Métis Nation of Ontario

OFIFC

ONTARIO NATIVE WOMEN'S ASSOCIATION

A Collaborative Submission Regarding The *Child and Family Services Act*

Jointly Submitted to: Minister of Children and Youth Services, Government of Ontario
By: Métis Nation of Ontario, Ontario Federation of Indigenous Friendship Centres, and Ontario Native Women's Association

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Introduction:

This document is a joint submission of the Métis Nation of Ontario (MNO), the Ontario Federation of Indigenous Friendship Centres (OFIFC), and the Ontario Native Women's Association (ONWA) to the Minister of Children and Youth Services stating the position of our organisations with respect to the 2015 review of the *Child and Family Services Act* (CFSA). Our collaboration flows directly from our work together on the Aboriginal Children and Youth Strategy (ACYS).

On September 17, 2014, the MNO, OFIFC and ONWA presented a joint submission to the Minister of Children and Youth Services on our vision for an Aboriginal Children and Youth Strategy for the province of Ontario. The goals and outcomes identified in the ACYS are premised upon four key elements: Prevention, Aboriginal Control, Systems Change and Evaluation and Measurement. These elements must form the basis for all amendments to the CFSA pertaining to the lives of Aboriginal children. As such, this submission aims to identify required changes to the CFSA in light of these four elements. Achieving the goals and outcomes identified in our submission is in part contingent on amendment of the CFSA in line with our position. In its current incarnation, the CFSA actively and explicitly impedes Prevention, Aboriginal Control, Systems Change and Evaluation and Measurement as defined in the ACYS. The CFSA is a deeply flawed and corrosive piece of legislation, which is inherently colonial in its outlook and is implemented from that perspective. It is structured in such a way to diminish the opportunities for prevention and increase the likelihood of disruptive state intrusion over the course of a child's life. An exceptionally problematic aspect of the CFSA is that it contains inadequate mechanisms for accountability on the part of institutions either to government or community. Lack of accountability, combined with the absence of processes for evaluation and measurement means that Aboriginal Control, a critical element necessary to ensure children develop and foster positive self-identity, is entirely absent from the CFSA. Similarly, if we

are to achieve systems change, then a necessary prerequisite is to amend the legislation governing the system and to ensure its full enforcement.

While we believe the ACYS should and will be implemented in a sustained manner over the course of the next number of years and beginning in the next six months, we understand that amending legislation can be a time-consuming labour intensive process. Nonetheless, we have framed this submission on the CFSA in a manner that facilitates the implementation of as many aspects of the ACYS as possible. We consider our submission on the CFSA and the ACYS to be linked intrinsically and recommend that discussions around implementation and resourcing be addressed under the auspices of the ACYS. Throughout this submission we provide concrete examples of the manner in which specific aspects or provisions of the CFSA play out in our communities. This is intended to demonstrate the inadequacy of such aspects or provisions and better illustrate the need for our proposed changes.

Our organisations have worked with children, youth and their families for many years and, based on this experience, we have participated in prior reviews of the *Child and Family Services Act*. We have remained consistent in our messaging over time, while refining our position to reflect increasing knowledge and expertise in the area of culture-based supportive program and service design, development, delivery and evaluation for children and their families. As community-based provincial organisations, we are deeply embedded in formal and informal relationships of knowledge transfer and exchange. As such, we have been receiving feedback and information on this subject for decades. In keeping with our approach to the drafting and submission of the ACYS, we have undertaken this submission with the knowledge that we are well informed about the needs of our communities with respect to the changes required in the CFSA. Frustratingly, we have seen little to no change as a result of the accumulated list of recommendations for change that we have submitted over time and, unavoidably, problems which were extremely serious to begin with have become exacerbated and are now in a state of on-going crisis. We are hopeful that our

renewed relationship with the Ministry of Children and Youth Services (MCYS) is indicative of an increased commitment to transformative change in the CFSA. The MNO, OFIFC and ONWA have therefore undertaken this work jointly in order to ensure that the momentum created by the ACYS will provide an additional impetus for substantive amendment of the legislation and its subsequent implementation.

