



**First Nations Child & Family
Caring Society of Canada**

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Canada's Ongoing Racial Discrimination Against 165,000 First Nations Children and Their Families

REPORT TO THE COMMITTEE ON THE RIGHTS OF THE
CHILD

Fifth and Sixth Periodic Report of Canada



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Executive Summary

These submissions are made on behalf of the First Nations Child and Family Caring Society of Canada (“Caring Society”), a non-profit organization committed to research, policy development and public education on behalf of First Nations agencies that serve the well-being of children, youth and families. At the Caring Society, we support providing opportunities for young people to take part in activities that foster reconciliation and culturally based equity for First Nations children and youth.¹ We believe that each of us can take peaceful and respectful actions to help make a better Canada for First Nations children and their families.

The Caring Society is of the view that Canada has failed to respect its obligations set out in the Convention on the Rights of the Child (“the Convention”). In particular, Canada is violating the rights of First Nations children that are guaranteed by articles 2 (right to non-discrimination), 18 (right of parents or legal guardians to assistance for the upbringing and the development of their child), 20 (right to special protection when deprived of his or her family) and 29 (right to education supporting his or her cultural identity, language and values) of the Convention.

This claim is supported by findings of discrimination made by a domestic human rights body. Indeed, in 2016, the Canadian Human Rights Tribunal (“CHRT”) found the Government of Canada’s First Nations Child and Family Services Program (“FNCFS”) to be discriminatory on the basis of race and national ethnic origin. In 2019, the Government of Canada found Canada’s discrimination to be “wilful and reckless” contributing to the deaths of some children and the unnecessary family separations of many others. Canada was ordered to provide \$40,000 to every First Nations child who was inappropriately removed from their family, as well as to their parents or grandparents, to compensate them for the wilful and reckless discrimination they experienced. However, the Government filed a judicial review seeking to quash all financial compensation arguing that such payments imposed too heavy of a burden on Canada. They created confusion among victims and Canadians by making public statements that they were committed to “compensation” and wanted to “get it right” and had no good answer when asked why their legal strategy was completely at odds with their rhetoric. Discrimination remains ongoing, with at least four further orders under reserve at the Tribunal and yet Canada makes repeated public statements that the discrimination is “in the past.” In light of this, the Caring Society is requesting that the Committee on the Rights of the Child (“CRC”) urge Canada to fully comply with the orders and immediately and appropriately, compensate all victims for Canada’s discriminatory conduct.

¹ According to the federal government’s definition of Indigenous People’s in Canada, there are three Indigenous groups in Canada: Inuit, Métis et First Nations.



Canada is also discriminating against First Nations children in the context of education. Shannen Koostachin, a youth from Attawapiskat lead a movement for “safe and comfy” schools and quality, culturally-based education for First Nations children called the Attawapiskat School Campaign. Shannen passed away in May 2010. Ten years later, the Government of Canada has yet to honor her legacy by providing culturally-based education to First Nations children in Canada.

The following submissions are divided into four parts. Part I provides a contextual overview from a few different domestic perspectives of the discrimination currently experienced by First Nations children in Canada. Part II supports the contextual overview by providing concerns expressed by international counterparts. Part III proposes questions to ask Canada during the review. Part VI presents the Caring Society’s proposed recommendations for Canada’s upcoming review before the CRC.



PART 1 – Background

a) Canada's Historical and Ongoing Racial Discrimination Against First Nations Children

Canada has a longstanding history of discrimination against First Nations children and youth. This claim is supported by findings of discrimination made by a domestic human rights body. On January 26, 2016, the Canadian Human Rights Tribunal (“CHRT”) issued a ruling in which it found the Government of Canada’s provision for First Nations Child and Family Services Program to be discriminatory on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act* which prohibits discrimination in the context of the provision of services.² While the Government of Canada did not seek a judicial review of this decision, it has nonetheless failed to comply with the CHRT’s orders to cease its discriminatory behavior, provide immediate relief, and further outline a process for determining more specific remedies.³ As such, the CHRT has been forced to issue subsequent non-compliance orders. For instance, on May 26, 2017, the CHRT ruled that “Canada has repeated its pattern of conduct and narrow focus with respect to Jordan’s Principle,”⁴ which ensures First Nations children get the services they need when they need them.

