific instructions on how to protect child victims.

Help lines

83. The Committee notes as positive the existence of a toll-free helpline for children, which seems to be used by a significant number of children within the State party who have sought psycho-social support for cases of depression, sexual exploitation, and school bullying. The Committee is however concerned that the State party has provided limited resources for the effective functioning of such a helpline.

84. The Committee urges the State party to provide financial and technical support to this helpline in order to maintain it and ensure that it provides 24 hour services throughout the State party. The Committee also urges the State party to promote awareness on how children can access the helpline.

Administration of juvenile justice

85. The Committee notes as positive that Bill C-10 (Safe Streets and Communities Act of 2012) prohibits the imprisonment of children in adult correctional facilities. Nevertheless, the Committee is deeply concerned at the fact that the 2003 Youth Criminal Justice Act, which was generally in conformity with the Convention, was in effect amended by the adoption of Bill C-10 and that the latter is excessively punitive for children and not sufficiently restorative in nature. The Committee also regrets there was no child rights assessment or mechanism to ensure that Bill C-10 complied with the provisions of the Convention. In particular, the Committee expresses concern that:

(a) No action has been undertaken by the State party to increase the minimum age of criminal responsibility (CRC/C/15/Add.215, 2003, para. 57);

(b) Children under 18 are tried as adults, in relation to the circumstances or the gravity of their offence;

(c) The increased use of detention reduced protection of privacy, and reduction in the use of extrajudicial measures, such as diversion;

(d) The excessive use of force, including the use of tasers, by law enforcement officers and personnel in detention centers against children during the arrest stage and in detention;

(e) Aboriginal and African Canadian children and youth are overrepresented in detention with statistics showing for example, that Aboriginal youth are more likely to be involved in the criminal justice system than to graduate from high school;

(f) Teenage girls are placed in mixed-gender youth prisons with cross-gender monitoring by guards, increasing the risk of exposing girls to incidents of sexual harassment and sexual assault.

86. The Committee recommends that the State party bring the juvenile justice system fully in line with the Convention, including Bill C-10 (2012 Safe Streets and Communities Act) in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee"s General Comment No. 10 (2007) (CRC/C/GC/10). In particular, the Committee urges the State party to:

(a) Increase the minimum age of criminal responsibility;

(b) Ensure that no person under 18 is tried as an adult, irrespective of the circumstances or the gravity of his/her offence;

(c) Develop alternatives to detention by increasing the use of extrajudicial measures, such as diversion and ensure the protection of privacy of children within the juvenile justice system;

(d) Develop guidelines for restraint and use of force against children in arrest and detention for use by all law enforcement officers and personnel in detention facilities, including the abolishment of use of tasers;

(e) Conduct an extensive study of systemic overrepresentation of Aboriginal and African Canadian children and youth in the criminal justice system and develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of Aboriginal and African Canadian children and youth, including activities such as training of all legal, penitentiary and law enforcement professionals on the Convention;

(f) Ensure that girls are held separately from boys and that girls are monitored by female prison guards so as to better protect girls from the risk of sexual exploitation; and

(g) Ensure that girls are held separately from boys and that girls are monitored by female prison guards so as to better protect girls from the risk of sexual harassment and assault.

J. Ratification of international human rights instruments

87. The Committee encourages the State party, in order to further strengthen the fulfilment of children"s rights, to ratify the CRC Optional Protocol on Individual Communication. The Committee further urges the State party to ratify ILO Convention No. 138 concerning the minimum age for admission to employment and ILO Convention No. 189 on decent work for domestic workers.

K. Cooperation with regional and international bodies

88. The Committee recommends that the State party cooperate with the Organization of American States (OAS) towards the implementation of the Convention and other human rights instruments, both in the State party and in other OAS member States.

L. Follow-up and dissemination

89. The Committee recommends that the State party take all appropriate measures to ensure that the present recommendations are fully implemented by, inter alia, transmitting them to the Head of State, Parliament, relevant ministries, the Supreme Court, and to heads of provincial and territorial authorities for appropriate consideration and further action.

90. The Committee further recommends that the third and fourth periodic report and written replies by the State party and the related recommendations (concluding observations) be made widely available in the languages of the country, including (but not exclusively) through the Internet, to the public at large, civil society organizations, media, youth groups, professional groups and children, in order to generate debate and awareness of the Convention and its Optional Protocols and of their implementation and monitoring.

M. Next report

91. The Committee invites the State party to submit its next combined fifth and sixth periodic report by 11 July 2018 and to include in it information on the implementation of the present concluding observations. The Committee draws attention to its harmonized treaty-specific reporting guidelines adopted on 1 October 2010 (CRC/C/58/Rev.2 and Corr. 1) and reminds the State party that future reports should be in compliance with the guidelines and not exceed 60 pages. In the event that a report exceeding the page limitations is submitted, the State party will be asked to review and eventually resubmit the report in accordance with the above mentioned guidelines. The Committee reminds the State party that, if it is not in a position to review and resubmit the report, translation of the report for purposes of examination of the treaty body cannot be guaranteed.

92. The Committee also invites the State party to submit an updated core document in accordance with the requirements of the common core document in the harmonized guidelines on reporting, approved at by the fifth inter-committee meeting of the human rights treaty bodies in June 2006 (HRI/MC/2006/3).

Schedule D, Tab 1

COMPLAINT FORM
CANADIAN HUMAN RIGHTS COMMISSION

We the Mississaugas of the New Credit First Nation (MNCFN) Chief and Council wish to lodge, what we believe to be, a 'Prima Facie Case of Systemic Discrimination' against the Department of Indian and Northern Affairs Canada (INAC) on the basis of race and disability.

