



## First Nations Child and Family Caring Society Submissions

### UN Day of General Discussion: “Children’s Rights and Alternative Care”

#### EXECUTIVE SUMMARY

The First Nations Child and Family Caring Society of Canada (“Caring Society”) a national, non-profit organization that works to ensure the safety and well-being of First Nations children, youth and their families through education initiatives, public policy campaigns and providing quality resources to support communities.<sup>1</sup> The Caring Society provides opportunities for people of all ages to make a difference for First Nations children, youth and families through activities that foster reconciliation and support culturally based equity. We believe that everyone can take peaceful and respectful action to help make a better Canada for First Nations children and their families.<sup>2</sup>

Canada’s ongoing legal battle against 165,000 First Nations children and their families will inform the Caring Society’s submissions relating to child protection and alternative care services for children for the Day of General Discussion. The following submissions are divided into two parts. Part I provides a contextual overview of ongoing human rights litigation relating to Canada’s discriminatory treatment against First Nations children and their families in the provision of child protection services and alternative care. Part II makes three recommendations for the Day of General Discussion. These recommendations are as follows:

- 1) Child protection and alternative care services must not perpetuate harm caused by colonization and discrimination. In other words, these services must aim to relieve pre-existing inequalities.
- 2) Child protection services and alternative care services must promote substantive equality.
- 3) Substantive equality must be ensured in *all* public services, not just child protection and alternative care services, in order to achieve equitable outcomes for all children.

<sup>1</sup>“First Nations Child and Family Caring Society”, online: *Caring Society* <<https://fncaringsociety.com/>> [*Caring Society*].

<sup>2</sup>*Ibid.*

#### SUBMISSIONS

##### Context

The Caring Society’ submissions for the Day of General Discussion on Children’s Rights and Alternative Care are informed by its ongoing human rights litigation against Canada involving the equality rights of 165,000 First Nations children and their families. This litigation commenced in 2007 when the Caring Society and the Assembly of First Nations, a political organization tasked with advocating for First Nations communities as directed by Chiefs-in-Assembly, lodged a human rights complaint against the Government of Canada alleging that it was discriminating against First Nations children and their families on the basis of race and/or national or ethnic origin, particularly in the context of the provision of child protection and alternative care services. In 2016, the Canadian Human Rights Tribunal (“CHRT”) found that Canada’s child protection services for First Nations children and their families perpetuate the disadvantage of First Nations children and families.<sup>3</sup> In particular, it held that Canada these services create incentives to remove First Nations children from their families, homes and communities.<sup>4</sup> It also found that Canada’s services fail to consider the actual service needs of First Nations children and their families.<sup>5</sup> Furthermore, the CHRT concluded that the lack of coordination between different essential government programs causes First Nations children to be denied culturally appropriate services or experience delays when seeking to access services.<sup>6</sup> According to the CHRT, this often causes First Nations children to be unnecessarily put into state care. In light of these findings, the CHRT concluded that the Government of Canada is discriminating against First Nations children and their families on the basis of race and/or national

<sup>3</sup>*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [CHRT 2016].

<sup>4</sup>*Ibid* at para 384.

<sup>5</sup>*Ibid* at paras 388-89.

<sup>6</sup>*Ibid* at para 391.

or ethnic origin contrary to the *Canadian Human Rights Act*.<sup>7</sup> This discrimination and its harmful impacts continue to this day.

Despite the CHRT’s findings of discrimination and its orders for Canada to cease its inequitable child protection and alternative care practices, Canada has failed to take the necessary steps to put an end to its discriminatory conduct. Moreover, it has refused to take measures to identify and remedy the inequities in other public services it provides to First Nations children and their families. While various public officials and lawyers for the Government of Canada erroneously claim that its discrimination against First Nations children is a “thing of the past”, Canada continues its non-compliance with the CHRT’s decision on the merits and has consequently been subject to ten (10) non-compliance orders.<sup>8</sup> Furthermore, the federal government is currently challenging two CHRT decisions concerning previously upheld racial discrimination claims.<sup>9</sup> Meanwhile, Canada’s discrimination against over 165,000 First Nations children and their families continues.