The parties are still waiting for the CHRT to rule on Canada’s funding of small agencies, definition of First Nations child (which impacts which children are affected by the ruling), major capital costs, reallocation within the budget of Indigenous Services Canada (meaning the practice of taking money away from other Indigenous services and programs to fill in for funding shortfalls in child welfare services thereby simply displacing the discriminatory conduct) and a timeline for work presently underway by the Consultation Committee on Child Welfare (“CCCW”).

In its most recent order, released in September 2019, the CHRT found that Canada’s wilful and reckless discrimination was ongoing. It also linked Canada’s unlawful conduct to the deaths of some children and the unnecessary family removals of others. Despite this finding, as recently as February of 2020, the Minister of Indigenous Services Canada continues to refer to the discrimination as “in the past”, raising serious questions as to whether Canada will undertake the reform needed to cease its discriminatory conduct. This positioning by Canada is particularly egregious given its direct role in the Indian Residential Schools and the 60s Scoop, which both caused mass removals of First Nations children from their families and

² 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) (26 January 2016), online: CHRT <canlii.ca/t/gn2vg>.

³ First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada) (6 September 2019), online: CHRT <canlii.ca/t/j3n9j> [CHRT 2019].

⁴ First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada) (26 May 2017), online: CHRT <canlii.ca/t/h4nqt>.



communities, and the now nine (9) non-compliance orders the Tribunal has issued since its 2016 decision ordering Canada to cease its discriminatory conduct.

Based on the findings made in its September 2019 decision, the CHRT ordered the Government of Canada to provide \$ 20,000 to every First Nations child who was inappropriately removed from their family, as well as to their parents or grand-parents, to compensate them for the discrimination they experienced (akin to damages for pain and suffering).⁵ In addition to this, Canada was also ordered to pay \$20,000 to every First Nations child who was inappropriately removed from their family, as well as to their parents or grand-parents, because its discrimination was found to be “wilful and reckless” (akin to punitive damages). The Government of Canada sought to challenge this decision before the Federal Court of Canada. Though it is legally required to engage in discussions with the parties regarding the compensation process, the CHRT has expressed concerns about Canada’s lack of collaboration and compliance with its orders.⁶ While contesting the compensation order made by the CHRT, Canada has also advised that it would be opposing the certification of a class action (separate to the CHRT process) in which those harmed by Canada’s discriminatory conduct could seek compensation.⁷ Canada’s conduct in these two legal actions is at odds with statements of numerous statements made by public officials suggesting that it is committed to compensating First Nations children and their families.⁸

b) Spirit Bear Plan

While the CHRT has ruled on the discriminatory funding of child welfare services, many other federally funded public services provided to First Nations, such as health care, housing, infrastructure, and safe water are also underfunded and insufficient.⁹ Government funding structures have been generally inequitable because they fail to take into account cultural needs, historical disadvantage caused by colonization and Indian Residential Schools, and geographical circumstances. As a result, First Nations peoples across Canada have significantly lower socio-economic well-being than other Canadians. In 2018, the Auditor General of Canada found that Canada had failed to take even the preliminary steps necessary to eliminate the socio-economic gaps between First Nations people and other Canadians and improve lives on reserves. The Auditor General urged Canada to gather and use data to comprehensively

5 CHRT 2019, supra note 2.

6 “Human rights tribunal says it felt ‘cornered’ by Canada to extend First Nations child compensation deadline” (27 November 2019), online: APTN <<https://aptnnews.ca/2019/11/27/human-rights-tribunal-says-it-felt-cornered-by-canada-to-extend-first-nations-child-compensation-deadline/>>.

7 Jorge Barrera, “Ottawa backed away from commitment to approve child welfare lawsuit, lawyer says” (25 January 2020), online: CBC <cbc.ca/news/indigenous/ottawa-lawsuit-children-1.5440349>.