We receive funding from Indian & Northern Affairs Canada to provide elementary school education to our members residing on our reserve. If any of our member children wish to attend school off reserve their families must pay the tuition costs; this includes access to specialized schools for special needs as well. With regards to Special Education we received $171,123 from INAC for the 08/09 school; 125,143 of which was used in our LSK elementary school to pay the Special Educ. Teacher and four Education Assistants on behalf of 49 students, the balance of $45,980 was targeted to address the needs of our students in the secondary school system (off reserve). This requirement to pay tuition costs (for either public school or specialized public schools) does not apply to parents and their children who live off the reservation.

Chronology of Events:

- Spring 2008 in meeting held between MNCFN educational staff and specialized workers from Landsdowne Children's Centre, the Grand Erie District School Board (GEDSB), Chedoke Medical Centre it was concluded that two special needs children (members) with Downs Syndrome residing in the community could not be accommodated at MNCFN's LSK elementary school

- September 2008 a meeting was held with representatives from the (GEDSB) to identify a school that could meet the needs of the children
  -school in Cayuga holding two seats pending letter of sponsorship at the cost of $175,432 (including transportation) for 2008/09

- In September of 2008 it was brought to the attention of the MNCFN Chief and Council that there were two special needs twins with Downs Syndrome who could not be accommodated at our school
  -Special Education funding for both the elementary and secondary schools provided for 08/09 by INAC was 171,123 (45,980 provincial special needs to support secondary school students, 125,143 LSK –used for Special Educ. Teacher, and four EA salaries to work with 49 LSK children

Signature _____ *Date* Sept 25/09

- October 14/08 MNCFN Council Motion resolved to find funding to support the two children for the 2009-09 school year (council so resolved while recognizing the costs are well beyond the Special Education funds received)
  -Director of Education to research funding sources to cover the costs of equipment and tuition
  -draft letter to INAC to inform that Council has taken interim steps to get the children in school but it is their position that INAC is responsible for the costs and to request meeting to discuss MNCFN needs for special/high cost needs educational funding

- December 08 Chief, Executive Director and Education Director met with INAC officials regarding funding needs for the two Special Needs Children
  -MNCFN position is this is an 'exceptional circumstance' as per clause 5.1 and 5.2 of the Multiyear Funding Agreement with INAC:

  5.1 In the event that exceptional circumstances occur during the term of this Agreement, the council may return to the Minister to seek changes to the level of funding or to obtain assistance.

  5.2 Section 5.1 is intended to address exceptional circumstances (including, but not limited to health, safety and socio-economic issues) which were not reasonably foreseeable at the time this Agreement was entered into and which have a significant impact on the Council's performance of the terms and conditions of this Agreement. In the event the Minister agrees to change the level of funding, that change shall be made by way of an Amending Agreement.

- Dec. 18, 2008 MNCFN Proposal to INAC requesting funding pursuant to sections 5.1 and 5.2 of our Multiyear Funding Agreement:
  -Transportation (5yrs subject to a 3% yearly increase) $38,000
  -Specialized Student Support Services (cost $132,166) yearly request of $97,660
- January 2009 INAC indicates MNCFN to receive one time capital funding in the amount of $93,659 (as discussed in Dec. 08 meeting use to offset transportation costs for the children --ie. Need escorts on bus, with special restraints etc)
  -arrangement made with Caledonia Transport to lease new bus purchased with the funds with actual annual payment being an offset ($11,497) of the costs to transport the two children
- March 10, 2009 INAC indicates the department approved:
  -$16,400 for assistance with tuition and student accommodation costs for 5 yrs.
  -$39,000 one time contribution for transportation costs

Signature _____ *Date* Sept 25/09

- April 9, 2009 INAC clarifies why only a portion of the funding request was approved for the exceptional circumstance:
  The majority of your request fell under funding authorities related to Special Education funding. Currently the Chiefs of Ontario allocate all special education funding as per a formula based approach. As such all funds in this area are exhausted annually INAC cannot provide any additional funds under this authority.

  However the funding that was approved fell under capital, tuition, and student transportation services authorities in which INAC could provide additional dollars:
  -$93,659 purchase special needs vehicle
  -$16,400 for tuition/student accommodation for five years
  -one time contribution of $39,000 for O&M cost related to the special needs transportation vehicle

CONCLUSION: SYSTEMIC DISCRIMINATION ON THE BASIS OF RACE AND DISABILITY

The Canadian Constitution provides for a separation of federal and provincial areas of jurisdiction. The federal government is responsible for Status Indians and their lands, while the provincial governments are responsible for the provision of services such as education. In Ontario as in other provinces children of residents do not have to pay to attend school (revenue is obtained through property tax) including schools that specialize in addressing the needs of special needs children. Generally, children living on reserve receive schooling on reserve (federal schools on reserve have been delegated to band councils through funding arrangements). First Nations who have children in need of Specialized Schools must pay directly to the Municipal school board for such services. As the Special Education funding received from INAC is insufficient to cover such costs, the impact of the First Nation not paying for these costs is a denial of service to children in need, or to pay and possibly place the First Nation in a deficit situation. First Nations that go into a 8% deficit may be placed under third party management by INAC.

This jurisdictional issue and negative impact of denial of service for First Nations was recognized by the Canadian government in the early 1960's with regards to Child Welfare and Social Assistance. That is, the 'catch 22' argument between the federal government and provinces was that the federal government should pay for the services given their Constitutional responsibility for First Nations, while the federal government argued that such services were the Constitutional responsibility of the provinces. Subsequently, the federal government developed a cost-share agreement called the "1965 Welfare Agreement, that Ontario did become a signatory to, and thus addressed the issue of provision of service to First Nations living on reserve. This information is provided to illustrate that jurisdictional issues can and must be addressed to ensure the access to critical services to First Nations living on reserve.

Signature _____ *Date* Sept 25/09

FURTHER DETAILS:

The following paragraphs were inserted by amendment made in January of 2010. They concern the "services" that the special needs children were denied, Canada's role in the provision of those services, and the proper "comparison group."

