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Human Rights Complaints

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PBLI Canadian Aboriginal Law 2013 Forum
Ottawa
November 26 & 27, 2013

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A civilization which for any reason puts a human life at a disadvantage; or a civilization which can exist only by putting human life at a disadvantage; is worthy neither of the name nor of continuance. And a human being whose life is nurtured in an advantage which has accrued from the disadvantage of other human beings, and who prefers that this should remain as it is, is a human being by definition only, having much more in common with the bedbug, the tapeworm, the cancer, and the scavengers of the deep sea.

James Agee, *Cotton Tenants: Three Families*

I. Prologue

For over 30 years, from the time it came into force in 1977 until 2008, the *Canadian Human Rights Act* (CHRA), R.S.C. 1985, c. H-6, included an exception in s. 67 that provided that: "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

The Federal Court of Appeal explained that because at the time, "the *Indian Act* still contained provisions such as section 14 that were recognized as discriminating against women," therefore "the original objective of section 67 was to immunize the *Indian Act* and its regime from scrutiny under the *Canadian Human Rights Act*": *Canada (Human Rights Commission) v. Gordon Band Council (C.A.)*, [2001] 1 F.C. 124 (C.A.), para. 23. Section 67 remained in the CHRA even after the gender discrimination was partly eliminated in 1985 by Bill C-31: *Id.*, para. 24.

The effect of s. 67 was to give the Canadian Human Rights Commission a reason to decline to refer a complaint to the Canadian Human Rights Tribunal or, if the Commission decided that the exception did not apply, to give Band Councils the basis for a preliminary objection to the Tribunal's jurisdiction before the complaint was heard.

When reviewing the Tribunal's judgments, the Federal Courts developed the principle that s. 67 immunized "decisions that, by virtue of their subject-matter, are within the authority expressly granted by a provision of the *Indian Act*." For instance, a Band member who had regained status under Bill C-31 was unable to challenge a decision of her Council that excluded her from housing allocations. The Federal Court of Appeal held that since the decision was taken in the exercise of Council's authority under s. 20 of the *Indian Act* concerning possession of lands in reserves, the Canadian Human Rights Tribunal was precluded by s. 67 of the CHRA from granting any remedy to the member: *Id.*, para. 20, 30.

Nevertheless, s. 67 was far from immunizing all Council decisions from human rights complaints. For instance, a decision to refuse social assistance to all non-Indians living on a Band's reserve was successfully challenged by a member's non-Indian spouse. The Tribunal and the Federal Court both held that in the absence of any "evidence to suggest that the decision was

made pursuant to a provision of the *Indian Act*," the Council could not rely on s. 67 to escape review under the CHRA: *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (1997), [1998] 2 FC 198 (T.D.). Similarly, s. 67 did not prevent the Tribunal from hearing complaints of discrimination in employment: *Desjarlais v. Piapot Band No. 7*, [1989] 3 F.C. 605 (T.D.); *Malec et autres c. Conseil des Montagnais de Natashquan*, 2010 TCDP 2.

In addition, once the guarantee of equality rights in s. 15 of the *Canadian Charter of Rights and Freedoms* came into effect in 1985, all legislation and government decisions – including those under the *Indian Act* and those by Band Councils – became subject to review by the courts, separately from the CHRA: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.

When in 2007 the Standing Committee on Aboriginal Affairs and Northern Development considered Bill C-44, which proposed to and did in fact repeal s. 67 of the CHRA, I appeared as a witness on behalf of the Barreau du Québec and made a comment that now to me appears far too pessimistic, even as I identified a key issue:

> …It is worth keeping in mind that the whole model of the *Canadian Human Rights Act*, which has many good points, is about individuals making complaints. The abrogation of section 67 will expand the number of points on which a member of the community can complain about how the limited resources of that community are distributed. The *Canadian Human Rights Act* is not something that lends itself very well to that community getting more resources from the federal government or from other places. This could push the conflict inward over how limited resources get distributed.
>
> Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, 39th Parliament, 1st Session, *Evidence*, Number 050, 8 May 2007, §1150

My comments proved prophetic because in recent years, the Canadian Human Rights Tribunal has been seized of a number of important cases concerning programs and services provided on reserve, which will be discussed in this paper.

However, my comments were unduly pessimistic because the cases are not based on complaints by members (or other residents) against Band Councils. Instead, those councils and related organizations have been bringing complaints against the federal government for precisely the inadequate funding that has limited the resources available.

II. The problem: Aboriginal inequality

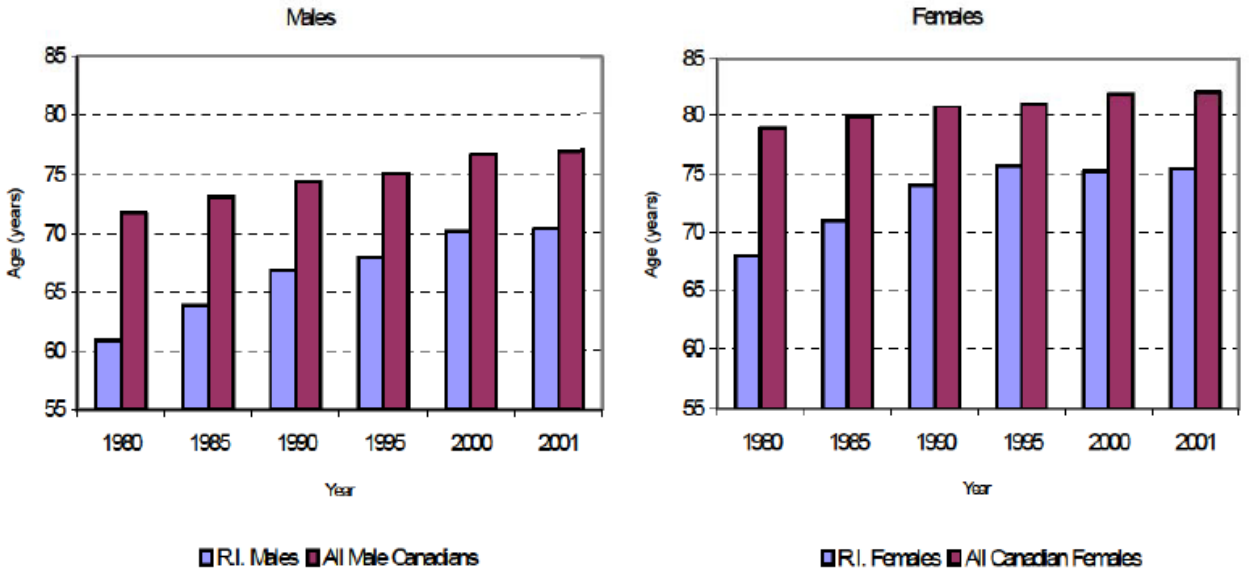
Shortly before she retired in 2011, then-Auditor General of Canada Sheila Fraser described improving the situation of First Nations members on reserve as one of the federal government's greatest challenges:

> It's no secret that their living conditions are worse than elsewhere in Canada. For example, only 41 percent of students on reserves graduate from high school, compared with 77 percent of students in the rest of the country. And more than half of the drinking water systems on reserves still pose a health threat.
>
> What's truly shocking, however, is the lack of improvement. […]
>
> We cannot simply continue to do the same things in the same way. There needs to be a serious review of programs and services to First Nations – we need to identify what services should be provided and by whom, as well as the funding required and the expected results.
>
> …Unless we rise to the challenge, I believe that living conditions on reserves will lag behind the rest of Canada for generations to come.
>
> Speaking Notes for an Address by Sheila Fraser, FCA, Auditor General of Canada, to the Canadian Club of Ottawa, "Serving Parliament through a Decade of Change", 25 May 2011

The *June 2011 Status Report* of the Auditor General of Canada clearly stated that First Nations members living on reserve suffer from concrete and longstanding inequality:

> It is clear that living conditions are poorer on First Nations reserves than elsewhere in Canada. Analysis by Indian and Northern Affairs Canada (INAC) supports this view. The Department has developed a Community Well-Being Index based on a United Nations measure used to determine the relative living conditions of developing and developed countries. INAC uses its index to assess the relative progress in living conditions on reserves. In 2010, INAC reported that the index showed little or no progress in the well-being of First Nations communities between 2001 and 2006. Instead, the average well-being of those communities continued to rank significantly below that of other Canadian communities. Conditions on too many reserves are poor and have not improved significantly.
>
> Chapter 4, "Programs for First Nations on Reserves", Preface

Projected Life Expectancy at Birth by Gender, Registered Indian and Canadian Populations, Canada, 1980-2001



Indian and Northern Affairs Canada, *Basic Departmental Data 2004*, Figure 2.1

After a decade of detailed and sharply critical reports to Parliament, the Auditor General found that the federal government's "commitments and subsequent actions have often not resulted in improvements. In some cases, conditions have worsened since our earlier audits: the education gap has widened, the shortage of adequate housing on reserves has become more acute, and administrative reporting requirements have become more onerous": Auditor General of Canada, *June 2011 Status Report*, para. 4.89.

