

**Invited Response to Concluding Observations
for the United Nations Committee on the Elimination of Racial
Discrimination: Canada's 19th and 20th reports on the *International
Convention on the Elimination of All Forms of Racial Discrimination*
(CERD)**

**Brief submitted by UNICEF Canada
to the Human Rights Program, Department of Canadian Heritage,
Government of Canada**

August 24, 2012

Introduction

UNICEF Canada commends the Human Rights Program, Department of Canadian Heritage, for consulting on how Canada might better strengthen its response and follow up actions related to the United Nations Convention on the Elimination of All Forms of Racial Discrimination. Given that the majority of population growth in Canada is taking place amongst Aboriginal peoples and new Canadians, it is in Canada's best interests to ensure that racial discrimination is effectively prevented and addressed. Doing so will result in a more equitable, inclusive and ultimately, a more prosperous Canada for all.

About UNICEF

UNICEF is the world's leading child-focused humanitarian and development agency. Through innovative programs and advocacy, we save children's lives and secure their rights in virtually every country. Our global reach, unparalleled influence on policymakers, and diverse partnerships make us an instrumental force in shaping a world in which no child dies of a preventable cause. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights. For more information about UNICEF, please visit www.unicef.ca.

Strengthening Canada's response to the Concluding Observations

- 1) Promoting better outcomes for Aboriginal children, children of African descent and other children from racialized and minority groups through child-sensitive governance mechanisms**

Racial discrimination is a human rights violation that impacts a range of children's rights and requires a rights-based response according to international normative standards and the principles of children's rights. As a State Party to the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the UN Convention on the Rights of the Child

(CRC), the primary responsibility to ensure that the rights articulated in both Conventions are implemented in Canada rests with government.

In relation to racial discrimination, a number of CRC articles are engaged, such as: the right to non-discrimination (article 2); the right to life, survival and development (article 6); the best interests of the child (article 3); the right to protection from harm (article 19) the right to participation (article 12); the right to the highest attainable standard of health (article 24); and the right to education (articles 28 and 29).

Given the interrelatedness of the rights in the CRC and CERD, responses to address discrimination against children should adopt a broad, Convention-based perspective, rather than simply addressing challenges pertaining to health and education outcomes identified in the Concluding Observations as isolated problems. The adoption of standard approaches for incorporating the principles of non-discrimination and the best interests of the child into all policies, programs and legislation would go a long way towards ensuring that unintended racial discrimination is avoided and towards supporting the protection and development of all children.

In 2003, the UN Committee on the Rights of the Child asked Canada to review and improve its application of the principles of non-discrimination and of the best interests of the child within Canada. It expressed concern that these principles are not adequately defined and reflected in all significant legislation, administrative and court decisions, and policies.

One approach to ensure children's best interests are given priority consideration and that potential discriminatory impacts are regularly taken into account is through the use of standardized Child Rights Impact Assessments. A Child Rights Impact Assessment (CRIA) can be defined as:

... a systematic process or methodology of ensuring children's best interests and the potential impacts of policy change upon them are considered in the policy-making process. CRIA involves examining a proposed law or policy, administrative decision or action in a structured manner to determine its potential impact on children or specific groups of children, and whether it will effectively protect and implement the rights set out for children in the Convention on the Rights of the Child.ⁱ

The process of conducting a Child Rights Impact Assessment involves identifying the articles or rights in the Convention on the Rights of the Child – and in particular the Guiding Principles in articles 2 (non-discrimination), 3 (best interests of the child), 6 (right to life, survival and development) and 12 (right to be heard) – that might be impacted by a proposed action. It asks decision-makers to pay attention to all the children that may be affected by a decision.

The federal government should consider delegating to Justice Canada and the Public Health Agency of Canada (the existing lead departments for the federal implementation of the Convention) the co-responsibility for developing a standard approach for Child Rights Impact Assessments and for ensuring that officials in other departments are trained and supported in conducting Child Rights Impact Assessments. Such a model could also be shared with provinces and territories through the Continuing Committee of Officials on Human Rights, so

that provinces and territories may be encouraged to develop a similar assessment tool (if not already in place).

Recommendation 1: That the federal and provincial/territorial governments use a robust Child Rights Impact Assessment process before legislation, policy and practice are developed that may have significant impacts on children.

The Child Rights Based Approach (CRBA) to the development of policy and programs is an important and feasible methodology to incorporate into departmental strategic planning. It involves examining the human rights related causes and impacts of particular problems that a policy, program, regulation or other administrative decision is intended to address; and employing useful tools such as a causal analysis and stakeholder identification that can be easily integrated into the planning process to ensure that interventions support the realization of human rights equitably, and without unintended discrimination.

While CRBA training is provided in many international fora, the Public Health Agency of Canada has piloted a Canadian training course that can be institutionalized, and extended to other federal departments and to provincial/territorial governments.

Recommendation 2: That the federal and provincial/territorial governments provide regular in-service training for public officials responsible for strategic planning and for all other relevant policy, programming and specialist staff, including advisors, in each federal and provincial/territorial department.