Disability claim:

Canada discriminated against the two special needs children on the ground of **disability** in relation to "education and schooling services" ("the services") when compared to "children living on the MNCFN reserve without special needs" ("the comparison group"), or in the alternative, when compared to children living elsewhere in Canada and Ontario without special needs.

Canada is engaged in the provision of education and schooling services for children living on the MNCFN reserve and on other First Nations reserves across Canada. For example,

1) Canada funds, and is responsible for, the education and schooling of First Nations children living on reserve;
2) Canada's First Nations elementary/secondary education program pays for on-reserve schools, reimbursement to provinces for First Nations children attending off-reserve provincial schools, and support services such as transportation, counselling, accommodation, and financial assistance;
3) Canada determines the amount of funding available for the education and schooling of on-reserve First Nations children;
4) Canada determines the funding available to accommodate on-reserve special needs First Nations children so that they can receive comparable education and schooling services;
5) Canada has legal and *de facto* control over the level and quality of education and schooling services provided to on-reserve First Nations children; and
6) Canada is one of the main architects of the education system for First Nations children living on First Nations land.

MNCFN also claims that the discrimination against these two special needs children is just one example of Canada's systemic discrimination against special needs children living on the MNCFN reserve and other reserves across Canada concerning the provision of education and schooling services.

Race claim:

Canada discriminated against the two special needs children on the ground of **race** in relation to "education and schooling services (including special education)" ("the services") when compared to "non-First Nations children with special needs living in Ontario, other Canadian provinces, and/or the three Canadian territories" ("the comparison group(s)").

As detailed above, Canada is engaged in the provision of education and schooling services (including special education) to First Nations children living on reserves. In addition, as part of Canada's constitutional federal jurisdiction and responsibility, Canada is engaged in the provision of education and schooling services (including special education) in the three Canadian territories: Yukon, Northwest Territories, and Nunavut. For example,

1) Canada has the ultimate constitutional jurisdiction over all matters in the territories;
2) Canada provides between 70 and 100 percent of the funding for social programs in the territories, including funding for education and schooling services (including special education); and
3) Canada has *de facto* control over the level and quality of education and schooling services (including special education) provided in the territories.

MNCFN also claims that the discrimination against these two First Nations special needs children is just one example of Canada's systemic discrimination against on-reserve First Nations children with special needs in the provision of education and schooling services (including special education) on the MNCFN reserve and across Canada.

Facts relevant to the race and disability claims:

Canada denied the two special needs children education and schooling services when, among other things, it did not provide the funding required to send them to a school that could accommodate their special needs. Although MNCFN has provided the required funding, this cannot continue in the future (as discussed below) and does not change Canada's denial of services. The MNCFN and the education authority for the MNCFN (the LSK Education Authority) do not have enough funding or revenues to accommodate the educational and schooling needs of these two special needs children. Other highly disabled children living on the MNCFN reserve will soon require education and schooling services. MNCFN and the education authority also do not have enough funding or revenues to provide these children with comparable education and schooling services.

The discrimination against the two special needs children is ongoing, as is the related systemic discrimination.

MNCFN retains the right to disclose additional material facts, adjust its position on the legal issues, and seek additional forms of relief later in these proceedings, particularly after the Commission investigation has occurred and in the statement of particulars required under Rule 6 of the *Canadian Human Rights Tribunal Rules Of Procedure.*

Schedule D, Tab 2

CANADIAN HUMAN RIGHTS COMMISSION | COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Assessment Report

PROTECTED

Complaint Information

***Complainant*:** Mississaugas of the New Credit First Nation

***Respondent*:** Indian and Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada)

File Number: 20091016

Section of the Act: 5

Date Accepted: September 28, 2009

***Relevant Grounds*:** National or Ethnic Origin, Race, Disability

Purpose

The purpose of this report is to help members of the Canadian Human Rights Commission (the Commission) decide whether or not the complaint should be sent to the Canadian Human Rights Tribunal (the Tribunal) at this time. An investigation into the complaint has not taken place.

This report is not a decision of the Commission. The Commission can decide:

a) to send the complaint to the Tribunal at any stage after the filing of the complaint under section 49(1) of the *Canadian Human Rights Act* (the Act), or

b) to appoint a conciliator under section 47 of the Act to attempt to bring about a settlement of the complaint, or

c) to send the complaint back for investigation.

The Commission is separate from the Tribunal. The Tribunal is like a court because it hears evidence from the parties in person and can decide questions of law and fact including whether or not there has been discrimination under the Act. If the Tribunal agrees that discrimination has happened, it can make orders to stop the discrimination, to prevent the discrimination from taking place again and to remedy the effects of the discrimination.

When the Commission decides whether or not to send the complaint to the Tribunal without an investigation, the Commission members take into consideration all the circumstances of the complaint including:

a) What is the nature of the dispute between the parties? Is it a purely private dispute or are there allegations of systemic discrimination?

b) Is there information to support the allegations in the complaint?

c) Was the information in support of the allegations contradicted by the respondent?

d) Has the respondent already addressed the complainant's allegations? Have substantial and comprehensive remedies already been provided by the respondent?

e) Would further investigation assist the Commission in making a final determination in the complaint?

f) How is the public interest engaged by this complaint?

N.B.: THIS REPORT IS NOT A PUBLIC DOCUMENT AND IS NOT FOR DISTRIBUTION EXCEPT TO THE PARTIES TO THE COMPLAINT.

28 Dec 2011

Signature: Deirdre Hilary

Date: December 28, 2011

The Complaint

1. The complainant, the Mississaugas of the New Credit First Nation (MNCFN), alleges that children from their community are being discriminated against on the basis of national or ethnic origin, race and disability. The complainant alleges that the failure of Indian and Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada) to provide funding and support to special education on reserve constitutes denial of service to Aboriginal children.