Discussion:

As noted above, the MNO, OFIFC and ONWA have been working with Aboriginal children, youth and their families since our inception, this uniquely qualifies us to address the myriad ways in which the CFSA has impacted Aboriginal populations across Ontario. To ensure that the specific areas identified by the Minister are addressed, we undertook engagement with our respective communities and frontline staff. In this regard and prior to addressing the fundamental challenges and issues with the CFSA and the way in which this legislation fails Aboriginal children, we would like to highlight some of the items that are specifically subject to the 2015 review of the CFSA including updating the age ranges to which the legislation applies as well as permanency options.

The MNO, OFIFC and ONWA believe it is vital for any legal regime that purports to serve children to extend to those under the age of 18. We therefore recommend that specific amendments be made to provisions such as Section 15 (3) (a) and (b) changing “under the age of sixteen” to “under the age of eighteen”. An added point we would like to make regarding age is that greater flexibility is required for children who are capable of making their own decisions regarding issues such as placement, consents of various kinds and other decisions, to reflect evolving capacity in children. Therefore, overall age ranges in the CFSA must be reviewed for pertinence and practicality and amended in light of current and changing needs.

Just as our organisations advocate for greater flexibility for children who are capable of making their own decisions, we would also encourage the government

to amend the CFSA to allow for greater flexibility and sustainability in the range of permanency options available to children in care. In particular, we would seek additional approaches that span the gap between fostering and adoption, such as the expansion of kinship and customary care through the provision of viable and sustained supports. As it stands, kinship care, under Sections 29.1, 57.5, is not funded, and funding of customary care under Section 212 is at the discretion of the CAS, resulting in impediments to kinship and customary care arrangements in those communities and families which experience higher than average rates of poverty and its associated challenges.

In its current approach to kinship and customary care, it is unclear why the government would choose to fund the break-up of families over the maintenance of these ties when it would not incur an increase in cost relative to foster care and would protect the rights of the child to her or his family and cultural relationships, while providing an opportunity for better outcomes by maintaining family ties.[1] [2] Therefore all sections that speak to this issue must be amended to facilitate sustainable, accessible and fair kinship and customary care opportunities for Aboriginal children. A further point is that customary and kinship care exist as middle ground between fostering, and its inherent instability, and adoption, with its inherent finality. Kinship and customary care options, when properly structured and funded, should therefore be seen as options which fit better with the needs of Aboriginal children and their families, and which lead to better outcomes as a result.

An added point which speaks to the ways in which our communities are failed by the CFSA, is that, as currently structured, the option of customary care is available only to children holding Indian status and living on–reserve. Even in this limited arena, customary care is used with shocking infrequency in practice. The proper application of kinship and customary arrangements must involve all Aboriginal

[1] United Nations, Office of the High Commissioner on for Human Rights, Convention on the Rights of the Child, Article 5,8, September 1990

[2] First Nations Child and Family Caring Society of Canada 2005, *Wen:de – We are Coming to the Light of Day, Chapter 4, Cost Benefit Analysis*, 2005, pg. 119

children as a matter of course, making it mandatory for CASs to explore the possibility of such arrangements. Therefore, Section 208 of the CFSA must be amended to include all Aboriginal children as per the definition that we provide below and, furthermore, accountability for these approaches should be directly to Aboriginal organisations.

As it is currently, the CFSA does not reflect the fact that the overwhelming majority of Aboriginal children in the province of Ontario reside in urban areas and, as such, our communities face much deeper and far-reaching problems caused by the effects of the CFSA. The latest statistics available from the federal government indicate that 84.1% of Aboriginal people in Ontario live off-reserve.[3] The numerical population of Aboriginal people in the province is of 301,430, meaning roughly 253,400 live off-reserve.[4] This is the number from which our membership and program participants originate. Research has shown that, where there is a choice, Aboriginal people prefer to receive their services from Aboriginal agencies.[5] This has meant that our front line service delivery agencies are regarded as community hubs for Aboriginal people across the province. The current assumptions inherent in the CFSA are that Aboriginal children belong to a First Nation, have status and live on reserve. However, as the current statistics indicate, this does not reflect the diverse realities of Aboriginal children and youth. Therefore, the CFSA is grossly out of date in this regard.