The Auditor General identified a number of structural impediments as the reasons for the lack of progress:

- lack of clarity about service levels,
- lack of a legislative base,
- lack of an appropriate funding mechanism, and
- lack of organizations to support local service delivery.

Id., Preface

With respect to appropriate funding, it is important to understand that as of 1997-1998, overall growth in First Nations' program funding was arbitrarily restricted to just two per cent per year, as a contribution by INAC to federal deficit reduction. As the Auditor General pointed out after a decade of this policy, "funding increased by only 1.6 percent, excluding inflation, in the five years from 1999 to 2004, while Canada's Status Indian population, according to the Department, increased by 11.2 percent": Auditor General of Canada *May 2006 Status Report*, para. 5.4.

Yet by contrast, the federal contribution to health and social services off reserve has not stagnated in the same way. The Canada Health and Social Transfers from the federal government to all provinces increased by 33 per cent between 2004-2005 and 2009-2010: Scott Serson, "Reconciliation: for First Nations this must include Fiscal Fairness" in Gregory Younging *et al.*, eds., *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Ottawa: Aboriginal Healing Foundation Research Series, 2011), 147 at 154.

A former senior federal civil servant has offered the following analysis of this pattern:

> For those that think of Canada as a caring, compassionate country, the question becomes: What justifies leaving this two per cent cap on First Nations programming when it clearly does not allow their funding to keep pace with inflation and population growth?
>
> - Is it because the quality of life gap between First Nations and non-Aboriginal Canadians has closed significantly? No, in fact, by all reports, the narrowing of this gap has slowed since funding was capped.
>
> - Is it because our political leaders are unaware of the situation? This is unlikely since, as noted above, DIAND mounted a major review of the situation in 2006 and a draft report entitled First Nations Basic Services Cost Drivers Project was available in November of that year.
>
> …
>
> - Is it because Canadian citizens generally are unaware of the quality of life in many First Nations communities? This is a plausible explanation and a helpful one for anyone who wishes to continue to believe that Canadians are a caring people. Most First Nations are in rural or remote locations. For whatever reasons, DIAND does not make an effort to focus its annual public documents on comparisons of quality of life statistics between First Nations and non-Aboriginal Canadians and it does not make an effort to explore comparisons between per capita funding for provincial schools and what it provides to First Nations schools. There are encouraging signs that if Canadians knew more of the poverty in First Nations communities, they would demand action. […]
>
> Of course, the dangerous thing about exploring these possible rationales is that they lead to the unfortunate conclusion that the federal government is practicing a subtle form of discrimination in the funding of First Nations. This is likely to continue to be the conclusion of more First Nations leaders as they understand the situation more clearly.

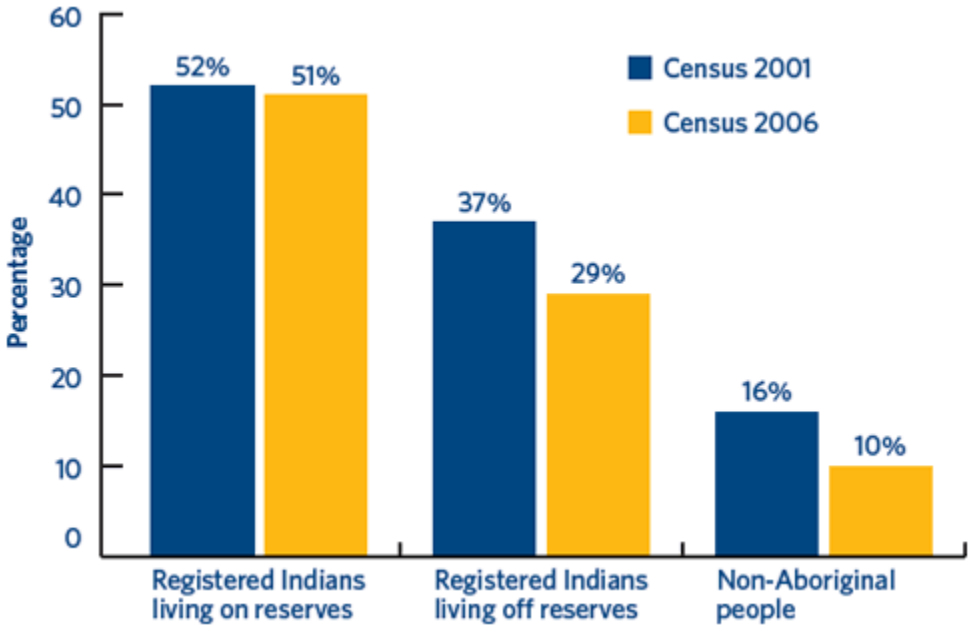
Serson, "Reconciliation: for First Nations this must include Fiscal Fairness", pp. 154-56

At her retirement, Sheila Fraser said:

> …[O]ur audits have shown that there are a number of issues affecting programs and services that hamper progress, and negate the efforts of many dedicated public servants. Let's take the education of children as an example. There is no legislation that clearly sets out responsibilities for educating children on reserves. Funding is insecure and often not timely because it is provided through short-term contribution agreements which are subject to the availability of funding—there are no statutory funding requirements or service standards.
>
> And there are no school boards or equivalent organizations monitoring and supporting First Nations schools.

The Auditor General has also pointed out that the federal government was unable to determine whether the funding provided to First Nations was sufficient to meet the education standards required by its own policies: *Report of the Auditor General of Canada to the House of Commons*, November 2004, "Chapter 4: Indian and Northern Affairs Canada – Education Program and Post-Secondary Student Support."

