



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

Submissions of the First Nations Child and Family Caring Society on the 20th Anniversary of the Duban Declaration and Programme of Action

Report to the Special Rapporteur on contemporary
forms of racism, racial discrimination, xenophobia
and related intolerance



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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 that works to ensure the safety and well-being of First Nations children through education initiatives, public policy campaigns and providing quality resources to support communities. The Caring Society provides opportunities for people of all ages, especially young people, to take part in activities that foster reconciliation and culturally-based equity for First Nations children and youth.¹

Over the past few months, the bodies of more than 1000 Indigenous children who attended Indian Residential Schools (IRS) in Canada have been found in unmarked graves across the country. The number of bodies continues to rise as ground searches of former IRS continue. Many of these children are believed to have died because of the poor conditions they experienced while attending IRS, including run down infrastructure and lack of proper medical care. The Government of Canada knew that their inadequate funding of IRS was leading to the deaths of children yet did nothing. Tragically, today’s First Nations children in Canada continue to receive poor and inequitable services from the Government of Canada. Indeed, in 2016, the Canadian Human Rights Tribunal (“CHRT”), a domestic anti-discrimination adjudication body, found that Canada was racially discriminating against 165,000 First Nations children by failing to provide them with culturally appropriate and equitable services.² The CHRT found that Canada’s wilful and reckless discrimination causes the unnecessary removal of First Nations children by child welfare from their families, homes and communities. These removals result in harms comparable to those experienced by children who attended the IRS such as loss of community, culture, language, worldview and traditional family, as well as dysfunction and high rates of suicide.³ As was the case in the IRS era, the Government of Canada is well aware of the harmful impacts of its discrimination against First Nations children but yet fails to take action. The legacy of IRS and Canada’s ongoing discrimination against First Nations children inform the Caring Society’s submissions on the Durban Declaration and Programme of Action (“DDPA”).

Part I: Introduction

These are the Caring Society’s submissions in response to the call for input made by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to commemorate the 20th anniversary of the DDPA. The Caring Society’s submissions focus on the challenges preventing integration of the DDPA into national legislation and policies, and suggest measures to overcome those challenges. In particular, the Caring Society will emphasize the two following points:

- 1) systemic and comprehensive measures and changes are required to break patterns of discrimination and colonialism;
and
- 2) compensating victims is required to combatting impunity of racial discrimination.

¹ According to the Federal government’s definition of Indigenous Peoples in Canada, there are three Indigenous groups in Canada: Inuit, Metis and First Nations.

² *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 12 at para 42 [CHRT 2021].

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)*, 2018 CHRT 4 at paras 122-124 [CHRT 2018]. See also *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 at para 151 [CHRT 2016].

Part II: Submissions on the challenges preventing compliance with the DDPA and measures to overcome them

(a) Systemic and comprehensive measures to break patterns of discrimination and colonialism

The DDPA recognizes that colonialism has led to racism, racial discrimination, xenophobia and related intolerance. It further emphasizes that the effects and persistence of colonial structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today.⁴ The DDPA urges States to condemn colonial structures and practices and take concrete measures to prevent their reoccurrence. The DDPA recognises that putting an end to colonial structures and practices requires structural change. For example, it encourages States to examine their norms and standards, their Constitutions, laws, legal systems and policies in conformity with relevant international human rights instruments.⁵ It also urges States to establish and implement national policies and action plans to combat discrimination.⁶ Finally, it implores States to adopt or continue to apply the relevant legal tools to promote, protect and ensure the enjoyment by Indigenous peoples of their rights.⁷ According to the DDPA, the obstacles to taking such measures lies in lack of political will and clear implementation strategies, as well as weak legislation.⁸

i. Challenges

Though the DDPA calls on States to put an end to colonial structures and practices, Canada has failed to take adequate measures to identify and remedy inequities in public services provided to First Nations children. In addition to the legacy of the IRS, Canada has a longstanding history of discrimination against First Nations children and youth in the provision of services to them and their families. This claim is supported by findings of discrimination made by the CHRT. On January 26, 2016, the CHRT issued a ruling which found the Government of Canada's 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.⁹ 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.¹⁰ Moreover, Canada's conduct since the ruling indicates a failure to address the thinking and beliefs that feeds discrimination. As such, the CHRT has been forced to issue 19 subsequent non-compliance and procedural 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."¹¹ The CHRT refers to this pattern of behaviour as Canada's "old mindset." The CHRT has also linked Canada's unlawful discrimination to the deaths of some children and the unnecessary family removals of countless others.

While the CHRT has ruled on the discriminatory funding of child welfare services and ordered Canada to implement Jordan's Principle, many other Federally funded public services for First Nations, such as health care, housing, infrastructure, and safe water

⁴ *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, 31 August–8 September 2001, A/CONF.189/12, art 26 [DDPA].

⁵ *Ibid* art 19.

⁶ *Ibid* art 66.

⁷ *Ibid* art 15 (a).

⁸ *Ibid* art 79.

⁹ CHRT 2016, *supra* note 3.