2. The respondent denies the allegation and states that it provides funding for a broad range of programs and services, and it is the complainant that determines how much is spent on education. The respondent maintains that the real provider of education services in this case is the Council itself. The respondent maintains that any differential treatment is in part a result of the choices made by the complainant in its allocation of special education funding.

Background to Complaint

3. This complaint is about service levels for special education for Aboriginal children living on reserve. The complainant states that, unlike special education in the provinces, there is no clear legislative and policy framework for special education on reserve, that funding authorities for special education are limited by a formula-based approach that results in funds being exhausted annually before needs are met, that additional funding must be sought through the "exceptional circumstances" category, and that bands that go into deficit to pay for special education may be placed under third party management by the respondent. The complainant says that it cannot make decisions that meet the special education needs of children on reserve because it only administers the money it receives through the respondent's funding formulas.

4. The MNCFN received $171,123 for special education from INAC for the 07/08 school year; $125,143 of which was used in the community's elementary school to pay the Special Education Teacher and four Education Assistants on behalf of 49 students. The balance of $45,980 was targeted for students in the secondary school system (off reserve). The MNCFN has stated that the money received was insufficient to meet the special education needs of Aboriginal children on reserve.

5. In the Spring of 2008 issues regarding the education of two special needs twins with Downs Syndrome arose. The complainant contacted the respondent regarding additional funding for the 'exceptional circumstance' as per clause 5.1 and 5.2 of the Multi year Funding Agreement.

6. The complainant received $164,949 in funding for special education in 08-09. The complainant requested an additional one time amount of $238,482 for miscellaneous education expenses. The breakdown of this request for additional funding was as follows:

   - $93,700 for a one time bus purchase;
   - $40,000 for one year of operation and maintenance of the bus;
   - $81,260 for special education needs;
   - $16,022 for tuition; and
   - $7,500 for specialized equipment.

7. Following discussions regarding the request, the respondent provided the following additional funding:

   - $93,659 for the actual cost of a one time bus purchase;
   - $39,000 for bus operation and maintenance;
   - $16,400 for tuition; and
   - $5,000 for one time specialized equipment.

In total, the respondent provided additional funding to the complainant in the amount of $154,059. The additional funding requested for special education was not granted.

8. The complainant maintains that the respondent told them that only a portion of the funding request was approved for the exceptional circumstance because:

> *The majority of your request fell under funding authorities related to Special Education funding. Currently the Chiefs of Ontario allocate all special education funding as per a formula based approach. As such all funds in this area are exhausted annually. INAC cannot provide any additional funds under this authority.*

The complainant maintains that while the Chiefs approved a formula for distributing special education funds, they have not conceded that funding is adequate to meet needs or to provide provincially equivalent services.

9. When the complaint was first filed, the respondent made an objection, pursuant to section 41(1)(c) of the *CHRA,* stating that the complainant had not provided reasonable grounds for believing that the alleged discrimination is based on a prohibited ground, and that the facts alleged in the complaint did not constitute a discriminatory practice. The respondent also argued that, pursuant to section 41(1)(d) of the Act, the respondent was not the real provider of education services, and the complainant made the choices that resulted in any differential treatment. On August 11, 2010, the Commission decided to deal with the complaint, reasoning it is not plain and obvious that members of the complainant First Nations are not being discriminated against on grounds of their national or ethnic origin.

10. The respondent continues to maintain that the complaint is beyond the jurisdiction of the Commission, pursuant to sections 41(1)(c) and (d) of the *CHRA.*

Jurisdiction

Respondent's position

11. The respondent maintains that its role is as a funder to the complainant, and that it has no control over the provision of services. The respondent maintains it is not involved in the day to day operations of education for the complainant.

12. The respondent says that the complaint is about the cost of provincial special education, and not about discrimination on the grounds of race and disability. The respondent argues that any differential treatment as between the federal and provincial governments is based on their constitutional jurisdictions. The respondent maintains that there cannot be a cross-jurisdictional comparison between two separate and distinct entities. The respondent cites the Tribunal decision in *First Nations Child and Family Caring Society of Canada et al.* vs. *Attorney General of Canada* 2011 CHRT 4 wherein the Tribunal concluded that even if INAC is a service provider, it cannot be compared to a provincial service provider.

Complainant's position

13. The complainant says that while it may be difficult to compare two service providers in the typical human resources cases, the situation of First Nations people is particular. The complainant argues that the federal government generally provides services on reserve (mainly to First Nations) whereas the provincial governments provide mostly off-reserve services (mainly to non-First Nations people). Therefore, if First Nations people are not entitled to compare the level of service they receive with another service provider, they are not entitled to the same government services as non-First Nations people, and would be excluded from the protections of the CHRA.

14. The complainant also alleges discrimination on the basis of disability, in that disabled children on reserve are treated in an adverse differential manner compared to non-disabled children on reserve. The complainant relies on the Supreme Court of Canada decision, *Withler v. Canada (Attorney General)* 2011 SCC 12 at pps. 59 and 60, that finding an appropriate comparator group may be impossible, and a mirror comparator may fail to capture substantive equality.

Analysis

15. This complaint raises allegations under section 5 that arguably could be analysed under ss. 5(a) and (b).[1] The ss. 5(a) allegation relates to whether Aboriginal children on reserve are denied access to the benefit of INAC's policy of providing special education services on reserve that are reasonably comparable to those of the provinces. The ss. 5(b) allegation is whether Aboriginal children on reserve who require special education services are treated differently and in a negative way compared to children who live off reserve.