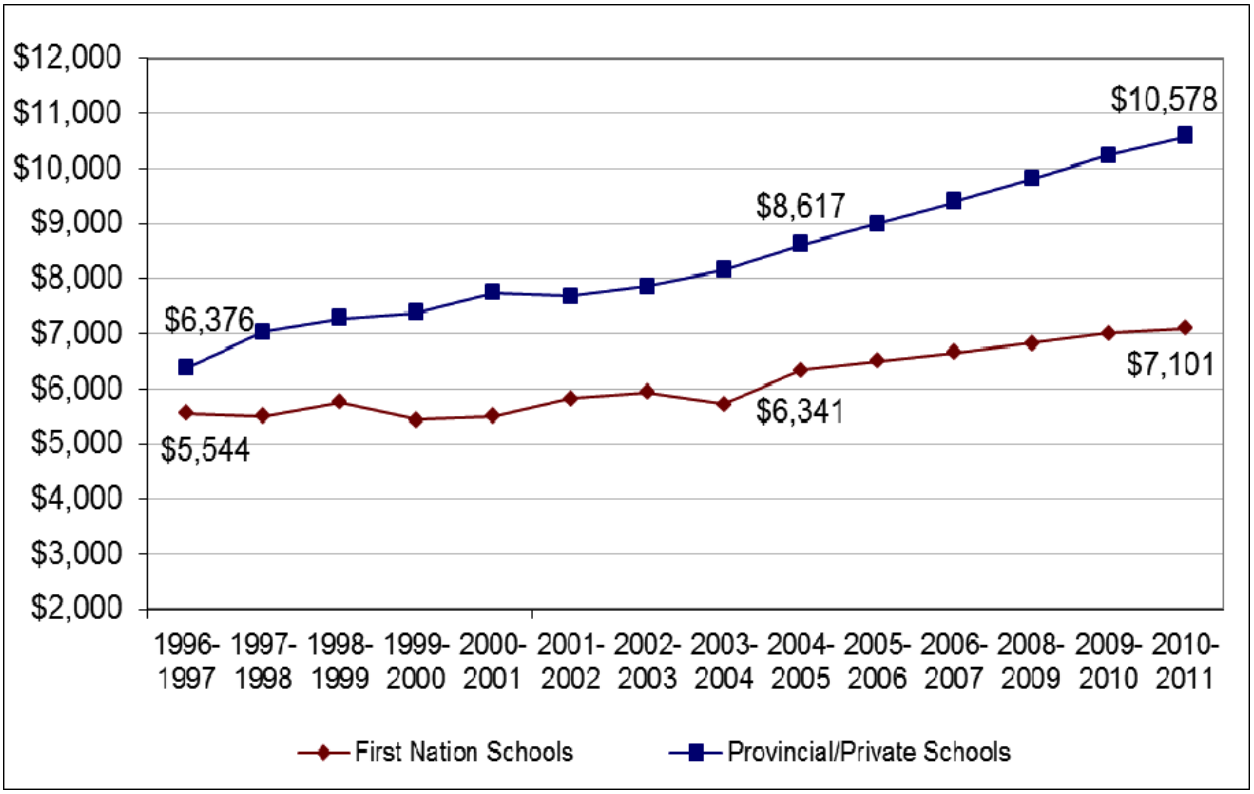
High School Non-completion Rates for First Nations People and Non-Aboriginal People Aged 25 to 34, 2001 and 2006



Source: Library of Parliament, *Current and Emerging Issues*, 41st Parliament, June 2011

To the extent that official federal policy is to provide children on reserve with primary and secondary education of a standard equivalent to that provided elsewhere in provincially-funded schools, however, the evidence shows that federal funding falls far short of that goal.

Average per-student funding, First Nation schools and provincial schools, 1996-2011



Source: Assembly of First Nations, October 2012 Chiefs Assembly on Education, Information Package

The Standing Senate Committee on Aboriginal Peoples concluded in a special report:

> We have already noted that increasing funding alone, unless accompanied by structural reform, will likely not achieve sustained and improved results in First Nations education. Similarly, we believe that structural reform without a revised method of financing First Nations education will meet with only partial success.
>
> *Reforming First Nations Education: From Crisis To Hope; Report of the Standing Senate Committee on Aboriginal Peoples*, December 2011, p. 62

Yet the case of primary and secondary education demonstrates that the federal government is still in no particular hurry to remedy the lack of an appropriate funding mechanism on the part of Aboriginal Affairs and Northern Development Canada (AANDC),[1] even if it is anxious to impose new service standards on First Nations.

Recently, AANDC published a draft of a proposed First Nations Education Act which proposes that:

- by law, "it is the First Nation council that has the responsibility to provide for access to elementary and secondary education to students between six and 21 years";
- but "the amount to be paid will be determined by a funding formula, which will be written out in regulations": *Working Together for First Nation Students: A Proposal for a Bill on First Nation Education*, October 2013

It therefore remains unknown whether First Nations will receive equal funding, though it is clear that AANDC will expect them to meet provincial standards regardless.

The federal government is also quick to impose equality with provincial services when the result would be to decrease federal transfers to First Nations, even at the price of cutting benefits to their members.

The National Manual issued in 2012 by AANDC for social assistance benefits paid by Band Councils to residents of their reserves "mandates a mirroring of provincial rates," the Federal Court recently noted, through "programs will be delivered at standards reasonably comparable to those of the reference province/territory of residence": *Simon v. Canada (Attorney General)*, 2013 FC 1117, para. 22, 21.

Based on that policy, AANDC was prepared to oblige communities in the Atlantic region to adjust reduce the benefits paid to levels available from the provincial governments, even though they could be lower: *Simon v. Canada (Attorney General)*, 2012 FC 387, para. 73. Its officials acknowledged that implementation of the current New Brunswick rate structure could leave individuals currently receiving benefits without assistance determined according to provincial regulations: *Simon v. Canada (Attorney General)*, 2013 FC 1117, para. 110.

In the event, AANDC's decision was suspended by the Federal Court in 2012 and set aside in 2013, on the grounds of inadequate consultation.

Another example of the federal government's eagerness to insist on consistency with provincial programs was the case of *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC

[1] The legal name of the department has not change: *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6.

342 ("the *Beadle* case"). Maurian Beadle's son Jeremy Meawasige is a severely disabled youth who lives with her on the Pictou Landing reserve; she provided for all of his care until she suffered a severe stroke in 2010. The Pictou Landing Band paid for the home care that experts said was needed for Jeremy to stay at home, but the federal government refused to reimburse those costs on the grounds that they exceeded what Nova Scotia's maximum of $2,200 per month for in-home services. Instead, INAC officials suggested that Jeremy could be institutionalized.

In the event, the finer points of provincial policy won the case when the Federal Court set aside INAC's decision as unreasonable. Among other things, Mandamin J. held that INAC had failed to apply Nova Scotia's rules because it ignored the fact that "the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum": *Pictou Landing* para. 88-94. The case is currently under appeal: docket no. A-158-13.

III. Does the law have a solution?

A. Introduction

The past quarter-century has seen an extraordinary change in Canadian law with respect to Aboriginal peoples, propelled by the courts and especially the judgments of the Supreme Court of Canada. However, that case law has been largely based on legal rules and principles that make Aboriginal peoples different from other Canadians, such as the statutory regime created by the *Indian Act* or the protection of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982*.

While equality has been recognized as one of the fundamental principles of public law in the past half-century, both in Canada and elsewhere, it has not been the driver of Aboriginal law.

B. Aboriginal and treaty rights

For an Aboriginal people to obtain recognition of a right protected by s. 35 of the *Constitution Act, 1982*, the case law requires proof that the activity is the exercise in a contemporary form of a practice, custom or tradition that was integral to the distinctive culture of the aboriginal group claiming the right, since prior to contact with European society: *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

Since constitutionally-protected Aboriginal rights belong to particular Aboriginal peoples, it is not clear whether they can be used to challenge inequality in government programs and services that affect virtually all First Nations in Canada.

Moreover, even if a right were proven, government action will only be unconstitutional if the First Nation can prove not only its inadequacies, but that that action infringes on the Aboriginal right: *Van der Peet*, para. 134. Since the fact that programs or services could be better does not

by itself prevent the right from being exercised, it is unclear to what extent this form of constitutional protection could be used to challenge underfunding.

The situation could be different under some of the historic treaties. For instance, Treaty Six of 1876 (covering modern-day southern Alberta and Saskatchewan) includes a right to both a "medicine chest" and school teachers: John Leonard Taylor, *Treaty Research Report - Treaty Six (1876)*, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1985.

To the extent that these treaty rights interpreted in the modern context would entitle First Nations to modern health care and education, it is hard to see why those services could legally be provided at lower standards than to other Canadians.

The situation is also different for rights created under land claims agreements or modern treaties, which often create specific funding obligations for education, health or social services: *Cree School Board v. Canada (Attorney General)*, 2001 CanLII 20652 (Que. C.A.), [2002] 1 C.N.L.R. 112. In that case, the issue is simply whether the government complied with the terms of the treaty or not.

C. Federal jurisdiction

Under the division of powers provided for in the *Constitution Act, 1867*, s. 91(24) gives jurisdiction to the federal government over Indians and lands reserved for Indians. However, it has not been easy to determine the extent to which this places programs and services delivered to First Nations under federal jurisdiction.

The case law of the Federal Courts held that organizations offering programs and services which "relate to the welfare of Indians" and which take into consideration "both the physical and cultural integrity" of Indians fall under federal jurisdiction, even in fields such as education, health or social services, all of which would otherwise fall under provincial jurisdiction: *Sappier v. Tobique Indian Band Council* (1988), 22 C.C.E.L. 170 (F.C.A.), p. 177; *Qu'Appelle Indian Residential School Council v. Canada (Canadian Human Rights Tribunal)* (1987), [1988] 2 F.C. 226 (T.D.): *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] 3 F.D. 449 (T.D.), pp. 459-61.

