

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

Mandate of the Special Rapporteur on the rights of indigenous peoples

10 May 2012

Excellency,

I have the honour of addressing you in my capacity as Special Rapporteur on the Rights of Indigenous Peoples in accordance with Human Rights Council resolution 15/14.

In this connection, I am writing to follow up on the situation of the **Attawapiskat First Nation, and broader issues related to the social and economic situation of First Nations in Canada**. As you are aware, on 19 December 2011, I sent an urgent appeal to your Excellency's Government in relation to this situation. I am grateful for your Government's detailed response in its letter of 14 February 2012, which will be reflected in full in the Joint Communications Report of Special Procedures Mandate Holders, alongside my original letter of 19 December 2011.

It appears that the Government has taken steps to address the situation in Attawapiskat as well as to tackle the persistent social and economic disadvantages that many First Nations in Canada continue to face. At the same time, it is apparent that there continue to be differing points of views and areas of disagreement between your Excellency's Government and other sources of information on these matters. Without purporting to resolve all the areas of disagreement, I would like follow up to my earlier communication with the following comments and further inquiries, in light of Canada's response of 14 February 2012 and new information and developments that have come to my attention.

H.E. Ms. Elissa Goldberg
Ambassador, Permanent Representative
Permanent Mission of Canada
To the United Nations Office at Geneva

The situation of the Attawapiskat First Nation

With respect the emergency housing situation in Attawapiskat, I understand that many of the short-term concerns have been or are being addressed, although there has been criticism about the timeliness and adequacy of the Government's response in this regard. In particular, emergency housing and some 2.4 million dollars in funding towards that end was provided to some 22 families identified as needing such assistance, and these families are currently living in better conditions. Still, I note that there is a continuing need for the Government of Canada, and especially the Department of Aboriginal Affairs and Northern Development Canada, to work with the Attawapiskat First Nation to develop medium and long term solutions to the social and economic situation faced in the community, especially the housing situation. In order for this to happen, concerted efforts will likely need to be taken by the Government to help overcome the significant feelings of mistrust and frustration that continue to exist among the people of Attawapiskat following this situation.

As your Government is aware, a clear source of this frustration among the people of Attawapiskat was the appointment of a third party manager by the Department of Aboriginal Affairs and Northern Development Canada to administer the funds provided for emergency housing. This was a principal concern raised in my 19 December 2011 letter, to which your Government responded in its letter of 14 February 2012. I am aware that the Government has decided to remove the third party manager and return the Attawapiskat First Nation to a co-management regime. This change is reportedly due to progress made in the health and safety situation of the Attawapiskat First Nation. At the same time, I understand that Attawapiskat people continue to criticize and challenge the legality of the Government's decision to appoint the third party manager, as well as allege that the manager mishandled funds. Still, I would like to acknowledge Canada's removal of the third party manager as a positive step and, at the same time, urge your Government to seriously consider and evaluate any future decision that has the effect of limiting or removing Attawapiskat decision-making authority, in light of Canada's human rights obligations.

Overall, the Government should, in cooperation with the Attawapiskat, enhance efforts to strengthen the First Nation's own governance structures and increase the capacity of the Attawapiskat leadership to manage funding independently, as the Government of Canada stated in its response of 14 February 2011 that it is committed to doing. Where necessary, this should include the training of Attawapiskat individuals in the skills necessary to be self-sufficient for the First Nation and to manage its own affairs, including its social and economic development. In this way, the goal of increasing the self-determination of the Attawapiskat First Nation should be folded in to all initiatives to improve the First Nation's social and economic conditions.

Other issues related to the social and economic situation of First Nations in Canada

That First Nations in Canada, in general, suffer worse social and economic situations than non-indigenous Canadians is undisputed. While your Excellency's Government pointed out in its 14 February 2012 letter that "the standards of living also vary widely between different Aboriginal communities", it also "acknowledges the gap in standards of living that exists, in aggregate terms, between Aboriginal and non-Aboriginal Canadians" (page 9). Certainly, the Government is taking various measures to address these gaps, including those referred to in your 14 February 2012 letter in the five key areas identified: economic development; education; citizen empowerment and protection of the vulnerable; resolution of land claims and reconciliation; and governance and self-government. I very much appreciate the information provided by Canada in this regard and look forward to examining these measures in more detail at a later time.

While I understand that this issue is extremely complex, and that there are numerous factors contributing to the relatively poor social and economic conditions of many First Nations in Canada, I am interested at this stage in knowing more about the 2 per cent funding formula provided to the Department of Aboriginal Affairs and Northern Development Canada (AANDC) for the delivery of basic social and economic programs and services to First Nations. I have additional questions about this two per cent funding formula in light of your Government's response and further information I have received on this issue.