8 See “Minister of Indigenous Services Mandate Letter” (13 December 2019), online: Justin Trudeau, Prime Minister of Canada <pm.gc.ca/en/mandate-letters/minister-indigenous-services-mandate-letter> and Indigenous Services Canada, “Joint Statement by the Minister of Indigenous Services and the Minister of Justice and Attorney General of Canada on compensation for First Nations children” (25 November 2019), online: Government of Canada <canada.ca/en/indigenous-services-canada/news/2019/11/joint-statement-by-the-minister-of-indigenous-services-and-the-minister-of-justice-and-attorney-general-of-canada-on-compensation-for-first-nations.html>.

9 “Spirit Bear Plan”, online: First Nations Child & Family Caring Society <fncaringociety.com/spirit-bear-plan>.



measure and report on the overall socio-economic well-being of First Nations people on reserves compared with that of other Canadians.¹⁰

The Spirit Bear Plan, unanimously supported by the Assembly of First Nations (AFN)¹¹, proposes a series of actions which would end inequalities in public services for First Nations children, youth and families.

The Spirit Bear Plan calls on:

- CANADA to immediately comply with all rulings by the CHRT ordering it to immediately cease its discriminatory funding of First Nations child and family services. The order further requires Canada to fully and properly implement Jordan's Principle (www.jordansprinciple.ca).
- PARLIAMENT to ask the Parliamentary Budget Officer to publicly cost out the shortfalls in all federally funded public services provided to First Nations children, youth and families (education, health, water, child welfare, etc.) and propose solutions to fix it.
- GOVERNMENT to consult with First Nations to co-create a holistic Spirit Bear Plan to end all of the inequalities (with dates and confirmed investments) in a short period of time, sensitive to children's best interests, development and distinct community needs.
- GOVERNMENT DEPARTMENTS providing services to First Nations children and families to undergo a thorough and independent 360° evaluation to identify any ongoing discriminatory ideologies, policies or practices and address them. These evaluations must be publicly available.
- ALL PUBLIC SERVANTS, including those at a senior level, to receive mandatory training to identify and address government ideology, policies and practices that fetter the implementation of the Truth and Reconciliation Commission's Calls to Action.¹²

10 Office of the Auditor General of Canada, Report 5—Socio-economic Gaps on First Nations Reserves—Indigenous Services Canada, 2018 Spring Reports of the Auditor General of Canada (29 May 2018), online, Office of the Auditor General of Canada: < https://www.oag-bvg.gc.ca/internet/English/mr_20180529_e_43084.html >

11 Perry Bellegarde, "Support the Spirit Bear Plan to End Inequities in all Federally Funded Public Services for First Nations Children, Youth and Families" (Ottawa: Special Chiefs Assembly, 7 December 17), online (pdf): First Nations Child and Family Caring Society of Canada <fncaringociety.com/sites/default/files/2017%20AFN%20Resolutions%2092%20SB%20Plan.pdf>.

12 Spirit Bear Plan, supra note 28.



c) Shannen's Dream

Shannen Koostachin of Attawapiskat First Nation led a movement for “safe and comfy” schools and quality, culturally-based education for First Nations children called the Attawapiskat School Campaign.

Shannen knew just how hard it was to learn in an on-reserve school that was under resourced. The only elementary school for the 400 children in Attawapiskat was closed as thousands of gallons of diesel fuel contaminated the ground under the school. The federal government put portable trailers on the playground of the contaminated school as a “temporary school” until a new one could be built. Nine years later there was still no sign of a new school.

Shannen never went to class in a proper school and the portables became more run down over time. The heat would often go off, the children would have to walk outside in the cold to go from one portable to another and the doors were warped. The children of Attawapiskat launched the Attawapiskat School Campaign to reach out to non-Aboriginal children all across Canada to write to the federal government and demand a new school for Attawapiskat.

Thousands of children answered the call and three Ministers of Indian Affairs¹³ promised a new school and then broke their promise. The children kept writing. When the Minister of Indian Affairs, Chuck Strahl, wrote in 2008 to say the federal government could not fund a new school, the grade 8 class canceled their graduation trip to Niagara Falls and used the money to send three youth, including Shannen, down to meet with Minister Strahl to demand a new school.