The Supreme Court of Canada recently questioned this case law, but did not overrule it: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, para. 69. The state of the law is ambiguous since this judgment, though it seems that health and social services provided to Indians on reserve is under federal jurisdiction at least to the extent that they are funded or regulated by the federal government and are not carried out pursuant to provincial statute.

But obviously federal jurisdiction by itself is no guarantee of adequate funding. It is worth recalling that during the Great Depression of the 1930s, the governments of Canada and Québec agreed on a reference to the Supreme Court of Canada to determine whether the Inuit were "Indians" within the meaning of s. 91(24). However, the two levels of government only did so because each wanted the other to pay for relief for Inuit in northern Québec, who were starving: *Re Eskimos*, [1939] S.C.R. 104.

The federal government's goal was to obtain a ruling that Inuit were not "Indians" so that it would not have to reimburse the province for the small amount of money it had spent for relief: Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999), pp. 31-34. When the Supreme Court ruled in favour of federal jurisdiction, the result did not lead to any increase in the federal welfare budget for Inuit in northern Québec and they remained largely neglected till they negotiated the James Bay and Northern Québec Agreement (JBNQA), the first modern treaty or land claims agreement.

D. The Crown's fiduciary duty

The history of Confederation in the nineteenth century reveals that it was protection of Aboriginal peoples that led to s. 91(24) in the *Constitution Act, 1867* giving the federal government exclusive jurisdiction over Indians: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 81, 51-52. According to the English Court of Appeal, the federal Crown's fiduciary obligation, which has it source in the *Royal Proclamation of 1763* was incorporated in to s. 91(24): *The Queen v. Secretary of State*, [1981] 4 C.N.L.R. 86 (Eng. C.A.), p. 93.

But even if the federal government can owe a fiduciary obligation, not all of its dealings with Aboriginal peoples create such an obligation.

The case law has distinguished between, on the one hand, liability that is obligations "'in the nature of a private law duty' towards aboriginal peoples" – such as in the case of a transaction concerning reserve lands – that gives rise to a fiduciary obligation and, on the other hand, the exercise of discretionary powers that do not, such as "a government benefits program": *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, para. 74.

The adequacy of health and social services or their funding appear on their face to be more in the nature of public law issues based on discretionary decisions than private law obligations that would easily allow for the Crown's fiduciary duties to be invoked.

In fact, a court has held that the obligation to provide health care, social assistance and housing on reserve at levels that at least match national standards raises political rather than legal issues that do not concern the Crown's fiduciary obligations: *Grant v. Canada (Attorney General)*, [2006] 1 C.N.L.R. 1, 2005 CanLII 50882 (Ont. S.C.).

In a more recent case, the court accepted that the federal government has a fiduciary obligation in relation to the education of Inuit children in Labrador: *Anderson v. Canada (Attorney General)*, 2013 CanLII 14093 (Nfld. S.C.T.D.), para. 20. However, the court added that the question of whether that obligation had been met would depend upon the circumstances and the even if such an obligation was held to exist, it scope would depend on the circumstances and would have to be proven: para. 43.

In face of a decision by the federal government to delegate control of the education of Aboriginal children in a British Columbia community, the Court of Appeal held that the delegation by itself did not create a fiduciary obligation, in the absence of proof of dishonesty or bad faith: *Aksidan v. Canada (Attorney General)*, 2008 BCCA 43, para.17.

The Supreme Court of Canada has held that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests": *Wewaykum*, para. 81.

Like Aboriginal rights, therefore, whose existence depends on the particular circumstances of the people who are invoking them, the Crown's fiduciary obligation depends on the powers being exercised by the federal government in particular circumstances and on the relationship thereby created with the Aboriginal community affected: it does not apply generally to any questionable government decision.

E. Equality rights and Aboriginal peoples

The Supreme Court has shown that it is concerned not to allow programs meant to help Aboriginal peoples to be invalidated based on a rule of formal equality with other Canadians.

For example, non-aboriginal commercial fishers were unsuccessful when they challenged the Aboriginal Fisheries Strategy that allowed communal fishing licences to be issued to bands that were not available to other fishers. The Supreme Court held it was a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups" provided for in s. 15(2) of the *Charter* and therefore not a violation of the right to equality: *R. v. Kapp*, 2008 SCC 41.

In a more recent judgment, the Supreme Court of Canada held that the money management provisions found in ss. 61 to 68 of the *Indian Act* make a distinction between Indians and non-Indians by prohibiting investment of a Band's royalties by the Crown. However, the court held that this distinction is not contrary to the guarantee of equality in s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The distinction was held not to be discriminatory because it is based on "considerations including Aboriginal self-determination and autonomy and the level of appropriate involvement and control on the part of the Crown": *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, para. 195.

Yet as the Supreme Court acknowledged, the unequal living conditions of Aboriginal people is not in dispute:

> […] The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Lovelace*, at para. 69). More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. […] The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.
> *Kapp*, para. 59.

The condition of Aboriginal peoples in Canada and the right to equality enshrined in our law therefore present an apparent contradiction. After all, as the Supreme Court has pointed out, Canadian law includes "the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para. 88.

IV. Equality rights in Canadian law

A. Section 15 of the Canadian Charter of Rights and Freedoms

Section 15 of the *Canadian Charter of Rights and Freedoms* provides:

> *Equality before and under law and equal protection and benefit of law*
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Affirmative action programs*
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has held that for the purposes of s. 15(1), the "law" that may not be discriminatory is a broader notion than just the statutes and regulations that adopted by Parliament or Cabinet and includes the policies that implement them.

> […] It would be incongruous if our entitlement to equality "before and under the law" and to the "equal protection and equal benefit of the law" did not reach the manner in which a law was interpreted and enforced by those charged with its operation. It will often be this process of interpretation and enforcement that determines the impact that a law has on the lives of those who come within its scope.
>
> *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483

Nevertheless, the discrimination must arise from a statutory regime:

> In order to succeed, the claimants must show unequal treatment under the law — more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. […]
>
> The specific role of s. 15(1) in achieving this objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law. […]
>
> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, para. 27-28

Based on this analysis, the Supreme Court of Canada held that British Columbia's refusal to finance behavioural therapy for pre-school autistic children was not discriminatory. In the court's view, the provincial statute at issue was a partial health plan whose purpose was not to meet all medical needs. Since the benefit being sought – funding for all medically-required services – was not provided for by law, it was not discriminatory for the province to fund certain medical services for some groups, while refusing to pay for therapy for autistic children.

More succinctly, the Supreme Court explained that "in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis": *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, para. 26.

The first response by the federal government to equality-based challenges to its programs and services for First Nations will therefore be that those programs and services have no statutory basis, which could end the litigation. As discussed below, however, in recent cases the courts have been unwilling to halt judicial review based on such a technical argument.

B. The Canadian Human Rights Act

1. The general prohibition

The *Canadian Human Rights Act*, R.S. C. 1985, c. H-6 ("CHRA") is a federal statute that prohibits "discriminatory practices" by the federal government and other federally-regulated entities. It has been characterized as a "quasi-constitutional" statute by Supreme Court of Canada: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

While the *Charter* "prohibits discrimination on the basis of enumerated and analogous grounds in regards to governmental action," like provincial human rights codes, the CHRA, "instead of being primarily concerned with governmental action, …more broadly prohibits discrimination within certain specified and mostly private relationships, and… on specifically enumerated grounds": Claire Mumme, "Tranchemontagne – Statutory Challenges to Statutory Enactments: What is the Appropriate Standard" The Court (10 September 2010), online: <http://www.thecourt.ca/>.