### Recommendations of the Caring Society

#### **1. Child protection and alternative care must not perpetuate harms caused by colonization and discrimination**

The Indian Residential Schools System (“IRSS”) began operating in the 1800s and separated tens of thousands of Indigenous children from their families and communities.<sup>10</sup> The federal government played a direct role in the expansion and management of these schools.<sup>11</sup> The objective of IRSS was to remove children from their homes and assimilate them into the dominant culture—in more infamous terms, “to kill the Indian in the child.”<sup>12</sup> For more than a century, Indigenous children were forcibly brought to IRSS.<sup>13</sup> The living conditions were “appalling, giving place to disease, hunger, stress, and despair.”<sup>14</sup> Children were forbidden to speak their native language and were martyred through austere punishment, including the insertion of needles into their tongues, the electric chair, forced consumption of vomit,

forced seclusion, as well as endless verbal, sexual and/or physical abuse.<sup>15</sup> In the 1960s, the focus of these institutions shifted from “education” to “child welfare” and the federal government took over sole management.<sup>16</sup> Throughout this decade, a large-scale “scooping” of First Nations children from their homes and their subsequent adoption into predominantly non-Indigenous households became known as the “sixties scoop.”<sup>17</sup>

Canada’s national conscience was shocked this month by the discovery of the remains of over 1000 children who attended IRSS in unmarked graves across the country. While this tragic news came as a surprise to some, the Truth and Reconciliation Commission of Canada had already cautioned that thousands of children died in IRSS and that estimates of the numbers of deaths were low due to failure proper document them. The TRC’s final report also found that IRSS institutions were poorly built and heated, and that children resided in unsanitary and unhealthy living conditions without access to appropriate health services or trained medical staff. These unsafe and poor health conditions were largely due to the Government of Canada’s systemic underfunding of the services provided to Indigenous children in the IRSS and put them more at risk to poor health outcomes, illness and death. The children who managed to survive the ordeal are psychologically scarred as a result.<sup>18</sup> The broader impacts of IRSS also include the erosion of culture and language in many First Nations communities. The legacy of IRSS also contributes to poor socio-economic well-being, as well as poor physical and mental health outcomes in First Nations communities.<sup>19</sup> The cumulative impact of these collective traumas is transmitted through generations, from survivors of the IRSS, to their children, grandchildren, and great-grandchildren.<sup>20</sup> Today, Indigenous communities experience the highest rates of suicide in the country.<sup>21</sup>

When the IRSS era came to an end, Canada implemented the First Nations Child and Family Support Program (“FNCFS”).<sup>22</sup> Today, this program’s funding formula “provides more incentives for taking children into care than it provides support for preventive, early intervention and less intrusive

<sup>7</sup>*Ibid* at paras 456–467.

<sup>8</sup>For an overview of the non-compliance orders issued by the CHRT against Canada, see *Caring Society*, online: <https://fncaringsociety.com/chrt-orders>.

<sup>9</sup>*Ibid*.

<sup>10</sup>CHRT 2016, *supra* note 3 at para 413.

<sup>11</sup>*Ibid* at para 411.

<sup>12</sup>*Ibid* at para 407.

<sup>13</sup>*Ibid*.

<sup>14</sup>*Ibid*.

<sup>15</sup>*Ibid*.

<sup>16</sup>*Ibid* at para 413.

<sup>17</sup>*Ibid*.

<sup>18</sup>*Ibid* at para 408.

<sup>19</sup>*Ibid* at para 418.

<sup>20</sup>*Ibid* at paras 417 and 420.

<sup>21</sup>*Ibid* at para 227.

