Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA WRITTEN SUBMISSION RE:

IMMEDIATE RELIEF FOR FIRST NATIONS CHILDREN AND FAMILIES LIVING ON-RESERVE AND IN THE YUKON WHO ARE NOT SERVED BY A FIRST NATIONS CHILD AND FAMILY SERVICES AGENCY

February 3, 2021

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Contents

I. Overview

1. On January 26, 2016, the Canadian Human Rights Tribunal (the "**Tribunal**") substantiated the complaint brought by the Assembly of First Nations (the "**AFN**") and the First Nations Child and Family Caring Society (the "**Caring Society**"), finding that First Nations children and families living on reserve and in the Yukon are denied substantively equal child and family services, and/or are differentiated adversely against in the provision of child and family services by the federal government, pursuant to section 5 of the *Canadian Human Rights Act* (the "***CHRA***"). The Tribunal examined Canada's funding formulas and other agreements under the First Nations Child and Family Services Program (the "**FNCFS Program**") and determined that the services provided by Canada are discriminatory and harmful to First Nations children and families (the "**Merits Decision**").

2. One of the Tribunal's keystone findings was that "human rights principles, both domestically and internationally, require [ISC] to consider the distinct needs and circumstances of First Nations children and families living on-reserve and in the Yukon – including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them."[1]

3. The Tribunal ordered Canada "to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision [emphasis in original]."[2] Since 2016, the complainants have returned to the Tribunal in relation to multiple issues of non-compliance with the Merits Decision. The Caring Society once again seeks immediate relief in relation to Canada's non-compliance with the Merits Decision and the orders that have followed. Canada has not taken sufficient measures to provide immediate relief to First Nations children and families receiving services from provinces/territories living on-reserve and in the Yukon, pursuant to agreements made and funded by Canada. The Caring Society seeks specific and targeted orders that will assist in providing immediate relief to those who receive services via federal-provincial and federal-territorial agreements.

[1] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 465.
[2] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 481.

4. Indigenous Services Canada's ("**ISC**") FNCFS Program delivers child and family services on-reserve and in the Yukon through one of two vehicles: (i) First Nations Child and Family Services Agencies ("**FNCFS Agencies**"), which are First Nations-run organizations operating pursuant to delegations under the applicable provincial or territorial legislation;[3] or (ii) via mainstream provincial or territorial child and family services organizations, which are funded by the federal government pursuant to federal-provincial or federal-territorial agreements.

5. The order to cease discriminatory practices and to reform the FNCFS Program to reflect the Merits Decision's findings was not limited to First Nations children and families living in communities served by an FNCFS Agency.[4] Indeed, in September 2016, the Tribunal stated that its Merits Decision already required Canada to update its policies, procedures and agreements under the FNCFS Program and, for clarity, ordered Canada "to update its policies, procedures and agreements to comply with the Panel's findings in the [Merits Decision]."[5] In making this order, the Tribunal indicated that updating agreements under the FNCFS Program would form part of longer-term reform, with interim measures put in place pending long-term reform.[6] These interim measures were to be discussed at the case management meeting scheduled for November 2016; however, that case management meeting was adjourned, after which the parties pursued the immediate relief motions that led to the Tribunal's March 2017, May 2017 and February 2018 Orders.[7]

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[3] The exception to this arrangement is in Prince Edward Island, where the Mi'kmaq Confederacy of Prince Edward Island does not hold provincial delegation and is funded by ISC to provide prevention services and contract with the government of Prince Edward Island to provide protection services, see: Cross-examination of Dr. Blackstock, March 1, 2013 at page 108 line 13 to page 109 line 14. See Affidavit of Nathalie Nepton, affirmed November 20, 2020 at para 31 [**Nepton Affidavit**]. Ms. Nepton was unable to confirm that she had seen a delegation agreement in relation to Prince Edward Island, see: Cross-examination of Nathalie Nepton, January 8, 2021 at page 30, lines 8-12 [**Nepton CX**]. In Undertaking Response #12, ISC confirmed that there is no delegation provision in Prince Edward Island's legislation, see: Responses to undertaking of Nathalie Nepton during the January 8, 2021 cross-examination in the matter before the Canadian Human Rights Tribunal at #12 [**Nepton CX Undertaking Responses**].

[4] *FNCFCSC et al v AGV*, 2016 CHRT 2 at paras. 383, 394, 458, 459.

[5] *FNCFCSC et al v AGC*, 2016 CHRT 16 at para 137.

[6] *FNCFCSC et al v AGC*, 2016 CHRT 16 at para 137.

[7] *FNCFCSC et al v AGC*, 2017 CHRT 7; *FNCFCSC et al v AGC*, 2017 CHRT 14; *FNCFCSC et al v AGC*, 2018 CHRT 4.

6. To date Canada has taken inadequate steps to redress discrimination suffered by First Nations children and families living in communities that are not served by FNCFS Agencies ("**Non-Agency Communities**"). The federal-provincial and federal-territorial agreements governing services to these communities have not been amended to reflect the findings and orders made in the Merits Decision. Moreover, there is no evidence that Canada has systematically applied any other measures to remediate the discrimination. Provincial and territorial governments do not have access to the "funding at actuals" process developed for FNCFS Agencies pursuant to the Tribunal's February 2018 Order.