A complaint must be made to the Canadian Human Rights Commission ("CHRC"), which decides whether or not the complaint should be referred to the Canadian Human Rights Tribunal ("CHRT") for a hearing: CHRA, ss. 4 and 44

To be admissible, a complaint requires:

- "goods, services, facilities or accommodation customarily available to the general public": s. 5;

- an individual who can be distinguished by his or her "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability [or] conviction for an offence for which a pardon has been granted" s. 3(1);

- discrimination in the individual's access to goods, services, facilities or accommodation that is based on those characteristics.

2. What are services "customarily available to the general public"?

The obstacle faced by cases challenging underfunding that rely on the CHRA has been the preliminary objection by the federal government that it is not engaged "in the provision of goods, services, facilities or accommodation customarily available to the general public" within the meaning of s. 5.

The Federal Court of Appeal held long ago "that 'services' under section 5 are not restricted to 'market place' activities, but extend to the provision of services by government officials in the performance of their functions": *Watkin v. Canada (Attorney General)*, 2008 FCA 170, para. 26.

However, the same court later questioned whether denial of government benefits "constitutes denial of a service within the meaning of the Canadian Human Rights Act": *Canada (Attorney General) v. McKenna* (1998), [1999] 1 FC 401 (C.A.). More recently, the Federal Court of Appeal settled the issue that "not all government actions are services": *Watkin*, para. 28.

In the First Nations Child & Family Caring Society litigation described in more detail below, the Attorney General of Canada argued that the CHRT had no jurisdiction because even when the federal government funds services, it is not providing them. This issue has not yet been settled because the Federal Court held it should be examined first by the CHRT in the context of the case before it: *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, para. 7 to 9.

What the CHRT itself has ruled inadmissible are complaints where "the sole source of the alleged discrimination… is the legislative language," because such a complaint is not based on the discriminatory provision of services, but "is really an issue taken with the *Act*": *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5, para. 38, relying on *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7 (the *Murphy* case).

As a result, the CHRT recently rejected a series of complaints of discrimination in granting registration ("status") under the *Indian Act* where the issue concerned the provisions of the statute themselves. The Tribunal held that legislation is not a service and what is more, the CHRA does not allow for "direct challenges to legislation" in the absence of a discriminatory practice in the provision of services: *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21, para. 64, 85; see also *Renaud et al. v. Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30; *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13, para. 58, 147.

C. What is discrimination?

While human rights codes such as the CHRA and the equality rights guarantee in s. 15 of the *Charter* are distinct, the definition of equality and discrimination under one has influenced the other.

Moreover, challenges based on discrimination in the rules for government programs rather on their execution have been rarer under the CHRA than under the *Charter* with the result that the case law on s. 15 of the *Charter* has become crucial to certain kinds of complaints under the CHRA or other human rights codes:

> By applying to the content of legislation and the manner by which governmental programs are apportioned, rather than solely their delivery, the Codes are being brought to bear on one of the core elements of the state's public function – the determination of resource allocation – which is the paradigmatic situation that section 15 of the *Charter* regulates, and an area in which the courts are often loathed to interfere with. In effect, these claims represent an attempt to bypass the closure of section 15 of the *Charter* to claims for economic and social rights.
>
> Mumme, "Tranchemontagne – Statutory Challenges to Statutory Enactments" (emphasis in the original)

The test for determining whether the *Charter* right to equality has been breached has varied over the years, but as most recently stated by the Supreme Court of Canada it has two steps:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
>
> *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 30

The Supreme Court explained that "the role of a comparison at the first step is to establish a 'distinction'," meaning "that the claimant is treated differently than others" and "asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)": *Withler*, para. 62.

At the second step, however, the Supreme Court has recently refined the exercise. It stated that "[w]hile the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected": *Quebec (Attorney General) v. A*, 2013 SCC 5, para. 418.

Chief Justice McLachlin explained:

> [419] […] First, the issue of whether the law is discriminatory must be considered from the point of view of "the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant": *Law* at para. 60.
>
> [420] Second, a legal distinction can be discriminatory either in purpose or in effect. As a practical matter, legislatures seldom set out to discriminate on purpose; discrimination when it occurs is usually a matter of unintended effect

Quebec v. A., para. 419, 420 (emphasis in the original)

The real goal of s. 15 of the *Charter*, according to Abella J., is that "certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed": *Québec v. A.*, para. 331.

When designing benefits programs, the government frequently decides to limit the "relevant universe of potential claimants": *Hodge*, para. 31. This choice will not always be considered discriminatory. For instance, non-status Aboriginal communities were unsuccessful when they challenged a provincial program that favoured *Indian Act* bands made up of registered Indians. The Supreme Court held that the fact the program was targeted at ameliorating the conditions of a specific disadvantaged group did not constitute discrimination against other disadvantaged groups who were thereby excluded: *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

For many years, the Supreme Court of Canada also held that the discrimination at issue in s. 15 always had to be assessed by means of a comparator group which had received the benefit and compared to which the complainant group was deprived. It had explained that:

> …[T]he equality guarantee is a comparative concept. Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when considering many of the contextual factors in the discrimination analysis.
>
> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 56 (emphasis in the original)

More particularly, "[t]he appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*." For instance, same sex partners were compared to married couples, who had "mirror characteristics" other than being of the opposite sex: *Hodge*, para. 23.

However, the Supreme Court has recently changed this rule:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis [i.e., "Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"]. This provides the flexibility required to accommodate claims based on intersecting grounds of

> discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.
>
> *Withler*, para. 63 (emphasis added)

Even more recently, the Supreme Court rendered an important decision on the prohibition against discrimination in the provision of goods and services under the British Columbia *Human Rights Code*, a provision similar to s. 5 of the CHRA.

The subject of the complaint was British Columbia's Ministry of Education. The complainant himself had severe dyslexia and had for a time benefitted from intensive remediation provided by his School District. However, the district closed the Diagnostic Centre he attended, after which his parents had to enroll him in a private school in order to receive the intense remediation he required: *Moore v. British Columbia (Education)*, 2012 SCC 61.

The provincial Human Rights Tribunal had ruled in his favour but, upon judicial review, the British Columbia courts had decided that the complainant's situation had to be compared to other students with special needs and concluded that he had not suffered any discrimination under the circumstances. This amounted to importing the comparator group requirement in the *Charter* case law into the interpretation of a human rights code.

The British Columbia Court of Appeal was not prepared "[t]o compare him with the general student population [because that] was to invite an inquiry into general education policy and its application, which it concluded could not be the purpose of a human rights complaint": *Moore*, para. 24.

However the Supreme Court of Canada did compare him to the general population because "for students with learning disabilities like Jeffrey's, special education is not the service, it is the <u>means</u> by which those students get meaningful access to the general education services available to all of British Columbia's students": *Id.*, para. 28 (emphasis in the original).

> To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut <u>all</u> special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396.
>
> *Moore*, para. 30 (emphasis in the original)

Canada's highest court therefore held that the as a student, the complainant had been deprived of a service ordinarily provided to the public, thereby "suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group," which was made up of children with learning disabilities: *Id*, para. 60.

V. The new equality rights litigation

A. What is the federal government doing in law?

The first difficulty posed by a legal challenge to programs and services for First Nations is that the federal government has avoided giving them any basis in statute.

The Auditor General of Canada has pointed out that the absence of an appropriate legislative foundation for programs provided to Aboriginal peoples has "caused confusion among government officials and clients about the jurisdiction, allocation of responsibilities, and rights of the Department and clients": Auditor General of Canada, *May 2006 Status Report*, para. 5.57.

The federal government has tried to use this confusion to its advantage in court. Thus, when Nova Scotia and New Brunswick communities fought changes to social assistance rules recently, INAC's lawyers argued unsuccessfully that there was no statutory decision subject to judicial review, just a purely discretionary decision on funding: *Simon v. Canada*, 2013 FC 1117, para. 61.

The court held instead that it was entitled to determine whether the Minister had "stay[ed] within the confines and parameters of the policy's terms and ensure that the objectives set by the Treasury Board will be attained," even if "the Minister's decisions relative to funding are limited by the terms and conditions of the Treasury Board's Directives and MOUs": *Id.*, para. 84, 86

Similarly, the court held in an earlier case that "pursuant to its general powers under the *Department of Health Act*, S.C. 1996, s.8, and the *Canada Health Act*, R.S.C. 1985, C-6 and in accord with the Indian Health Policy adopted by Cabinet in 1979 and the 1997 Reviewed Mandate in that respect, created the Non-Insured Health Benefits Program (the Program) to provide to eligible registered members of the First Nations and recognized Inuits and Innus medically necessary health related goods and services not covered by other federal, provincial, territorial or third party health insurance plans": *1018025 Alberta Ltd. v. Canada (Minister of Health)*, 2004 FC 1107, para. 2.