Children living on reserve fall under the 1965 Indian Welfare Agreement, according to which the province receives an allocation of $.95 for every $1 spent on child welfare for every child living on reserve.[6] The Ministry of Finance 2013-2014 Statement of Revenue indicates that MCYS received $115,974,800 for Indian

[3] Ontario Ministry of Finance, 2011 National Household Survey Highlights: Factsheet 3 Aboriginal Peoples of Ontario.
[4] Statistics Canada, 2011 National Household Survey: Data tables – Aboriginal Identity, selected for Ontario, Off-Reserve Population
[5] First Peoples Child & Family Review, Volume, 3, Number 3, pp. 43-56
[6] Ministry of Community Safety & Correctional Services, Office of the Chief Coroner, *The Office of the Chief Coroner's Death Review of the Youth Suicides at the Pikangikum First Nation*, 2006-2008, Part F7 - Funding

Welfare from the federal government in 2014, and $111,552,253 in 2013.[7] The fact that the province is being reimbursed by the federal government means that it is much more inclined to target funding to these children. Targeted funding is made all the more difficult in an off-reserve context because the province does not collect any self-identification data in child welfare or other services.[8]

Aboriginal children and youth who do not live on-reserve are subject to the same legal regime as all other children in Ontario, namely the CFSA. Since there are no legal requirements in the existing legislation to address the cultural specificities of most Aboriginal children and youth, there is an erasure of the lived reality of the vast majority of Aboriginal children in this province simply because they are treated as non-Aboriginal in the legislation. For example, the CFSA must reflect the diversity of cultures represented within Ontario's various Aboriginal communities so that terminology such as "Indian and native culture, heritage and traditions" of section 136 (3) does not lead to further erasure of Aboriginal identities.

In practice, the "Indian and native" provisions in the CFSA are inconsistently applied precisely because they are unclear and do not explicitly include all Aboriginal children and youth. The current language pertaining to Aboriginal children and communities in the CFSA is archaic and racist and we expect that this will be updated to reflect acceptable terminology in any future iteration of the CFSA. New language must reflect a true commitment to the best interests of the child by facilitating an accurate understanding of who is and who is not an Aboriginal child.

Currently any section in the CFSA which refers to "Indian or native" person or child is exclusive and does not apply to the majority of Aboriginal children in this province. It is for this reason that any sections using this definition must be entirely reconceptualised and redrafted to reflect the definition as set out below in order to meet the needs of all Aboriginal children. Therefore, we are not

[7] Ministry of Finance, Public Accounts of Ontario, 2013 – 2014, Statements and Schedules Volume 1,p.2-76
[8] This will be addressed in full later.

proposing specific amendments to any of these sections as they should be removed entirely and replaced with more coherent, practical and inclusive language. We would suggest as an example Section 1(1) of the British Columbia *Child, Family and Community Service Act,* with changes which reflect current terminology. Thus, we propose the following definition:

> 'Aboriginal child' means a child
>
> a) Who is registered under the *Indian Act* (Canada);
> b) Who has a biological parent who is registered under the *Indian Act* (Canada);
> c) Who is a Métis child;
> d) Who is an Inuk child;
> e) Who is under 12 years of age and who has a biological parent who;
> i. Is of Aboriginal ancestry and;
> ii. Considers herself or himself to be Aboriginal;
> f) Who is 12 years of age or over, of Aboriginal ancestry and considers herself or himself to be Aboriginal; or
> g) Who is under 12 years of age, or 12 years of age or over and lacking capacity, and for whom a person provides an attestation as to the Aboriginal identity of the child.

In addition, for the Minister to commit to improving child and welfare services for Aboriginal children in Ontario more comprehensively, language in the CFSA must be strengthened to reflect the government's obligation to fulfil the purpose and intent of the legislation. Thus, words like 'may' or 'consider' must be replaced with language such as 'shall' or 'must' in order to create a duty on behalf of the Minister. For example, language such as that used in section 20.2(1) or (2) which provides for flexibility as to whether or not a prescribed method of alternative dispute resolution is used to resolve an issue must be removed and an obligation vis-a-vis an Aboriginal child in these circumstances must be created. This is but one example of many throughout the CFSA. Our proposed changes for inclusivity of Aboriginal identities and creating obligations to respond to those identities will

orient the CFSA towards greater reliance on self-identification as the driving element to determine the best interests of the child from a cultural, historical and relational perspective.