Minister Strahl said the government could not afford a new school. Shannen did not believe him and she told the Minister that she would never give up because the younger children in her community deserve a proper school. She kept her promise. Shannen spoke to thousands of people asking for their help to ensure every child got a good education and a “comfy” school. She was an inspiring speaker because she talked from the heart. She made a compelling speech at an education rights conference hosted by the children of Attawapiskat and attended by 500 other children at the University of Toronto in 2009.

Shannen's leadership was remarkable and she was nominated, as an ambassador for all the children of Attawapiskat, for the International Children's Peace Prize given out by the Nobel Laureates. In May of 2010, Shannen Koostachin tragically passed away in an automobile accident. With the support of her loving family, friends and community, Shannen's Dream (www.shannensdream.ca) is a campaign named in her memory to make sure all First Nations children across Canada have “safe and comfy schools” and receive a good quality education that makes them proud of who they are. In 2015, the Truth and Reconciliation Commission also called upon Canada to provide culturally-based education for First Nations children.¹⁴

¹³ Now Indigenous Services Canada

¹⁴ “Calls to Action” (2015), online: Truth and Reconciliation Commission of Canada <nctr.ca/assets/reports/Calls_to_Action_English2.pdf>



Ten years after Shannen's death, the Government of Canada has still not taken adequate measures to ensure safe and comfy schools and equitable and culturally-appropriate education services and programs to First Nations children. First Nations children across the country continue to experience discrimination in education and limited access to education in their First Nations languages.¹⁵

PART 2 – Canada's Failure to Meet its International Obligations

a) Violation of the Convention

The deficiencies and inequities of the child welfare and education services violate the Convention on the Rights of the Child in the following ways:

- Article 2 provides that all rights within the Convention must be ensured, free from any discrimination.¹⁶ The CHRT found Canada to be engaging in unlawful discrimination against 165,000 First Nations children, their parents and grand-parents, on their basis of race and ethnic origin. The CHRT also found Canada to have engaged in wilful and reckless discrimination contrary to the CHRA because it was aware of its underfunding and its detrimental impacts on First Nations children and their families. Similarly, Canada's failure to provide equitable and culturally-appropriate educational services, programs and infrastructure to First Nations children also amounts to discrimination. This is contrary to article 2 of the Convention.
- Article 18 of the Convention stresses the importance of the central role parents play in the upbringing and development of a child, as well as the importance of assistance that States shall offer to parents to support them in their child-rearing responsibilities.¹⁷ Therefore, this article calls for preventative measures and support in order to allow First Nations children to remain with their families and communities. Canada's failure to fund such preventative measures and support to First Nations families is a breach of article 18 of the Convention. While Canada may claim to have taken steps to meet its obligations under article 18 by adopting, *An Act respecting First Nations, Inuit and Métis children, youth and families* (Bill C-92,), this legislation does not guarantee equitable and culturally-appropriate funding. In the absence of this adequate funding, the law's stated

¹⁵ "Why fixing First Nations education remains so far out of reach" (22 August 22 2014), online: MacLeans <macleans.ca/news/canada/why-fixing-first-nations-education-remains-so-far-out-of-reach>. See also "Commission Laurent: des jeunes Autochtones tenus à l'écart de l'école par la bureaucratie", (6 February 2020), online : Le Devoir <<https://www.ledevoir.com/societe/education/572305/du-yoga-plutot-que-l-ecole-pour-des-centaines-de-jeunes-autochtones?fbclid=IwAR1mTChizb-2UyEjYEGBVS6QkyRyiYeA92W8GhDckImwFcXgOvbkiGICisU>>

¹⁶ Ibid at art 2.

¹⁷ Convention on the Rights of the Child, 20 November 1989 at art 18 (entered into force 2 September 1990) [Convention].



objective of keeping Indigenous children and youth connected to their families, communities, and culture is nothing but an empty promise.