B. The First Nations Child and Family Caring Society case

1. Introduction

On February 27, 2007, a human rights complaint was filed with the CHRC by the Assembly of First Nations (AFN), a political organization representing Band councils, and the First Nations Child and Family Caring Society of Canada (the Caring Society), a national non-profit organization providing services to First Nations child welfare organizations. The complaint alleges that the federal government has for years provided lower funding for child welfare services to First Nations children on reserves than is provided to non-Aboriginal children.

In October 2008, the CHRC ordered a panel of the CHRT to determine whether or not discrimination prohibited by the CHRA had taken place, as alleged. In theory, the AFN and the Caring Society should have presented their case and then the federal government should have responded; if the CHRT found that discrimination had occurred, it could have ordered a remedy. Instead, the case is still before the CHRT with no end in sight.

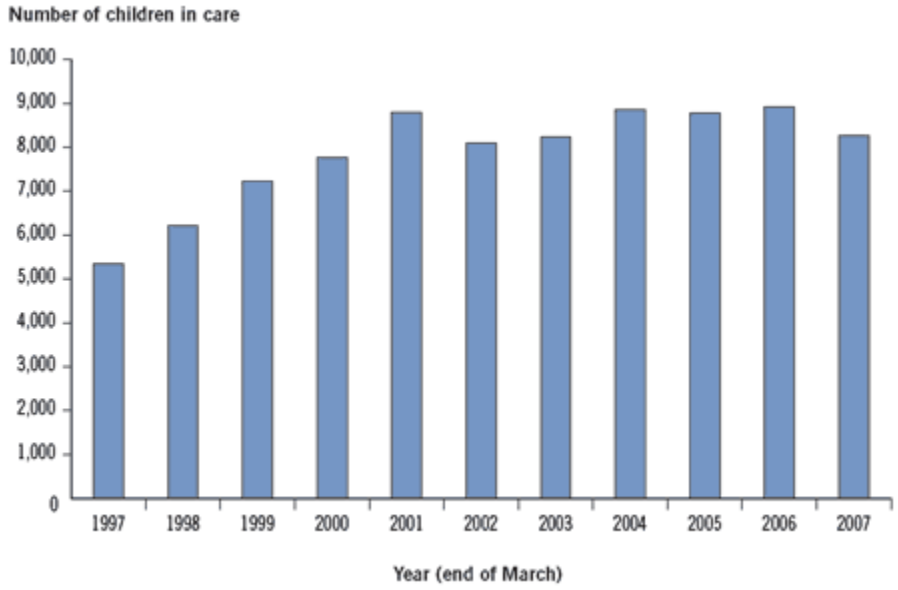
2. Child welfare on reserve

The issue in the Caring Society case is the drastic overrepresentation of First Nations children in the child welfare system: there are now more First Nations children in care in Canada than were in Indian residential schools at their height.

This overrepresentation has been shown by the 2003 *Canadian Incidence Study of Reported Child Abuse and Neglect* to be caused in large part by "the difficulties faced by many Aboriginal families to historical experiences and poor socio-economic conditions," particularly, "poverty, inadequate housing, and caregiver substance misuse on many reserves." These lead "to the higher substantiated incidence of child neglect occurring on reserves compared to non-Aboriginal children off reserves": Auditor General of Canada, *May 2008 Report*, para. 4.10.

It is noteworthy that an analysis funded by INAC found that Aboriginal children are not over-represented in reports of child abuse. Instead, they are "more likely to be reported for neglect than non-Aboriginal children" and "twice as likely to be investigated for possible abuse or neglect as non-Aboriginal children": *Id.*, para. 4.11.

The number of on-reserve children placed in care



Source: *2008 May Report of the Auditor General of Canada*, "Chapter 4—First Nations Child and Family Services Program—Indian and Northern Affairs Canada"

While provincial child welfare statutes apply both on and off reserve, the provinces expect the federal government to fund child welfare programs on reserve. In the event, the federal government funds on-reserve agencies at rates considerably lower than the provincial system.

The Auditor General's review of INAC's Child and Family Services Program resulted in a report with the following headings:

Program implementation

- The program has not defined key policy requirements
- Responsibilities and services are not always well defined
- The Department has limited assurance that services meet legislation and standards
- Coordination with other programs is poor
- INAC devotes limited human resources to the program

Funding of services

- Program funding is inequitable

- Financial obligations are not reflected in the allocation of resources to the program
- Compliance with Treasury Board authority could be improved

Information for accountability

- The Department lacks information on the program

Auditor General of Canada, *May 2008 Report*, Chapter 4, "First Nations Child and Family Services Program—Indian and Northern Affairs Canada"

More particularly, the Auditor General found that:

- "INAC has not analyzed and compared the child welfare services available on reserves with those in neighbouring communities off reserves. However, INAC officials and staff from First Nations agencies told us that child welfare services in First Nations communities are not comparable with off-reserve services": para. 4.19;

- "INAC has not defined the meaning of 'culturally appropriate services.' Further, while INAC has provided funding to First Nations to develop culturally appropriate standards for the provinces we covered, only British Columbia has approved Aboriginal standards, although BC's own standards contain an Aboriginal component": para. 4.23;

- "funding arrangements between INAC and First Nations agencies are generally not tied to the responsibilities that First Nations agencies have under their agreements with provinces; INAC pre-determines the level of funding it will provide to a First Nations agency without regard to the terms of the agreement between the First Nation and the province": para. 4.30;

- "in the five provinces we covered, INAC has limited assurance that child welfare services delivered on reserves by First Nations agencies comply with provincial legislation and standards": para. 4.34;

- "the formula was designed in 1988 and has not been significantly modified since. This has had a significant impact on the child welfare services provided to some First Nations children, as the formula does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided": para. 4.51;

- "In 2007, INAC obtained authority from the federal government to link its funding of Alberta First Nations agencies to provincial legislation. It has undertaken to provide them with funding and flexibility to deliver services that meet provincial legislation" and as a

> result, "on average, funding to Alberta First Nations agencies for the operation and prevention components will have increased by 74 percent when the new formula is fully implemented in 2010," but still "the new formula does not address the inequities we have noted under the current formula": para. 4.62 to 4.64.

In 2008, INAC told the Auditor General that by 2012, it planned to apply the Alberta model (the "Enhanced Prevention Focussed Approach") to all the agencies it funded across Canada: *Id.*, para. 4.65. As of May 2013, however, it covers six provinces and 68 per cent of the children living on reserve in Canada: AANDC, "Better Outcomes for First Nation Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nation Child and Family Services", May 2013.[2]

3. The litigation so far

a) The complaint

The Caring Society litigation has been exceptionally complex, including issues such as broadcast of the proceedings (2011 FC 810) and document disclosure (2013 CHRT 16), some of which had to be resolved by the Federal Court on judicial review, but which are not relevant to this paper.

The essence of the complaint is the allegation that the federal government "has engaged in prohibited discrimination by under-funding child welfare services for on-reserve First Nations children, and denying them services available to other Canadian children": *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, para. 2.

More particularly, the complaint pointed out that INAC funded "maintenance" by reimbursing "approved costs incurred by provincial or First Nations child welfare agencies for maintaining a child in care outside the family home," while it funded regular operations at a fixed rate per child on reserve. The result was "that the greater the number of at-risk children in a given community, the fewer the services that are actually available to each child" and "an increase in the number of First Nations children unnecessarily being taken into care": *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, para. 40 to 46.

Even under the new rules, "maintenance funding – the most costly element of child welfare programs – is capped, and that any deficit in maintenance costs must thus be covered by funding from the least disruptive measures or operations budgets. The complainants further allege that funding for preventative services is decreased in the third, fourth and fifth years of the plan": 2012 FC 445, para. 49.