<sup>22</sup>*Ibid* at para 414.

measures.”<sup>23</sup> As a result, more Indigenous children live out of family care today, than at the height of IRS.<sup>24</sup> The ongoing consequences of removing First Nations children from their homes continue to cause severe harm to First Nations children and their families. According to Commissioner Dr. Marie Wilson, one of the three commissioners of the Truth and Reconciliation Commission, the harms experienced by First Nations children today when they are removed from their families, homes and communities are comparable to those experienced by children who attended the IRSS.

The CHRT has held that Canada’s current child protection services for First Nations children and their families perpetuate the disadvantage of First Nations children and families. In accordance with the CHRT’s ruling, the Caring Society submits that child protection and alternative care services must not perpetuate the harms experienced by Indigenous children caused by colonization and discrimination. Rather, they must take into account the unique needs of these children and seek to remedy past and ongoing forms of colonization and discrimination.

## **2. Child protection and alternative care services must be substantially equal**

In its 2016 decision, the CHRT found that Canada child protection and alternative care services do not meet the actual needs of First Nations children. In particular, it held that funding formulas are based on flawed assumptions that do not accurately reflect the service needs of many First Nations communities.<sup>25</sup> Moreover, it found that the levels of funding provided is not reasonably compared to child protection and alternative care services provided to other children. According to the CHRT, this discrimination causes First Nations children to be unnecessarily put into state care.

Having made these findings, the CHRT ordered Canada to ensure substantive equality in the provision of child and family services to First Nations children and their families. According to the CHRT, this means that Canada must provide First Nations children and their families with child protection and alternative care services that consider their distinct cultural, historical and geographical needs and circumstances.

<sup>23</sup>*Ibid* at para 168.

<sup>24</sup>*The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit, and Métis Children, Youth and Families*, by Yellowhead Institute (4 July 2019) at 7 [*Promise and Pitfalls of C-92*].

<sup>25</sup> CHRT 2016, *supra* note 3 at para 458.

In keeping with the CHRT’s orders, the Caring Society submits child protection and alternative care services for Indigenous children must be substantially equal to those provided to other children. This means that they must be funded, at a minimum, at levels that ensure the provision of services that are comparable to the quality of those provided to other children. Moreover, child protection and alternative care services for Indigenous children and their families must take into account and seek to remedy the unique harms caused by colonialism and discrimination. Finally, child protection and alternative care services for Indigenous services must be culturally appropriate and take into account their geographic realities.

## **3. Substantive equality in all public services**

There are well-documented inequities in the public services (housing, education, health, etc.)<sup>26</sup> Canada provides to First Nations children. In addition to failing to provide culturally appropriate services and services that consider unique needs caused by colonialism and systemic racism, Canada also provides First Nations children public services that are often inequitable when compared to those offered to other children living in Canada.<sup>27</sup> To that end, the Spirit Bear Plan aims to provide a concrete road map for the Government of Canada to ensure substantive equality in all public services for First Nations children and their families.<sup>28</sup> The plan calls on Canada to publicly cost out the funding shortfalls in all services provided to First Nations children and their families and propose solutions to fix them.<sup>29</sup> It also urges departments of the government of Canada that provide services to First Nations children and their families, to undergo a thorough and independent evaluation to identify ongoing discriminatory ideologies, policies or practices and to address them and implement a mandatory cultural safety training for all public servants.<sup>30</sup>

Disparities in the outcomes for children in alternative care will continue to occur so long as they experience discrimination when accessing certain public services. In other words, child protection and alternative care services cannot be examined in a silo without considering the quality of all of the other public services they receive.

<sup>26</sup>*Ibid*.

<sup>27</sup>*Ibid*.

<sup>28</sup>*Ibid*.

<sup>29</sup>*Ibid*.

<sup>30</sup>*Ibid*.

Substantially equal outcomes can only be achieved for children in alternative care if equitable services are provided to them holistically in all public services without exception.