16. In *First Nations Child and Family Caring Society of Canada et al.* vs *Attorney General of Canada*, the Tribunal held that section 5(b) of the CHRA, requires a comparison, that the choice of an appropriate comparator is "a pure question of law" (at para. 107), and that the comparison must be within the same service provider. The Tribunal went on to find that comparisons between two service providers are not permitted and, even if they were, "the CHRA does not allow INAC as a service provider to be compared to the provinces and service providers" (at paras. 4 and 128 to 131). However, the Tribunal held that comparisons are not required under ss. 5(a) (at para. 125).

17. It would appear that the allegations could be considered under ss. 5(a) and/or (b). Based on this, the *Child and Family Caring Society* decision is mixed in its support for the respondent's position that the complaint should not be dealt with because it requires comparisons with provincial special education services. If the complaint is considered under (a), comparisons are not required. Under (b), comparisons may be required.

18. Furthermore, the *Child and Family Caring Society* decision is currently being judicially reviewed by the Federal Court of Canada. One of the issues that the Federal Court will consider is the impact of the decision of the Supreme Court of Canada in the Withler case. The requirement of a strict comparator group in the analysis of allegations of discrimination was rejected by the Supreme Court. In its decision, the Supreme Court stated the following:

> *A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group.*

19. The respondent says that the complaint should not be dealt with pursuant to s.41(1)(d) as its role is as a funder to the complainant, and that it has no control over the provision of service. It should be noted that the issue of whether funding can be considered a service, pursuant to s. 5 of the CHRA, is not settled as a decision is yet to be made by the Federal Court on the matter. In the meantime, the Commission continues to deal with complaints where the allegation pertains to an alleged discriminatory level of funding on the basis of a prohibited ground of discrimination.

20. Based on the foregoing, it appears that the complaint raises serious and unsettled issues of law, and mixed fact and law that warrant further inquiry. The Tribunal is a quasi-judicial body and under s. 50(2) of the CHRA, has jurisdiction to decide "... all questions of law or fact necessary to determining the matter".

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[1] In another case the Tribunal decided that both subsections were infringed: *Hughes v. Elections Canada*, [2010] C.H.R.D. No. 4.

Is there information to support the allegations in the complaint?

21. The information provided by the parties has been analysed using the following framework that is based on section 5 of the CHRA.

Step 1:

Does the available information tend to support the Complainant's allegation of a denial of special education services or adverse differential treatment in special education services, to children living on reserve, specifically:

i. Are special education services for children on reserves "services... customarily available to the general public"?

ii. Does the respondent deny or differentiate adversely with respect to the provision of special education services to children on reserve?

iii. Is the denial of special education services and/or the adverse differential treatment with respect to special education services, linked to national or ethnic origin, race and/or disability?

Step 2:

Depending upon the findings in Step 1, the Commission may also consider:

i. Has the respondent provided a reasonable explanation for its actions that is not a pretext for discrimination on the basis of national or ethnic origin, race and/or disability?

Step 1:

i. Are special education services for children on reserve "services... customarily available to the general public"?

22. This issue was addressed in the "Jurisdiction" section above. As noted, the respondent asserts that the complaint is about funding and INAC funding is not a service under section 5. The complainant says that the complaint is about more than funding and that in any event, funding is a service. By determining how much funding is available, the complainant says that INAC effectively controls the level and quality of education and schooling services provided.

23. By way of decision dated July 14, 2010, the Commission decided under s. 41(1)(c) of the CHRA to deal with the complaint because, amongst other reasons, INAC's "... role and responsibilities in funding education in the context of the allegations raised in the complaint are unclear".

24. INAC's website provides the following information regarding its Special Education Program which it lists as a program activity:

> *The Special Education Program (SEP) provides investments in programs and services for students ordinarily resident on reserve with identified special education needs. Program funds are targeted to improve the quality of education and levels of support services for eligible students with special needs classified as moderate to profound. The objective is to allow students to achieve their fullest potential and be contributing members of society, as well as increase the numbers of high cost special needs students acquiring a regular high school diploma.*
>
> Reference: http://www.aadnc-aandc.gc.ca/eng/1100100014714

Analysis

25. The evidence appears to indicate that the respondent may do more vis-à-vis special education on reserve than simply provide funding. As explained on its website, INAC has a program regarding special education.

ii. Does the respondent deny or differentiate adversely with respect to the provision of special education services to children on reserve?

Complainant's position

26. The complainant says that, in addition to inadequate funding to meet the needs of children on reserve requiring special education, INAC's involvement with special education on reserve goes beyond funding. Specially, they claim that the funding formula which is established by INAC has limits and restrictions which result in First Nations children with special needs being denied educational opportunities. The lack of special education services on reserve means that First Nations children with special needs must then go off-reserve, and communities pay the municipal school board for services. The result is either a denial of educational services to children in need, or if the money is paid by the band, a potential deficit situation which could result in a First Nation being placed under third party management.

Respondent's position

27. The respondent does not specifically deny that children on reserve are discriminated against in the provision of special education services. However, it says that it is the complainant who "... must ensure that the educational programs and services are comparable to the programs and services in the province."

28. The respondent further states that it has no control over the provision of services as required by section 5 of the CHRA. "INAC is not involved in the day to day operations of education nor does it dictate or control how the Council spends the funds that it receives. INAC is not responsible for the educational standards, nor does it employ teachers or otherwise provide educational services."

Analysis

29. It appears that INAC's policy is to support the provision of special education services on reserve that are reasonably comparable to those of the provinces and territories. The available information shows that, generally speaking, the range and quality of special education services on reserve appear to fall short of this policy. INAC does not expressly deny this although it says that it is not responsible, as it is the result of policy choices made by the complainant.