The Standing Senate Committee on Human Rights has repeatedly called for a National Children's Commissioner and has stated that "the Commissioner should be actively involved with Aboriginal communities to address issues specific to Aboriginal children who are, or are at risk of being, sexually exploited."ⁱⁱⁱ The establishment of a National Children's Commissioner is an important step in ensuring that significant legislative, policy and program decisions are considered from the perspective of children's views and their interrelated rights, including the right to non-discrimination. A National Children's Commissioner could advise on both the development and also the impacts of programs and policies affecting children, particularly by maintaining a focus on children to complement the sector focus in federal departments and by engaging children and youth and ensuring their views of the potential and actual impacts are available to decision-makers. This would contribute to the capacity of program and policy developers and decision-makers to ensure that they promote equity and avoid unintended discrimination in the treatment of and/or impacts on different groups of children.

Recommendation 3: That all federal departments work towards consensus to ensure that an independent Commissioner for Children and Young Persons is established so that legislation, policies and services for children are effective, more equitable and better coordinated.ⁱⁱⁱ

2) Promoting better outcomes specifically for First Nations children

The shared responsibility for children's rights, including access to health care, protection and education, across federal departments and between federal and provincial/territorial governments – and, increasingly, shared with First Nations governance bodies – is a challenge

to effective coordination and can result in disparities in the provision of, access to and benefits from such services, particularly for First Nations children for whom the funding and provision of services is statutorily organized differently than for other Canadian children. In 2003, the UN Committee on the Rights of the Child recommended that the Government of Canada “strengthen effective coordination and monitoring, in particular between the federal, provincial and territorial authorities, in the implementation of policies for the promotion and protection of the child, as it previously recommended (CRC/C/15/Add.37, para. 20), with a view to decreasing and eliminating any possibility of disparity or discrimination in the implementation of the Convention.”^{iv}

One of the ways in which Parliament intends for such disparity to be addressed is through effective implementation of Jordan’s Principle.^v Jordan’s Principle was adopted as an all-party motion in the House of Commons in 2007. It is a child-first principle to guide the resolution of disputes about the provision of services for children within and between federal and provincial/territorial governments in Canada. Where there is a lack of agreement about which jurisdiction should fund or provide a service, a frequent occurrence for First Nations children, Jordan’s Principle calls on the government of first contact to put the best interests of the child first and fund the service without delay, then seek reimbursement through a resolution process. Jordan’s Principle was intended to apply to all government services available to children, such as education, health, special needs, child welfare and culture and language services.

However, it appears that while federal and provincial governments have progressed in establishing certain agreements or protocols to implement Jordan’s Principle, there are missing elements that contribute to confusion among stakeholders; concerns that the implementation is construed in a far more limited scope than Parliament intended; and potential continuing inequity if the policy is inconsistently implemented in each jurisdiction through varying agreements and protocols.

While almost all provinces and territories have adopted Jordan’s Principle, independent assessments - such as that undertaken by the Canadian Paediatric Society - suggest that Jordan’s Principle is not fully operational in any province or territory or by the federal government. Implementation should, in our view, include the adoption of a policy, an implementation strategy and a dispute resolution process. Specifically, the following elements should be incorporated in every jurisdiction to support effective and full implementation of Jordan’s Principle, and with the resulting benefits of reducing confusion among important stakeholders and meeting human rights standards of transparency and accountability:

- a common and properly scoped definition of Jordan’s Principle, including when/how a claim will be identified as subject to Jordan’s Principle;
- standards for response time;
- a clearly identified focal point to receive queries;
- a transparent and consistent process for the resolution of claims, including standardized comparison and assessment methods;
- an independent oversight body;
- an appeal process rooted in procedural fairness;
- sufficient and designated financial and human resources for policy implementation, including a budget for adjudicating (as distinct from servicing) claims;

- regular access to training and capacity building amongst government officials and other relevant governance bodies, such as First Nations agencies; and
- a process of monitoring and evaluation, including regular, public reports on case management and outcomes.

Recommendation 4: That the federal and provincial/territorial governments work together to fully implement Jordan’s Principle according to enhanced implementation standards and protocols developed in collaboration with key stakeholders.

Inadequate and inequitable funding for the education, protective welfare and health care of First Nations children in comparison to other Canadian children continues to be a concern and has been raised by parliamentarians, independent bodies such as Canada’s Auditor-General and professional organizations, and subject to reviews and reports by federal officials. Allegations of inequitable funding particularly in relation to on-reserve child welfare services have been the subject of a complaint brought before the Canadian Human Rights Tribunal, an ensuing appeal to the Federal Court, and most recently a pending appeal to the Federal Court of Appeal. While new and existing programs continue to provide, and in some cases enhance, funding for particular services for First Nations children living in reserve communities, it is unclear whether such measures constitute or are based on equitable funding. Equitable funding is a concept that is variously interpreted, and unless an approach to funding is developed that is broadly understood and supportable, this approach to address discrimination in service provision and/or impact will continue to be challenged in the courts and in the court of public opinion.