The CFSA needs to prescribe self-identification mechanisms that accurately and fulsomely account for Aboriginal children. These mechanisms must run throughout all state systems, be mandatory and permit disaggregation of data. Self-identification must be linked to a sustained Aboriginal community-based program and service delivery infrastructure; this linkage must be mandated in the legislation. The report of the Commission to Promote Sustainable Child Welfare, *A New Approach to Accountability & System Management*, urges that CASs begin to consistently capture information on the ethno-cultural backgrounds of clients served using the standard set of categories adopted for the 2006 Canadian long form census.[9] Disaggregated, accurate and complete self-identification data is essential for any administration model that may be created to enhance accountability and guide activities in the area of children and youth in the Aboriginal community.

Self-identification is critical to optimising outcomes for Aboriginal people, including children. Ontario's Ministry of Education has recognised this and has been implementing a system of self-identification for Aboriginal children in schools that has begun building knowledge of the population(s) it is serving. The failure of systems such as child welfare, youth justice, policing and others, to gather valuable identity information has served to undermine the greater accountability to Aboriginal communities and increased investments into Aboriginal community-based organisations for the provision of culture-based services as called for by our organisations.

Without new accountability mechanisms in the CFSA, governments, ministries and the Aboriginal community will be unable to monitor impact and degrees of accountability both fiscally and to the community. For example, in 2013-2014

[9] Commission to Promote Sustainable Child Welfare 2012, *A New Approach to Accountability and Systems Management*, pg. 5.

Ontario spent over $1.5 billion in child protection services and there is currently no detailed and accurate report that links this expenditure to outcomes for Aboriginal children and youth. This demonstrates a clear lack of accountability both to governments and Aboriginal communities. This financial reality should also give us pause to reflect on the gross underfunding of Aboriginal community-based organisations that are best equipped and suited to provide effective program and service delivery.

The lack of accountability to Aboriginal communities is compounded by the fact that, in many communities, Aboriginal children are a huge source of economic stability for non-Aboriginal people and organisations. Numerous mainstream agencies are being sustained by the disproportionate number of Aboriginal children in the child welfare system, which is particularly the case in the north where many agencies are funded to deliver services to predominantly Aboriginal populations. This includes government services such as secure care for youth offenders.[10]

Beyond the issues of fiscal accountability, which point to a significant disconnect between the Ministry and its agencies, deeper questions remain about the accountability of these agencies to the Aboriginal community as a whole and those specific communities in which agencies are operating. In those instances where the current legislation is in fact adhered to, engagement processes, their success or failure, or outcomes of programs and services delivered by mainstream agencies and their impact in communities are not monitored. This replicates a typical colonial dynamic wherein the church or state is sanctioned to act against, with, for, or on behalf of Aboriginal people, without ever having a concomitant obligation to explain its actions or lack thereof.

No effective mechanisms exist for complaint or penalty in the case of misuse or non-use of the legislation. Were one to complain, and should the Minister find a complaint to be founded, there is no option for the Minister to sanction the CAS

[10]Community policy meeting with the United Native Friendship Centre held on Sept.22, 2014, in reference to the community's experience and impact regarding the Young Star House Residential Group Care, Off Lake ON, 2014.

other than that outlined in section 22 (1) (e) or (f) which essentially forces the society to suspend operations, at a minimum. This does not allow for a gradual or nuanced approach that would assist the Minister and our organizations in addressing issues in a more pragmatic and measured way. We therefore request that a number of changes take place in this regard; first, mainstream agencies and service providers must have clear obligations to engage with urban Aboriginal organizations, as mentioned. Second, a complaint mechanism must exist for legislative non-compliance and for lack of accountability fiscally and to the community.[11] Third, that non-compliance must result in the application of reasonable and incremental measures, short of causing operations to cease, that ensure compliance with legislative obligations.

A future iteration of the CFSA must obligate all mainstream agencies and organisations dealing with any Aboriginal children to develop and formalise relationships with Aboriginal organisations in their community, and to maintain a sustained and defined level of accountability to these organisations as well as to MCYS. The point at which this level of accountability is implemented is the prerequisite for the effective leveraging of Aboriginal community-based organisations. Our organisations are extremely effective in improving outcomes for children and their families with limited resources. Changes to the CFSA must explicitly set out the role of our organisations. This will result in improved outcomes and increased accountability to both the community and government.