While the two per cent funding formula has been described as a "cap", in the 14 February 2012 letter your Government stated that "[t]his 2 per cent increase is not a "cap", but rather an escalator – it guarantees a minimum rate of increase in spending on Aboriginal core services" (page 8). Nevertheless, I understand that, effectively, funding to the AANDC cannot increase by more than 2 per cent each year, and that this has been the case since the 2 per cent funding formula was established in the mid-nineties. I would therefore be grateful for further clarifications about the statement that the 2 per cent is a "minimum rate of increase in spending on Aboriginal core services". Specifically, are there any plans to increase the approved annual growth rate for basic services from 2 per cent to a higher percentage? If not, why not?

In response to my question regarding the reason for the establishment in the mid-nineties of the 2 per cent cap on spending increases by the Federal Government for core services for Aboriginal people, your Government stated that the program was initiated in order to "reduce Canada's deficit" (page 8). Is this still the reason for the 2 per cent limit today?

As I brought up in the 19 December 2011 letter, a principal concern with the funding formula is that it has been kept at the same level since the mid-nineties, while funding levels for core services provided by the provinces—through the Canada Health Transfer and the Canada Social Transfer, as well as the “equalization” transfer for the less well-off provinces— has increased. If this is true, why has Canada increased funding rates for basic service delivery by the provinces and kept the funding rate for the AANDC the same?

In this connection, in its response of 14 February 2012, your Government stated, “Although AANDC’s approved annual growth rate for a bundle of basic services has remained at 2 per cent since the mid-1990s, the overall annual growth rate is larger due to significant investments made in priority areas through successive budgets” (page 9). Your Government further added, “Since 2006, the Department has invested \$1.9 billion in First Nations Water and wastewater, \$3.8 billion in First Nations Infrastructure including, School Construction Funding, and close to \$1 billion in First Nations housing” (page 9). However, I have received information that these investments have by and large been for targeted and time-limited programs, which while welcome, do not make up for the lack of adequate funding to First Nations for day to day basic services.

Also in this connection, in its letter of 14 February 2012, your Government stated, “The 1996 Royal Commission on Aboriginal Peoples found that Aboriginal Canadians in fact benefited *more* from Government spending than non-Aboriginal Canadians” (page 9). Bearing in mind that that finding was made before the 2 per cent funding formula was established, is it still true that Aboriginal Canadians benefit more from Government spending than non-Aboriginal Canadians?

Another concern with this 2 per cent funding formula is that, while the total amount of funding for First Nations programs has increased, it has not been at a rate equal to population growth or inflation rates. In her May 2006 report on Management of Programs for First Nations, the Auditor General concluded, “Funding for First Nations programs has increased in recent years, but not at a rate equal to population growth. [AANDC]’s funding increased by only 1.6 percent, excluding inflation, in the five years from 1999 to 2004 while Canada’s Status Indian population [...] increased by 11.2 percent” (Chapter 5, paragraph 5.4). Has Canada considered adjusting the 2 per cent formula to take into consideration inflation and population growth rates? If not, why not?

As a result of this situation, First Nations have reportedly been forced to reallocate the discretionary funding resources available to them in order to match the funding increases for basic services by the provinces. According to the information received, AANDC provides funding for many of the same services to status Indians living on reserves that the provincial governments provide to other segments of the population, such as education. AANDC is expected to fund these province-like services at a level that is comparable to the provinces’ expenditure levels for similar services. Although the source of this requirement is reportedly not totally clear, constitutional and human rights standards related to non-discrimination would seemingly call for these comparable levels of spending. There is also reportedly insufficient clarity about the meaning of the term “comparable”, as pointed out in the Auditor General’s 2011 report on Programs for First Nations on Reserves (page 23).

In order to meet this standard, and without adequate overall funding for social and economic services, First Nations have allegedly been forced to reallocate funding for discretionary programs, such as housing, to the province-like programs, in order to match provincial increases in funding for similar programs. I have been told that this may help explain why First Nations such as Attawapiskat have had difficulties in securing adequate housing for their members. Is this reallocation in fact occurring as described? If so what steps are being taken to address the problems it causes for funding for services such as housing?

Concluding comments

Excellency, these are only some initial observations and inquires regarding the Attawapiskat situation and the overall social and economic situation of First Nations in Canada. I would be grateful for any comments by your Excellency's Government on the above information and observations, and for responses to the questions presented regarding the funding formula.

I would welcome the opportunity to maintain further dialogue with your Government in this regard. Therefore, I would like to reiterate my the interest I expressed in my letter of 8 February 2012 in carrying out visit to Canada within the framework of Canada's open invitation to Special Procedures Mandate Holders. As your Government is aware, in that letter, I suggested that the visit take place for a period of seven or so days, sometime between March and August 2012, although I am of course open to suggestions of your Government.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya
Special Rapporteur on the rights of indigenous peoples