30. The objectives and services of the Special Education Program are described as follows:

> *The objective of the Special Education Program is to improve the educational achievement levels of First Nations students on reserve by providing access to special education programs and services that are culturally sensitive and meet the provincial standards in the locality of the First Nations.*
>
> *Programs and services available to students generally include, but are not limited to, providing support such as hiring special-education teaching staff and assistants, professional services such as speech language pathologists and counsellors, and specialized programs and assistive technology to meet the students' special needs and enhance their quality of education.*
> Reference:
> http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2008/page09.shtml

31. The complainant and the respondent disagree about whether the respondent has any responsibility for the shortcomings in special education services on reserve. There is evidence, including evidence from government websites, that the respondent's role may go beyond providing funding.

iii. Is the denial of special education services and/or the adverse differential treatment with respect to special education services, linked to national or ethnic origin, race and/or disability?

Complainant's position

32. The complainant states that while provinces and territories provide programs, services, policies and legislation for special education, the needs of First Nations special education students are largely ignored or forgotten. Thus, they say that non-Aboriginal children with special needs receive better services than First Nations children.

33. In support of their position, the complainants provided "First Nations Education Policy in Canada: Progress or Gridlock" by Jerry Paquette. On page 231, Dr. Paquette concludes that INAC's funding for special education "is reflective of service levels well below current provincial norms when the very high incidence rates in First Nations student populations is taken into consideration, and is well below any reasonable estimate of overall assessment and service need in First Nations communities."

34. The assessor reviewed a number of additional reports and documents provided by the complainant, which support its position, including the following:

- Auditor General of Canada, Status Report of the Auditor General of Canada to the House of Commons, Chapter 4 Programs for First Nations on Reserves, 2011
- Harvey McCue Consulting, First Nations 2nd & 3rd Level Education Services, A Discussion Paper of The Joint Working Group, April 2006
- Paquette, Jerry and Smith, William J., "Equal Educational Opportunity for Native Students: Funding the Dream," Canadian Journal of Native Education vol. 25, no. 2, 2001, 129
- Phillips, Ron, "Forgotten and Ignored: Special Education in First Nations Schools in Canada," Canadian Journal of Educational Administration and Policy, Issue 106, June 7, 2010
- Phillips, Ron, "Special Education in First Nations Schools in Canada: Policies of Cost Containment" Alberta Journal of Educational Research, Vol. 56, No. 1, Spring 2010, 72

35. The complainant provided the following chart comparing special education services on and off reserve:

Some Differences Between Special Education Services On and Off Reserves

Special Education On Reserves	Ontario's Special Education System
There is no legal right to free and appropriate special education in the *Indian Act* (see Education Act, R.S.O. 1990, c. E.2, s. 8(3))	All children have a legal right to free education and appropriate special education under provincial laws
Guaranteed funding insufficient to meet provincial standards regarding identification, assessment and programming	Provincial standards require all school boards to identify and assess special needs children and to purchase special education programs and services for all school age children regardless of exceptionality.
There are no specialized legal procedures or rights for First Nations parents to ensure their children get appropriate services	Parents can use provincial laws to ensure their children get appropriate services (e.g. parents can appeal decisions made about their children[2])
Some children may not get services unless the family or First Nation can pay	Children are guaranteed special education services paid for by school boards
Specialists (e.g. speech therapists) often unavailable or very expensive	Specialists (e.g. speech therapists) available from school board
Little or no funding for high-level curriculum creation and policy setting	Provincial ministry provides high-level curriculum planning and creation and policy setting and compliance
Smaller education departments have small budgets that cannot absorb costs of certain students with high needs	Larger school boards have large budgets that can afford high cost services, benefit from economies of scale, and can balance out high cost cases

Analysis

Special Education in Canada

36. All provinces and territories have a legal regime for providing special education services for those children for whom it is necessary. In Ontario, the special education needs of non-First Nations children are addressed in s.8(3) of the *Education Act* which requires school boards to:
- implement procedures for the early and ongoing identification of the learning abilities and needs of students;
- define exceptionalities of pupils and to prescribe classes, groups or categories of exceptional pupils and to require the use of these definitions by school boards;
- provide an appeal process for parents concerning special education identification and/or placement decisions;
- ensure that special education programs and services are provided without payment of fees by school boards to their exceptional pupils.

Special Education for First Nations

37. While the *Constitution Act, 1867* gives responsibility for education to the provinces and territories generally, responsibility for "Indians and Lands reserved for Indians" is given to the federal government. Education of First Nations students on reserves is provided

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[2]See, for example, *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

for in various treaties and under ss.114 and following of the *Indian Act.* Various INAC documents affirm the federal government's responsibility to provide for the education of First Nations children. In addition, the recent *Status Report of the Auditor General*, June 2011, includes a section (p.12) on the federal government's "unsatisfactory progress" in improving First Nations education.

38. The complainant says that the federal government does not have an education act for First Nations students, and for students with special needs there are only policies and guidelines. It maintains that the respondent's special education for First Nations is flawed and under-funded, stating that the terms and conditions do not ensure that First Nations children living on reserve will receive appropriate special education services – as do neighbouring non-First Nations children.

39. The respondent states that First Nation communities themselves govern education, including special education. The respondent maintains that its role in special education is limited to providing funds for general and special education programs and services. In terms of general education, INAC provides funding for elementary and secondary education of students living on reserve and reimbursement for students attending provincial schools off reserve. In the latter case, the MNCFN negotiates its own tuition agreements with the school board. The respondent states that it is not a party to these agreements.

40. The complainant notes that these agreements arise when First Nations communities lack any capacity to provide for some special needs children. As a result, they are required to leave their communities to attend off-reserve public schools. The complainant maintains that the respondent does not provide sufficient funding for First Nations communities to receive special education in the provincially funded schools, when necessary.

41. In support of this position, the complainant provided a letter from the President of the Ontario Public School Boards' Association to INAC, published in their newsletter at http://www.opsba.org/index.php?q=advocacy_and_action/aboriginal_issues/aboriginal_students_and_special_education. The letter (attached as Appendix A) expresses concern about the respondent's funding decisions on the special education services provided to First Nations children by the public boards, and states:

> • The per pupil amount approach to funding for special education adopted by INAC does not reflect the incidence of high needs or the costs of particular supports, including educational assistants, that some students need.
>
> • education funding for First Nations students with special needs should be restructured to recognize the real costs of providing First Nations students with the support to which they are entitled, and ensuring that First Nations receive services comparable to those available to other Canadian residents.