Role of Aboriginal Community Based Organisations:

The MNO, OFIFC and ONWA are community-based organisations and our existence is testimony to an expression of self-determination emerging from our communities. In our different ways, through different structures that reflect the needs of our communities, we are inextricably linked to our respective entities on the ground, be they Friendship Centres, Métis service delivery sites, or ONWA Locals. As a result of our collective infrastructure that extends to communities

[11] 2010 review re: non-compliance with customary care

across the province where the majority of Aboriginal children and youth reside, we represent an unmatched, tested, province-wide service delivery network. We also draw on the knowledge provided to us through our networks to drive advocacy, policy development, and research in order to advance the well-being of our communities, with a particular focus on children, youth and families.

At the community level, our infrastructure is also leveraged to create much broader networks of information and knowledge exchange as well as service provision that multiplies the effectiveness of our work. In this vein, at the regional and local levels, our organisations engage in varied partnerships and collaborations beyond those we have with each other. It is for this reason, among others, that we are "Aboriginal community hubs" in the cities and towns in which we are located. As prevention focused community hubs, we mitigate risk to Aboriginal children, youth and families through solutions-oriented, strengths-based, cultural approaches to addressing wellness needs.

In our view it has been amply demonstrated that it is functionally impossible to provide effective prevention and "protection" services simultaneously. Based on years of experience, we know at-risk families are highly unlikely to access prevention supports from child protection agencies given this is perceived as a fast track to irreversible state intrusion. Conversely, at-risk families are more inclined to reach out to Aboriginal service providers to access supports in solutions-oriented, strengths-based and cultural environments, leading to more positive outcomes. Therefore, in whatever iteration of the "Functions of society" (under Section 15) the Ministry chooses to put forward, the spirit of this request must be reflected, namely that CASs should not work in the area of prevention wherein they deal with families that are subsequently subjected to child protection action, and specifically that Section 15 (3) (c) be amended and that "or for the prevention of circumstance requiring the protection of children" be removed from the Act. More broadly, a section by section review of the CFSA should entail a decoupling of prevention and other upstream services, in particular as prevention relates to the child welfare and youth justice systems.

A further problematic aspect of the CFSA, is the manner in which it fails to recognise that services and programs delivered to Aboriginal children require a level of knowledge and expertise that is rarely, if ever, available in mainstream organisations. Frequently, these organisations will employ Aboriginal people, and make laudable and necessary efforts to increase their cultural competency. However, because of the inherent and hidden bias built into their structures, these organisations are divorced from community and systemically resistant to Aboriginal worldviews. As such, state systems continue to fail Aboriginal children, youth, and families. This resistance has profound effects on Aboriginal children and youth. Furthermore, it is non-sense to task a system that consistently fails Aboriginal children and families with addressing the needs of Aboriginal children and families. For this reason, mainstream, state and para-statal agencies are not competent to provide prevention-oriented programming and services to Aboriginal children and youth[12].

As we have put forward in the ACYS, our organisations operate from a child and family-centred approach grounded in Aboriginal cultures. In this context, we would submit that Section 1 (2) (5) be reformulated to reflect that the services Aboriginal people are entitled to receive include the broad range of prevention and other upstream services which our organisations are uniquely positioned to continue to provide. For our organisations to take on these new roles we are proposing that a new definition of "Aboriginal service provider" be created; an Aboriginal service provider "means an agency in the meaning of this act which delivers multiple community driven culture-based services on a status-blind basis as negotiated with the Minister". As a further example, in Section 15 we propose a new subsection 4 that does not replace the existing subsection which would read "in the case of Aboriginal children, guidance counselling and other services

[12]Carpenter, Amy; Rothney, Alex; Mousseau, Joseph; Halas, Joannie; Forsyth, Janice; (2008). *Seeds of Encouragement: Initiating an Aboriginal Youth Mentorship Program*. Canadian Journal of Native Education; 2008; 31, 2; ProQuest pg 51.
Green, Brenda L., *Culture is Treatment Considering Pedagogy in the Care of Aboriginal People.* Journal of Psychosocial Nursing Vol. 48, No. 7, 2010.
O'Sullivan, Bonnie, Canadian Medical Association 2013. *Considering culture in Aboriginal Care*.

to families for the prevention of circumstances requiring the protection of children, such services shall be provided by an Aboriginal service provider wherever one exists".