¹⁰ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39

¹¹ *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14. Jordan's Principle is a legal rule to ensure First Nations children get equitable and culturally appropriate public services when they need them.

are also underfunded and insufficient.¹² Federal government funding structures are problematic because they often provide less than what is given to non-Indigenous peoples for the same service.¹³ Federal funding is also inequitable in that fails to take into account cultural needs, historical disadvantage caused by colonization and IRS, 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 First Nations reserves. The Auditor General urged Canada to gather and use data to comprehensively measure and report on the overall socio-economic well-being of First Nations people on reserves compared with that of other Canadians, which has yet to be completed.¹⁴

ii. Idea on how to overcome these challenges

The Spirit Bear Plan, unanimously supported by the Assembly of First Nations (“AFN”),¹⁵ 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, and to fully implement Jordan’s Principle.¹⁶ It also calls on the Parliamentary Budget Officer to publicly cost out the shortfalls in all Federally funded public services provided to First Nations children i.e. education, health, water, etc.¹⁷ With this information, the plan requires the government to consult with First Nations to co-create a holistic Spirit Bear Plan to end all inequalities.¹⁸ Accordingly, the plan calls on all government departments that provide services to First Nations children and families to undergo a thorough, public and independent evaluation to identify any discrimination.¹⁹ Finally, the plan calls on all public servants to receive mandatory training in order to better implement the Truth and Reconciliation Calls to action.²⁰ The Spirit Bear Plan is paramount in combating inequities that exist in public services for First Nations children and respecting their right to substantive equality.

More generally, the Caring Society submits that substantive equality can only be achieved through comprehensive structural change. Siloed, piecemeal or *ad hoc* measures focused uniquely on specific services or programs will not achieve substantive equality. As outlined in the Spirit Bear Plan, across the board structural evaluations and systemic reforms in all public services and programs are required to achieve substantive equality.

(b) Compensating victims is require to combatting impunity of racial discrimination

The DDPA emphasizes the need to put an end to impunity for racial discrimination.²¹ To that end, the DDPA provides that persons who experience racial discrimination ought to have access “to effective and adequate remedies and enjoy the right to seek from competent national tribunals and other national institutions just and adequate reparation and satisfaction for any damage as a result of such discrimination.”²² In a similar vein, the DDPA calls on States find appropriate ways restore dignity of the victims of racial

¹² *Spirit Bear Plan*, online: First Nations Child & Family Caring Society <fncaringssociety.com/spirit-bear-plan> [Spirit Bear Plan].

¹³ In general, services for First Nations are provided by the Federal government, while services for all others in Canada in are provided by the provinces.

¹⁴ Office of the Auditor General of Canada, Report 5—Socio-economic Gaps on First Nations Reserves—Indigenous Services Canada, 2018 Spring Reports of the Audit General of Canada (29 May 2018), online, Office of the Auditor General of Canada: <www.oag-bvg.gc.ca/internet/English/mr_20180529_e_43084.html>.

¹⁵ 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 <fncaringssociety.com/sites/default/files/2017%20AFN%20Resolutions%2092%20SB%20Plan.pdf>.

¹⁶ *Spirit Bear Plan*, supra note 12.

¹⁷ DDPA, supra note 4.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid* art 26.

²² *Ibid* art 165.

discrimination.²³

i. Challenges

Though the DDPA emphasizes the importance of providing effective and adequate remedies to victims of racial discrimination, Canada is currently contesting a legally binding CHRT order requiring it to compensate First Nations children and families who have been most harmed by its discriminatory conduct. While Canada fights this decision in court based on technicalities, the First Nations children and youth who were unnecessarily removed from their homes, and those who were denied important services because of Canada's racial discrimination are denied right to compensation for the pain and suffering they have experienced.²⁴

ii. Idea on how to overcome these challenges

Canada must comply with the CHRT order requiring it to compensate victims of its discriminatory conduct and cease its ongoing legal battle against First Nations children. In that regard, the CHRT's order provides Canada with a roadmap on how to honor its commitments under the DDPA. Firstly, providing compensation to victims of racial discrimination promotes accountability and combats impunity by making perpetrators liable for their harms caused by their actions. Compensation also helps prevent reoccurrence by putting a cost on racial discrimination and acting as a financial deterrent for inequality.²⁵ Finally, providing compensation for the harms they have experienced due to racial discrimination may help built trust and restore the dignity of victims. It is particularly important for States to compensate victims of racial discrimination when the State itself is the perpetrator in order to send the message that racial equality is a shared collective value and racial discrimination is a social wrong.

Conclusion

The DDPA provides States with a roadmap on how to eliminate racial discrimination. Despite this, Canada itself continues to discriminate against First Nations children, has refused to implement a plan endorsed by First Nations to identify and remedy inequities in public services and to continues to fight First Nations children in court.

The Caring Society submits that systemic and comprehensive measures are needed to break the pattern of discrimination and colonialism. In Canada, this means implementing the Spirit Bear Plan to ensure that all public services for First Nations children, youth and families are equitable and culturally appropriate. The Caring Society also submits that compensation is key to combating impunity. It follows that First Nations children and their families should be fairly compensated for the pain and suffering they experienced because of Canada's discriminatory conduct towards them.

²³ *Ibid* art 101.

²⁴ *CHRT 2019, supra* note 10.

²⁵ An Act to amend the *Canadian Human Rights Act*, SC 2008, c 30.