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[2] http://www.aadnc-aandc.gc.ca/eng/1100100035210/1100100035218

A challenge by the federal government to the CHRC's decision in 2008 to refer the complaint to the CHRT for a hearing had already been dismissed by the Federal Court in 2010: *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343.

b) The comparator group issue

In March 2011, the CHRT granted a motion by the federal government to quash the complaint on the grounds that for adverse differentiation to exist, "one has to compare the experience of the alleged victims with that of someone else receiving those same services from the same provider." When the complaint sought a comparison between INAC's funding on reserve and provincial funding elsewhere, the CHRT held, it brought up "separate and distinct service providers with separate service recipients" that "cannot be compared": *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4, para. 10, 12 (emphasis in the original).

A year later, in April 2012, the Federal Court set aside the CHRT's decision and ordered that the matter be "remitted to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination": *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445. In March 2013, the Federal Court of Appeal upheld the lower court decision and dismissed the federal government's appeal: 2013 FCA 75.

The Federal Court held that the CHRT had been wrong to conclude the complaint could not be heard in the absence of an appropriate comparator group. It also held that the CHRT had engaged in "a rigid and formulaic interpretation" of the prohibition against discrimination, "one that is inconsistent with the search for substantive equality mandated by the *Canadian Human Rights Act* and Canada's equality jurisprudence": 2012 FC 445, para. 9, 290.

The court pointed out that the CHRT's view that the CHRA always requires a comparator group in order to prove discrimination would leave to absurd results that Parliament cannot have intended: 2012 FC 445, para. 255.

It gave the example of an "employer who sets out to hire only foreign workers in the belief that the company could pay such workers 50 percent of the going rate. On the Tribunal's analysis, that employer would not have committed a discriminatory practice if the company did not employ any Canadian workers to whom the foreign workers could be compared": 2012 FC 445, para. 261.

A comparator group is not essential because what is prohibited by the phrase "differentiate adversely" is "to treat an individual or group differently than one might otherwise have done [and] on the basis of a prohibited ground": 2012 FC 445, para. 358.

But the Federal Court also disagreed with the CHRT's decision if a comparison had "to be made in order to establish adverse differentiation in the provision of services, the Tribunal… could not compare the child welfare services provided by the Government of Canada with those provided by the provinces": 2012 FC 445, para. 367.

The court pointed out that "the Government of Canada has itself chosen to hold its child welfare programming for First Nations children living on reserves to provincial child welfare standards in its programming manual and funding policies": 2012 FC 445, para. 374. This meant at the very least that the CHRT would have to decide what "if any, implications this may have" in comparing "child welfare services provided by the Government of Canada… with those provided by the provinces": para. 379. The court rejected the federal government argument that "its reference to provincial child welfare standards in documents governing its First Nations Child and Family Services program… is simply a 'financial accountability issue'": para. 380.

In addition, the Federal Court rejected the suggestion "that it is never appropriate to look beyond the actions of a respondent service provider or employer for comparative evidence that may assist in establishing discrimination under the Act": 2012 FC 445, para. 384. Returning to the example of an employer who "sets out to hire only foreign workers so as to exploit their vulnerability by paying them less, it would be perfectly open to the Tribunal to receive expert evidence regarding the 'going rate' for employees providing similar services to other employers": para. 385.

The Federal Court of Appeal upheld the Federal Court's decision and, more particularly, ruled that the Supreme Court of Canada judgments discussed above (*Moore* and *Québec v. A*) though "postdating the Federal Court's decision have confirmed the reduced role of comparator groups in the equality analysis": 2013 FCA 75, para. 18.

However, the Federal Court of Appeal was more reserved than the lower court on the significance of provincial funding, which it held was a matter for the CHRT to decide after a full hearing:

> The legal significance and factual relevance of the Government of Canada's adoption of provincial child welfare standards in its funding policies – and, for that matter, larger issues such as whether comparison can be made to provincial child welfare funding and whether provincial funding constitutes relevant evidence deserving of weight in the analysis of discrimination – is best left for the Tribunal to consider alongside all of the evidence it will receive.
>
> 2013 FCA 75, para. 21

The appellate court pointed out "that discrimination is a broad, fact-based inquiry. Among other things, it requires 'going behind the facade of similarities and differences', and taking 'full

account of social, political, economic and historical factors concerning the group': *Withler*, *supra* at paragraph 39": 2013 FCA 75, para. 22.

C. Other human rights complaints

1. Special education

Another outstanding complaint under the CHRA concerns the inequality between the special education services provided to First Nations children on reserve and children elsewhere in Canada: http://www.firstnationsspecialeducation.ca/.

The Mississaugas of the New Credit First Nation (MNCFN) filed a complaint with the CHRC in 2009 on behalf of two children with Down syndrome, who they allege do not receive the same special education services as non-First Nations children.

The children attend a provincial school that can provide the special education support they need, such as educational assistants and specialists. However, since they live on reserve, they cannot attend the provincial school for free and if the $80,000 annual cost of their special education is not paid to the school board by the MNCFN, they cannot attend at all. The federal government refused to pay the amount, suggesting that the MNCFN should pay for these two children out of its existing special needs budget of about $165,000, a solution that would have taken resources away from other children.

The complaint alleges systemic discrimination by AANDC against First Nations children with special needs because they are not guaranteed the same level of special education services as other children. The community's website states: "The basis of the case is very simple – that First Nations children should get at least the same level and quality of special education services as non-First Nations children."

The CHRC ruled in 2010 that the complaint was admissible and should be heard by the CHRT. The federal government objected in 2011 on the basis that the MNCFN's complaint raised the same issues as the Caring Society and should be rejected for the same reasons that the CHRT initially rejected that complaint.

Some Differences between Special Education Services On and Off Reserve in Ontario

Special Education On Reserves	***Ontario's Special Education System***
There is no legal right to free and appropriate special education in the *Indian Act*	All children have a legal right to free education and appropriate special education under provincial laws
Funding insufficient to meet provincial standards	Greater funding to meet student needs
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 participate in and appeal decisions made about their children)
Some children may not get services unless the family or First Nation can pay	Children are guaranteed special education services
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 creation and policy setting
Small education departments have small budgets that cannot absorb costs of certain students with high needs	Large school boards have large budgets that can afford high cost services, benefit from economies of scale, and can balance out high cost cases

Adapted from: http://www.firstnationsspecialeducation.ca/problems-with-first-nations-special-ed/

2. Policing

In 2007, seven First Nations on the western coast of James Bay in Ontario, acting as the Mushkegowuk First Nations, filed a complaint with the CHRC alleging discrimination in the federal government's funding of police services on reserve, through INAC and Public Security Canada, in comparison with non-First Nations communities in Canada.

Summary Chart Comparing Policing On and Off Reserve in Ontario

Policing in Mushkegowuk Communities	**Policing in non-First Nation Communities**
No binding legal standards for the adequacy or effectiveness of police services or facilities	Police services are held to the binding, legal standards
No legally binding procedures for civilian complaints or independent oversight mechanisms	Multiple legally binding complaints procedures and oversight mechanisms, including the Special Investigations Unit and the Independent Police Review Director
No mechanism to ensure police budgets are adequate	A municipal police service may appeal to an independent commission for a hearing and a binding decision on the adequacy of its budget
NAPS has little power in budget negotiations; it essentially faces a “take it or leave it” scenario	The OPP and municipal police services have a high degree of control over their budgets for municipal policing in the framework created by the Police Services Act
Long history of unsafe and inadequate police stations (e.g. the dilapidated Kashechewan police station that burned down in 2006, killing two young men)	Superior police station facilities
Major capital funding is unavailable under the First Nations Policing Policy (e.g. for new police-stations)	Capital funding is available
Funding is provided as if the First Nation police service is an “add-on” to the OPP, leading to inadequate funding because NAPS is the primary police presence	Non-First Nations police services are funded, operated, and supported as the primary police force
24/7 policing is largely unavailable	24/7 policing is usually available; police in non-First Nations communities are legally required to provide services 24 hours a day

Adapted from: http://www.firstnationspolicing.ca/inferior-policing-for-aboriginal-people/

The Mushkegowuk First Nations are served by the Nishnawbe-Aski Police Service which is severely underfunded in comparison with either the Ontario Provincial Police (OPP) or the Royal Canadian Mounted Police (RCMP).