- Article 20 of the Convention stipulates that States must provide child welfare services, which should consider the child's ethnic and cultural background.¹⁸ The CHRT found that Canada's child welfare services were not equitable and failed to consider their unique historical, cultural and geographical circumstances. Canada is therefore violating article 20 of the Convention.
- Article 29 provides that a child's education shall be directed to the development of a child's cultural identity, language and values. Canada has failed to bring Shannen's Dream to life by providing equitable and culturally-appropriate educational services, programs and infrastructure to First Nations children. This is contrary to article 29.

b) Concerns expressed by other international and regional human rights bodies

Numerous international and regional treaty bodies have expressed concerns regarding Canada's racially discriminatory conduct against First Nations children and their families. These include, by way of example:

- In 2009, UNICEF expressed concern regarding the underfunding of child welfare services provided to First Nations children in Canada.¹⁹
- In April 2012, the UN Committee on the Elimination of Racial Discrimination recommended that Canada discontinue the unnecessary removal of Aboriginal children from their families and that it provides sufficient funding for Aboriginal family and childcare services.²⁰
- In December 2012, the UN Committee on the Rights of the Child expressed concern regarding the significant overrepresentation of Aboriginal children in out-of-home care and recommended that Canada "take urgent measures" to address the problem.²¹
- In the 2014 report on the situation of Indigenous Peoples in Canada, the UN Special Rapporteur on the Rights of Indigenous Peoples pointed to Canada's child welfare

¹⁸ Ibid at art 20.

¹⁹ Canadian UNICEF Committee, *supra* note 5.

²⁰ Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the Convention, UNCERDOR, 8th Sess, UN Doc CERD/C/CAN/CO/19-20 (2012) at para 19.

²¹ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic report of Canada, UNCRCOR, 61st Sess, UN Doc CRC/C/CAN/CO/3-4 (2012) at paras 32, 33.



system as one a cause of “significant concern” for the health and well-being of Indigenous Peoples in Canada.²²

- In August 2015, the UN Human Rights Committee expressed further concern regarding the insufficient funding of child welfare services provided to Indigenous children in Canada. It urged Canada to provide sufficient funding for family and childcare services on reserves.²³
- In March 2016, the UN Committee on Economic, Social and Cultural Rights expressed concern that the inadequate funding of child welfare services for Indigenous Peoples living on-reserve exacerbated the already high likelihood that Indigenous children be placed in childcare institutions. It recommended that Canada increase its funding of child welfare services for Indigenous Peoples.²⁴
- In December 2016, the Inter-American Commission on Human Rights convened a hearing on the human rights situation of Indigenous children in Canada.
- In September 2017, the UN Committee on the Elimination of Racial Discrimination (“CERD”) stated that it was “alarmed” that despite its previous recommendation and multiple decisions by the Canadian Human Rights Tribunal, “less money is reportedly provided for child and family services for indigenous children than for children in other communities, and that this gap continues to grow.”²⁵ Additionally, the CERD also expressed concern that “the federal Government has adopted an overly narrow definition of the Jordan’s Principle, as stated in the Canadian Human Rights Tribunal decision [...] in 2016, and has failed to address the root causes of displacement, while tens of thousands of children are needlessly removed from their families, communities and culture and placed in State care (arts. 1-2 and 5-6).”²⁶
- In 2018, at the third universal periodic review of Canada, the United Nations Human Rights Council presented several recommendations to Canada aimed at protecting the rights of First Nations children. In particular, the UNHRC urged Canada to:

22 Report of the Special Rapporteur on rights of indigenous peoples, James Anaya : The situation of indigenous peoples in Canada, UNHRHOR, 27th Sess, Addendum, Agenda Item 3, UN Doc A/HRC/27/52/Add.2 (2014) at para 31.

23 Human Rights Committee, Concluding observations on the sixth periodic report of Canada, UNHRCOR, 2015, UN Doc CCPR/C/CAN/CO/6 at para 19.

24 Committee on Economic, Social and Cultural Rights, Concluding observations of the sixth periodic report of Canada, UNESCOR, 2016, UN Doc E/C.12/CAN/CO/6 at para 35.