42. The respondent maintains that funding for special education is calculated by a formula proposed by the Ontario First Nation Special Education Working Group. The complainant notes that this funding formula simply divides and allocates an overall, set amount of funding, which is insufficient to begin with. The formula does not determine the overall amount available; that decision is made unilaterally by the respondent. The complainant also maintains that the funding formula does not in any way limit or prevent the respondent from providing additional funding to First Nations when required to meet provincial standards.

43. The complainant provided documentation indicating that the Chiefs of Ontario have clearly indicated that, by approving the funding formula, they do not concede that funding is adequate to meet needs or to provide provincially equivalent services.

Special Education for MNCFN Children

44. The complainant maintains that the respondent has justified its refusal to pay for the two special needs twins' education by saying that it already provides yearly special education funding to MCNFN, and that the twins' education should be paid for using those funds. The respondent also notes that it has provided additional funding to the complainant to pay for the special costs for the twins. The information provided to the Commission suggests that MNCFN's existing special education funding allocation may be insufficient to pay for the special needs twins' education, since they attend an off-reserve provincial school because of their high special needs.

45. The evidence gathered indicates that the provincial school board charges the Band over $80,000 per year to provide the required special education services. The complainant provided a spread sheet indicating that since 2008, MNCFN's special education allocation has equalled between $160,000 and $190,000. Thus, the cost of these two high needs children would take up roughly half of the MNCFN's budget. An examination of the overall special education funding vs. the costs for the special needs twins indicates the following:

	2008-2009	**2009-2010**	**2010-2011**
Total special education allocation from INAC to MNCFN	$164,949.00	$171,903.00	$166,990.00
Special education for the twins (charged by provincial school board)	$116,983.03	$ 81,342.03	$84,160.00
Special education budget for remaining special needs children on reserve	$ 47,966.00 for 28 children*	$ 90,561.00 for 23 children*	$ 82,830.00 for 23 children*

* these numbers only include special education needs as identified in the nominal roll at the beginning of the school year and do not include students with high cost special needs who have not yet been formally identified, but who are on an Individualized Education Program; students who are awaiting assessment of high cost special needs; and students who may have undiagnosed special needs (e.g. learning disabilities, behaviour issues, ADD, ADHD, etc.)

It appears that the provincial school boards recognize that the cost per child for special education can range from $40,000 to $58,000, depending on the needs, existing services and infrastructure. The current funding regime leaves the complainant in a situation whereby they have to provide special education funding for the remaining special education children on as very limited budget.

Step 2:

Depending upon the findings in Step 1, the Commission may also consider:

i. **Has the respondent provided a reasonable explanation for its actions that is not a pretext for discrimination on the basis of national or ethnic origin, race and/or disability?**

Respondent's position

46. The respondent maintains that pursuant to the Funding Agreement, it is the Band Council that controls the funds in question and requires only limited reporting to INAC as to how these funds are allocated for educational services. Furthermore, the MNCFN has the ability to shift the funds between programs and services as needed.

Complainant's position

47. The complainant says that INAC's own policy is to provide First Nations special education that is not inferior in quality to mainstream provincial special education or, at the very least, to put First Nations in a position where they can do so themselves. They claim that this is not happening. The complainant says that the special educational services should be culturally appropriate, and the respondent should:

> (1) Ensure that First Nations children with special needs are adequately identified and assessed;
> (2) Ensure that specialized services are available for First Nations children;
> (3) Ensure that First Nations children benefit from second and third level services (e.g. curriculum development, policy setting and compliance, specialized services, strategic planning, etc.), which are typically provided in non-First Nations communities by school boards and the provincial education ministry;
> (4) Guarantee First Nations children the same right to special education held by children in the mainstream provincial system (see Education Act, R.S.O. 1990, c. E.2, s. 8(3));
> (5) Guarantee First Nations parents the same right to have input into their children's education and to ensure their children receive appropriate special education services; and
> (6) Provide the funding required for equivalency in services.

Analysis

48. Both parties agree that funding is provided to the MNCFN pursuant to a multi-year Funding Agreement. The Funding Agreement allows the Council to control the funds in question and requires only limited reporting to INAC as to how these funds are allocated for educational services. The MNCFN has the ability to shift the funds between programs and services as needed.

49. However, the complainant provided evidence indicating that the current arrangement, including the funding formula, does not appear to fulfil the objectives of the respondent's Special Education Program. The complainant cites a letter from the Ontario Public School Boards's Association which states that the current funding decisions do not reflect the incidence of high needs or the costs of particular supports, that some students need. The letter states that the current situation does not ensure that First Nations students receive services comparable to other Canadian children.

50. The funding arrangements mean that INAC controls how the Council can ask for money (e.g., through "exceptional circumstances" funding or otherwise) and limits how much money is available. INAC sets the standard for services (reasonably comparable level to the provinces) although the Council appears hampered in meeting that standard because INAC does not define the range or quality of services that will be funded nor does it provide an adequate framework or funding for the management and delivery of those services.

Is the information provided by the parties contradictory?

51. On the jurisdictional issue, the parties have opposing views as to whether the respondent is providing a service. As to the merits, the respondent states that any issues relating to the provision of special education services are a result of policy choices made by the complainant.

52. The available information suggests that the parties see the allegations of discrimination very differently. While the respondent does not contradict the complainant's allegation that Aboriginal children are disadvantaged in special education services on reserve, it sees

its role as limited to providing funding. It does not consider whether there are practices (e.g., lack of defined service levels, lack of legislative and policy framework, etc.) for which it has responsibility that contribute to Aboriginal children not receiving the special education services they need. In contrast, while the complainant focusses on the fact that the amount of money received is inadequate, it highlights broader issues such as the lack of a policy and legislative framework and guaranteed levels of service.