Recognition of urban Aboriginal organizations as distinct service providers within the CFSA must be explicit. We therefore recommend that Section 3 (1) "service means" include subsection "(f) Aboriginal community support service", and that "service provider means" be amended to include subsection "(f) Aboriginal service provider" and that these changes be reflected throughout the CFSA. One such amendment would be to include sections that detail procedural steps to be taken with off-reserve Aboriginal service providers. For example, under Section 20 (2) "Where the child is Indian or native", a further subsection (3) should be added "Where the child is an Aboriginal person" to recognize the role of Aboriginal service providers as set out in Section 3 (1). Similarly, a new subsection (5) "Notice to Aboriginal service provider" should be added. These are examples of the manner in which the role and function of "Aboriginal service provider(s)" can be incorporated into amended legislation in order to better serve the needs of children.

The amendments that we have flagged above are examples of ways in which the Ministry could effectively capitalise on a strong network of program and service delivery to Aboriginal children and their families by incorporating obligations towards Aboriginal community-based organisations within the legislation. This would guarantee an increase in access to effective prevention services across the province for all Aboriginal children and their families.

Permissive language about the role for our organisations that takes into account a diversity of current and future needs must be inserted into the CFSA. For instance, currently, the MNO, OFIFC and ONWA and our respective memberships, are interested in amendments that would guarantee the involvement of Aboriginal service providers in a range of matters without making us parties to a

dispute, such as in a child protection matter.[13] For example, provision with respect to consultation with "Bands and native communities" in Section 213 must be extended to Aboriginal service providers.

Where there is an obligation to engage with Aboriginal service providers, then it should only be with those organisations that are designated as Aboriginal service providers for the purposes of this legislation. Where no designated Aboriginal service provider exists, the agencies must regularly consult with the geographically nearest urban Aboriginal service provider to meet this obligation. Because Aboriginal service providers will largely be engaged in prevention rather than protection, those non-Aboriginal agencies engaged in protection services must be able to demonstrate an optimum level of cultural competency when providing those services to Aboriginal children and youth.

Throughout this document we have suggested changes, many of which pertain to Part X. It is our position that Part X must be entirely revised to take into account the new definition of Aboriginal child we have provided, and a new role for Aboriginal services providers as we have outlined. This change is needed to reflect that the majority of Aboriginal children and youth in Ontario currently do not fall under the limited and antiquated definitions of Aboriginal identity. Equally, language in the CFSA and specifically in Part X must protect individual choice around residency and service access, and must not allow the rights of bands to trump the rights of children and their families. In short, the CFSA must be changed to explicitly acknowledge the principal that Aboriginal children and youth deserve to access quality, culture based services regardless of status or place of residence.

<u>Conclusion:</u>

This joint submission provides a summary of the principal concerns our organisations and communities have experienced with the CFSA as it is currently drafted. The intent was to provide a provision-by-provision analysis of the

[13] See MNO Appendix.

legislation, however the poverty of drafting, the number of inconsistencies found throughout the CFSA and the problematic definitions, made it extremely difficult for us to provide anything other than a broader analysis of our concerns. Further, we acknowledge that the Ministry itself is aware of these issues and thus, we have sought here to bring the Ministry's attention to the foundational essential matters we would like to see properly addressed.

We understand that a substantive amendment process will be undertaken at a later date, once direction on the course of action is established. When more amendments are made to the legislation, we expect the Ministry to continue to engage us on the substance of the proposed changes and the manner in which these will have optimal effects for Aboriginal children. We anticipate that changes affecting Aboriginal children sought by the Ministry in the new iteration of the CFSA will be in compliance with the principles of Prevention, Aboriginal Control, Systems Change and Evaluation and Measurement as set out in our ACYS submission. Finally, we recommend that provision be made in the CFSA for a legislative and compliance review to take place every two and a half years with respect to all provisions as they affect Aboriginal children. This will provide the opportunity for a mid-point review in order to adjust the course of implementation as required.

Appendix:

2015 Review of the Ontario Child and Family Services Act – Metis Nation of Ontario Addendum to Joint Submission