25 Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada, UNCERDOR, 2017, UN Doc CERD/C/CAN/CO/21-23 at para 27.

26 Ibid.



- take steps to ensure that all Canadian children have equal access to government services such as health, education and welfare, and address the disparities in access to these services for [I]ndigenous children in particular;²⁷
- provide adequate needs-based funding for all social programmes for children and families of First Nations and [I]ndigenous communities;²⁸
- remove all discriminatory practices against First Nations children in access to health, educational and social support and services; and²⁹
- strengthen and enlarge its existing programmes and take more and specific measures towards improving the situation of [I]ndigenous persons, in particular with regard to the improvement of housing, employment and education opportunities especially after elementary school, and better safeguard women's and children's rights, in consultation with civil society.³⁰

PART 3 – Proposed Questions

The Caring Society requests that the following questions to asked to Canada during its upcoming Review.

- 1. The Government of Canada should be asked for a detailed account on the steps it will take in order to appropriately compensate each child and family who has been a victim of racial and national ethnic origin discrimination through the First Nations Child and Family Services Program. This should include a precise timetable, as well as the amount of resources which will be allocated to support victims entitled to compensation.*
- 2. The Government of Canada should be asked for a detailed account on the steps it will take to implement the Spirit Bear Plan to ensure equity and culturally-appropriateness of all services and programs provided to First Nations children.*
- 3. The Government of Canada should be asked to outline, in detail, what steps it intends to take to proactively address the outstanding issues before the CHRT including major capital, reallocation, and timelines for the CCCW.*

27 Report of the Working Group on the Universal Periodic Review, UNHRCOR, 39th Sess, Annex, Agenda Item 6, Un Doc A/HRC/39/11 (2018) at para 142.139.

28 Ibid at para 142-144.

29 Ibid at para 142-145.

30 Ibid at para 142-243.



4. *The Government of Canada should be asked for a detailed account on the steps it will take to honour Shannen's memory by funding education for First Nations children in ways that are equitable and culturally-appropriate.*

PART 4 – Proposed Recommendations

In light of the submissions made above, the Caring Society urges the Committee on the Rights of the Child to make the following recommendations to the Government of Canada:

1. Immediately withdraw its October 4th, 2019 application for judicial review before the Federal Court of Canada of the decision of the Canadian Human Rights Tribunal (2019 CHRT 39) which orders the Government of Canada to pay compensation to First Nations children, youth and families for its “wilful and reckless” discriminatory practices in providing services to First Nations children and families.
2. Immediately implement all orders of the Canadian Human Rights Tribunal in good faith, in consultation with First Nations Peoples and in a manner that promotes and protects the best interests of First Nations children as defined by First Nations communities, namely:
 - a. Pay \$40,000 to every First Nations child who was inappropriately removed from their family, as well as their parents or grandparents, to compensate them for the wilful and reckless discrimination they experienced;
 - b. Undertake immediate measures to relieve the children's suffering by substantially increasing culturally-based prevention services intended to keep children safely in their homes and communities and implementing other reforms to relieve the deep inequality in service provision, while First Nations and the Government of Canada negotiate a more robust solution.
3. Implement the full scope and meaning of Jordan's Principle throughout all government departments and in all services provided to First Nations children, youth and their families so that access to these services is never delayed or denied including because of disputes between the federal, provincial and territorial governments over their respective responsibilities.
4. Fully implement the Spirit Bear Plan and cease discrimination in other services to First Nations children such as health care, clean water and housing. Ensure that all children, on and off reserve, have equal access to all services available to other children in Canada.



5. Fully implement Shannen's Dream by funding education for First Nations children in a way that is equitable and culturally appropriate.
6. In partnership and meaningful consultation with the Assembly of First Nations, the Caring Society and the Canadian Human Rights Commission, develop an independent expert structure with the authority and mandate to ensure that Canada maintains a non-discriminatory and adequately funded First Nations Child and Family Services Program to ensure that First Nations communities are able to deliver culturally-appropriate services that meet the needs of First Nations children, youth and families.