> 10. In their human rights complaint, the Mushkegowuk First Nations allege that policing in the Mushkegowuk communities is inferior to the policing provided in non-First Nations communities. This disparity in service levels is detailed in various reports, studies, and government documents provided to the Commission investigator. For example, in the Report of the Ipperwash Inquiry (2007), the Honourable Sidney B. Linden wrote that:
>
> > Our research, consultations, forums, and submissions from the parties have consistently confirmed that First Nation police services are working with restricted budgets and substandard facilities, which frustrates their efforts to provide high quality police services
>
> […]
>
> 11. A federal government report concluded that "NAPS detachments generally fall a long way short of acceptable facility and operational standards for the RCMP and OPP in remote locations." As discussed in submissions made to the Commission, these inferior policing facilities resulted in the deaths of two young First Nations men in a police station fire in one of the Mushkegowuk communities. […]
>
> Mushkegowuk Council Factum, 17 October 2011, FC docket T-762-11[3]

The federal government applied to the Federal Court in 2009 for an order setting aside the CHRC's decision even to investigate the complaint, before discontinuing that case in 2010: docket T-1825-09. It then applied to the Federal Court in 2011 to set aside the CHRC's decision to refer the complaint to the CHRT for a hearing, but discontinued that application in 2012: docket T-762-11.

The case is now before the Tribunal but has not proceeded beyond disputes about document disclosure: *Grand Chief Stan Louttit et al. v. AGC*, 2013 CHRT 27.

3. Funding formula for large Ontario bands

Four of the five largest First Nations in Ontario — the Mohawks of the Bay of Quinte, Oneida Nation of the Thames, Wikwemikong Unceded Indian Territory, and Six Nations of the Grand River — filed a complaint in 2010 with the CHRC concerning "chronic and discriminatory underfunding of reserve communities in Canada" that they allege "has been aggravated for select First Nations in Ontario by arbitrary funding distinctions between First Nations":

[3] www.firstnationnspolicing.ca/wp-content/uploads/2012/02/Mushkegowuk-Council-Factum-ie-Legal-Submissions-Oct-17-2011.pdf

https://www.facebook.com/pages/The-InJustice-Project-advocating-for-indigenous-justice/285421587179?v=info

> [2] The basis of the complaint lies in various funding formulas and policies (the funding formulas) used by INAC to allocate funds to First Nations. These funds support a wide range of social and economic programs, policies and initiatives in reserve communities (ex: Band government, Band support, economic development, education, environment, income support, infrastructure, lands and trusts, major capital, minor capital and self-government negotiations).
>
> [3] In 2008, INAC, in cooperation with the five largest First Nations of Ontario, undertook a study for the purpose of examining INAC's funding formulas to determine whether funding inequities existed between the largest First Nations and other First Nations in Ontario. The study was conducted by PricewaterhouseCoopers LLP and concentrated on four main areas: education funding, major capital funding, minor capital funding and infrastructure funding.
>
> [4] The respondents submit that the study identified many instances where the five largest First Nations receive substantially less funding per capita than smaller First Nations. They concede that the study shows that economies of scale and urban proximity may explain some differences in per capita funding between larger and smaller First Nations but they argue that, nevertheless, funding gaps in per capita funding remain in each of the four areas studied that cannot be explained or justified by any factor. Thus, the funding formulas distinguish in an arbitrary manner between members who belong to larger and smaller First Nations. The respondents further contend that each First Nation has a unique national or ethnic origin and that therefore a distinction on the basis of First Nation membership amounts to a distinction on the basis of national or ethnic origin, which is a prohibited ground of discrimination. Thus, the funding formulas which distinguish on the basis of the neutral criterion of First Nations' size have an adverse discriminatory effect on members who belong to larger First Nations; members of the larger First Nations will receive less funding per capita because of their membership in that particular First Nation.
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> *Canada (Attorney General) v. Mohawks of the Bay of Quinte*, 2012 FC 105

The CHRC's decision to deal with the complaint – that is, not to refer it for a hearing, but merely to accept it for further investigation – was challenged by the federal government in Federal Court in 2011: *Id.*, para. 11.

Among other things, the federal government argued "that the distinctions stemming from the funding formulas are based on the number of people that make up the First Nations and that the national or ethnic origin of a First Nation's members has no impact on the level of funding that this First Nation will receive. Size is not a prohibited ground under the Act. Consequently, the complaint fails to disclose the necessary link to a prohibited ground of discrimination": *Id.*, para. 24.

The Federal Court held in 2012 that it was not the CHRC's role at the pre-investigation stage to dismiss the complainants' position "that each First Nation has a distinct national or ethnic origin and that, therefore, First Nation membership is a marker for national or ethnic origin": *Id.*, para. 40.

VI. International law obligations

A. International treaty obligations in Canadian law

Canada's commitments under international law always include an important limitation. On the one hand, only the federal government can negotiate and ratify international treaties and it alone is responsible in international law for seeing to it that they are respected. On the other hand, treaty obligations in areas of provincial jurisdiction can only be implanted by the provinces: *Attorney General for Canada v. Attorney General for Ontario*, [1937] 1 D.L.R. 673 (J.C.P.C.) (the *Labour Conventions Case*).

In areas such as education or health and social services, this means that most of Canada's obligations under international law cannot be executed by the federal government. Yet the federal government does deliver programs and services in these areas to Aboriginal peoples, especially to communities governed by the *Indian Act*. It is therefore in Aboriginal affairs that Canada's international commitments with respect to education, health and social services should be most scrupulously respected.

Another rule of Canadian law is that international treaties and conventions are not enforceable unless and until they have been implemented by statute: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para. 69.

None of the treaties by which Canada has undertaken to ensure equality has been made part of Canadian law except to the extent that the CHRA itself could be considered the means by which Canada gave effect to the *International Convention on the elimination of all forms of racial discrimination* and the *International Covenant on Economic, Social and Cultural Rights* of 1966.

Nevertheless, the Supreme Court of Canada has held that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation". They will indicate whether the government's decisions in applying a statute are reasonable: *Baker*, para. 70.

More particularly, Canada's treaty obligations are relevant to the guarantee of equality in s. 15 of the *Charter* because the Supreme Court has held that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights

documents that Canada has ratified" More recently, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, para. 70.

Canada's obligations under international law must therefore be reflected in the way its obligations to Aboriginal peoples under Canadian law are interpreted and applied.

B. Instruments

1. The general prohibition against discrimination

Canada has undertaken in numerous treaties to protect the right to be free of discrimination based on ethnic origin:

- *International Convention on the elimination of all forms of racial discrimination*, Can. T.S. 1970 No. 28;
- *International Covenant on Civil and Political Rights* (1966), 999 U.N.T.S. 171;
- *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 47;
- *American Declaration of the Rights and Duties of Man*, through membership in the Organization of American States (OAS) in 1990.

The *International Covenant on Civil and Political Rights* provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status": art. 26.

2. Specific obligations to ensure equality

In the *International Covenant on Economic, Social and Cultural Rights*, which Canada ratified in 1976, it undertook "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" and those rights include health and education, among other things": art. 2(2), 12, 13.

Canada ratified the *Constitution of the World Health Organization*, Can. T.S. 1946/32, which states in its preamble that one of the principles that "are basic to the happiness, harmonious relations and security of all peoples" is that: "The enjoyment of the highest attainable standard of

health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

By ratifying the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Canada undertook to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind," including health, education and the protection of disabled children: art. 2, 23, 24, 28.

Canada has also recently endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), A/RES/61/295, which even if it is not a treaty, as a resolution of the UN General Assembly, can serve to interpret international law: *Charter of the United Nations*, Can. T.S. 1945 No. 7, para. 13(1).

Among other things, the Declaration provides:

> Article 21
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> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.
>
> …
>
> Article 24
> …
> Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right