It is difficult to separate children’s rights to the equitable provision of services from the equitable funding of such services, and from the equitable impacts of such services in terms of outcomes for children. However, a transparent and rights-consistent approach to funding interventions for First Nations children, regardless of which duty-bearers provide the funding or the services, should be developed that can in principle be applied to health care, education, child welfare and other government-supported services for children in Canada.

The equitable funding approach should include the following principles: secure, sustainable, transparent in formulation; consistently applied; supportive of culturally appropriate service provision; enabling of equitable outcomes for First Nations children in comparison to other Canadian children; monitored and reported on; subject to independent review; and delivered through accountable governance mechanisms.

Recommendation 5: That the federal government review and develop an approach to equitable funding for services provided to First Nations children, in consultation with First Nations, to support better health, child welfare, educational and life outcomes.

Conclusion

In all its manifestations, racial discrimination is a human rights violation that impacts a range of children’s rights and can severely impact children’s social, health, education and life outcomes. Preventing racial discrimination through child-sensitive governance mechanisms that help decision-makers fully consider the rights of children and through policy measures that

incorporate rights principles are effective ways to prevent discrimination, gain public support and yield better outcomes for children and youth. Using Child Rights Impact Assessments and a Child Rights Based Approach to policy and program development; establishing a national Children's Commissioner; incorporating rights-consistent principles in the implementation of good policy initiatives, including Jordan's Principle; and the increased funding of certain services for First Nations children are concrete ways to address the Concluding Observations raised by the UN CERD Committee. Implementing these measures would also serve to address the 2003 recommendation of the UN Committee on the Rights of the Child that Canada "continue to strengthen its legislative efforts to fully integrate the right to non-discrimination (article 2 of the Convention) in all relevant legislation concerning children, and that this right be effectively applied in all political, judicial and administrative decisions and in projects, programmes and services that have an impact on all children, in particular children belonging to minority and other vulnerable groups such as children with disabilities and Aboriginal children."^{vi}

Submitted on behalf of UNICEF Canada by:

Marvin M. Bernstein, B.A., J.D., LL.M.
Chief Advisor, Advocacy
UNICEF Canada

APPENDIX 1

List of Recommendations

Recommendation 1: That the federal and provincial/territorial governments use a robust Child Rights Impact Assessment process before legislation, policy and practice are developed that may have significant impacts on children.

Recommendation 2: That the federal and provincial/territorial governments provide regular in-service training for public servants responsible for strategic planning and for all other relevant policy, programming and specialist staff, including advisors, in each federal and provincial/territorial department.

Recommendation 3: That all federal departments work towards consensus to ensure that an independent Commissioner for Children and Young Persons is established so that legislation, policies and services for children are effective, more equitable and better coordinated.

Recommendation 4: That the federal and provincial/territorial governments work together to fully implement Jordan's Principle according to enhanced implementation standards and protocols developed in collaboration with key stakeholders.

Recommendation 5: That the federal government review and develop an approach to equitable funding for services provided to First Nations children, in consultation with First Nations, to support better health, child welfare, educational and life outcomes.

ENDNOTES

ⁱ For more information, see: <http://www.unicef.ca/en/policy-advocacy-for-children/what-is-a-child-rights-impact-assessment>

ⁱⁱ See Standing Senate Committee on Human Rights, Report The Sexual Exploitation of Children in Canada: the Need for National Action, page xi (November 2011), at:

<http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep03nov11-e.pdf>

and Standing Senate Committee on Human Rights, Children: The Silenced Citizens – Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children, at:

<http://www.parl.gc.ca/Content/SEN/Committee/391/huma/rep/rep10apr07-e.pdf>

ⁱⁱⁱ For more information related to establishment of a National Children’s Advocate, please see, *Not There Yet: Canada’s implementation of the general measures of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre and UNICEF Canada, (Florence, Italy: 2009), at:

<http://rightsofchildren.ca/wp-content/uploads/Not-There-Yet-Canadas-implementation-of-CRC-general-measures-UNICEF.pdf>

and *Right in principle, right in practice: Implementation of the Convention on the Rights of the Child in Canada*, Canadian Coalition for the Rights of Children (2012), at:

<http://rightsofchildren.ca/wp-content/uploads/CCRC-Report-to-UN-on-CRC.pdf>

^{iv} See Committee on the Rights of the Child, *Concluding Observations*, Document CRC/C/15/Add.215, 27 October 2003, at paragraph 11, at:

<http://daccess-ddsny.un.org/doc/UNDOC/GEN/G03/446/48/PDF/G0344648.pdf?OpenElement>

^v The Canadian Paediatric Society reviewed the implementation status of Jordan’s Principle in its 2012 report, *Are We Doing Enough? A status report on Canadian public policy and child and youth health*, which is accessible at:

<http://www.cps.ca/advocacy/StatusReport2012.pdf>

^{vi} See Committee on the Rights of the Child, *Concluding Observations*, Document CRC/C/15/Add.215, 27 October 2003, at paragraph 22, at:

<http://daccess-ddsny.un.org/doc/UNDOC/GEN/G03/446/48/PDF/G0344648.pdf?OpenElement>