53. A tribunal hearing would afford both parties the opportunity to provide evidence and explain their point of view. A decision from a tribunal following a full hearing appears necessary in order to clarify complex factual issues including whether the role of the respondent is limited to funding or whether it is broader. Further, the complaint raises serious and unsettled legal issues some of which require complex factual determinations including whether funding is a service and what constitutional and treaty obligations the federal government may have in relation to special education services on reserve. A quasi-judicial hearing is well-suited to addressing and deciding on such issues.

Has the respondent already addressed the complainant's allegations? Have substantial and comprehensive remedies already been provided by the respondent?

54. From the evidence gathered, it does not appear that the respondent has provided a remedy to the complainant's allegations, particularly with regard to the broader systemic implications of this issue.

Would further investigation assist the Commission in making a final determination in the complaints?

55. There are several studies which appear to point to potential inequalities in all aspects of education and service for First Nation children with special needs. Furthermore, the evidence gathered indicates that the complaint raises legal and factual questions which are best addressed by a Tribunal, with the power to hear evidence from the parties in person, and witnesses including experts.

How is the public interest engaged by this complaint?

56. The CHRA's purpose is to extend the laws in Canada "to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have ... without being hindered in or prevented from doing so by discriminatory practices." Under Article 28 of the United Nations Convention on the Rights of the Child, children have the right to education on the basis of equal opportunity. In addition, under Article 8, States parties undertake to respect the right of the child to preserve their "ethnic identity" and Article 30 provides that an indigenous child shall not be denied the right to enjoy his or her own culture.

57. The Auditor General's Status Report 2011 notes the inequality in education generally for First Nations children, and states that the gap is widening. The report notes concerns regarding structural impediments, a lack of clarity about service levels, and inadequacies with respect to legislative frameworks, appropriate funding mechanisms and organizational support.

58. It appears that the situation of the particular special needs children represented in this complaint may be indicative of a broader systemic issue affecting First Nations communities across Canada. While a recent National Panel on First Nation Elementary and Secondary Education is engaged in developing options, including legislation, to improve elementary and secondary education for First Nation children who live on reserve, there is nothing in its mandate to indicate it is addressing the needs of special education children. http://firstnationeducation.ca/home/panel-mandate.

59. For all of the reasons above, there is a compelling public interest in examining further the human rights implications of the differences in the special education regimes that may be a part of the long-standing divergence of educational outcomes for First Nation children in communities across Canada.

Conclusion

60. Many reports and studies suggest that the current funding levels, legal and policy frameworks and community supports for First Nation special education may not be sufficient to provide substantive equality in education outcomes for First Nation children. Despite efforts to make progress, it appears that a less comprehensive legal and policy framework for First Nations, an overall lower level of on-reserve infrastructure and community supports, and inadequate services available to schools on reserves all appear to contribute to persistently lower outcomes for First Nation as compared to the rest of Canada. This may indicate a possible discriminatory impact under the CHRA, and as such, further inquiry may be warranted.

61. The information gathered during this assessment suggests that special needs children living in the complainant's community are disadvantaged as compared to other, non-First Nations children in regard to the educational services they receive. Given the current evidence of disparity in educational outcomes considered in this case, combined with the complexity of the systemic issues and the fundamental, compelling, and long standing public interests engaged by this complaint, it is recommended this issue be referred for further inquiry.

Recommendation

62. It is recommended, pursuant to section 49(1) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:

- the issues of whether the respondent is a service provider and whether funding is a service within the meaning of section 5 of the *Canadian Human Rights Act,* warrant further inquiry;
- the available evidence appears to indicate that children living on reserve are denied special education services and/or differentiated against adversely in the provision of special education services;
- given the conflicting evidence, the positions of the parties and the need to determine complex issues of fact and law, further investigation will not assist in resolving the complaint; and
- in all the circumstances of the complaint, further inquiry is warranted.

Encl. Appendix A

Appendix A

Rick Johnson
President

GAIL ANDERSON
Executive Director

ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

439 UNIVERSITY AVENUE, 18th FLOOR, TORONTO, ONTARIO M5G 1Y8
TELEPHONE: (416) 340-2540 ! FAX: (416) 340-7571

November 27, 2006

The Honourable Jim Prentice
Minister for Indian and Northern Affairs Canada

Dear Minister Prentice

The Ontario Public School Boards' Association (OPSBA) represents public district school boards and public school authorities across Ontario, which together serve more than 1.3 million public elementary and secondary students. Our members include First Nations trustees who have responsibility for the agreements under which First Nations students receive education in provincially funded schools.

It is a matter of grave concern to First Nation trustees and to the entire Board of Directors of the Ontario Public School Boards' Association that the Department of Indian and Northern Affairs Canada took a decision at the end of the last school year to reduce the funding for First Nations special needs students. Funding reductions experienced by individual First Nations ran as high as $325,000 and the impact for students is severe. The per pupil amount approach to funding for special education adopted by INAC does not reflect the incidence of high needs or the costs of particular supports, including educational assistants, that some students need.

We believe that every student in our provincial schools deserves the level of assistance and support that will help them achieve their full potential. INAC's funding decision shortchanges First Nations students and runs counter to equity of opportunity.

We respectfully request that the matter of education funding for First Nations students with special needs be re-opened and that funding be restructured to recognize the real costs of providing First Nations students with the support to which they are entitled. Your Department's mandate includes ensuring that First Nations receive services comparable to those available to other Canadian residents. Equitable treatment for students with special needs is one of these services.

We look forward to hearing from you on this matter.

Sincerely

Rick Johnson
President