7. The Caring Society has been trying to address immediate relief for First Nations children and families living in Non-Agency Communities since 2016 with few results.[8] In fact, it was not until the summer of 2020 that Canada provided copies of the relevant federal-provincial and federal-territorial agreements for inspection. A review of the agreements makes clear that Canada has failed to implement the Tribunal's orders, leaving First Nations children and families living in Non-Agency Communities exposed to the profound discrimination found by the Tribunal. In August 2020, the Caring Society brought the present motion, seeking confirmation that the Tribunal's orders apply to Non-Agency Communities and asking the Tribunal to require Canada to take specific steps as outlined above.

8. For its part, Canada's explanations for its lack of action for First Nations children and families in Non-Agency Communities appear to be: 1) that it is "engaging" with First Nations organizations and communities; 2) that it has provided some funding for some communities (not tailored to their needs) through the Community Well-being and Jurisdiction Initiative ("**CWJI**") fund and; 3) vaguely supported statements that the *An Act Respecting First Nations, Inuit and Métis children, youth and families* ("**Bill C-92**")[9] somehow addresses the discrimination within the FNCFS Program. None of these explanations redress the discrimination and harm experienced by First Nations children and families in Non-Agency Communities.

9. Canada's answers to their lack of action for First Nations children and families in Non-Agency Communities reflects the resurgence of Canada's old mindset and demonstrates that it has

[8] Affidavit of Dr. Cindy Blackstock, affirmed October 30, 2020, at para. 14 [**Blackstock Affidavit**].
[9] *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24.

not learned from its discriminatory conduct. As a result, this motion seeks to redress the immediate and ongoing discrimination experienced by First Nations children and families in Non-Agency Communities. The goal is to enforce the Tribunal's immediate relief orders and ensure that the acute discrimination suffered by these children and families is alleviated while Canada (with the assistance of the Parties) tackles long-term reform of the FNCFS Program.

II. Facts

10. While the exact number of Non-Agency Communities varies from year-to-year,[10] there have been between 135 and 138 Non-Agency Communities since the Tribunal's Merits Decision.[11] A further roughly 500 First Nations communities are served by the approximately 150 FNCFS Agencies across Canada.[12] The distribution of Non-Agency Communities varies by region composing 100% of First Nations in the Yukon and approximately 40% of First Nations in British Columbia, and 60% of First Nations in Newfoundland and Labrador. Overall, this motion affects approximately 20% of the roughly 640 First Nations in Canada.

11. The Tribunal received ample evidence during the hearing regarding federal-provincial and federal-territorial agreements. Indeed, in introductory paragraphs of its August 2014 closing submissions, the Caring Society noted that:

> The Respondent's provision of First Nations child and family services is substantively expressed in its agreements with provincial/territorial government recipients and in three policy regimes applied to First Nations child and family services agencies […][13]

12. The Canadian Human Rights Commission's ("**Commission**") closing submissions also canvassed some of this evidence.[14] The 2012 version of the Department's Social Programs Manual confirmed that "[t]here are circumstances where AANDC has entered into agreements with the provinces/territories where it was determined that program benefits may exist to AANDC and First

[10] Nepton Affidavit at para 12; Nepton CX at p. 43, lines 16-22.
[11] Nepton CX Undertaking Responses at #1.
[12] Nepton Affidavit at para 12.
[13] Memorandum of Fact and Law of the Complainant First Nations Child and Family Caring Society, dated August 29, 2014 at para 8 [**Caring Society August 2014 closing submissions**].
[14] Closing Submissions of the Canadian Human Rights Commission, dated August 25, 2014 at paras 205-206 and 240-264.

Nations",[15] and Dr. Blackstock addressed such arrangements in British Columbia and Alberta at length, for instance in her recalled examination on February 10, 2014.[16]

13. The Caring Society raised the need to address discrimination faced by First Nations children and families living in Non-Agency Communities in 2016. For instance, following the Tribunal's order requiring Canada to update its agreements under the FNCFS Program, in a letter to the then-Minister of Indigenous and Northern Affairs' chief of staff, the Caring Society called on the Department to require non-Indigenous child and family service providers funded under the FNCFS Program to report on their consultations with First Nations to ensure that the funding received was adequate and responsive to the needs of their children and families.[17]

14. Despite the Tribunal's orders to date, Canada has not updated its agreements with provincial and territorial governments delivering services under the FNCFS Program. This was confirmed by Canada's affiant, Ms. Nathalie Nepton (Director General of ISC's Children and Families Branch), during her cross examination.[18] Ms. Nepton reports directly to the Assistant Deputy Minister of the Child and Family Services Reform Sector of ISC.

15. While the agreements have not been updated to reflect the Tribunal's orders, Canada has made some additional funding available to Non-Agency Communities (beginning in 2018) through the CWJI (addressed in more detail below).[19] The CWJI was unilaterally developed by Canada as a mechanism to fund jurisdictional initiatives, some prevention services and, later, COVID relief measures.

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[15] CHRC Book of Documents, Tab 272, National Social Programs Manual (2012) at p 10.
[16] Recalled examination of Dr. Blackstock, February 10, 2014, see for instance at pages 6-45 (British Columbia) and pages 274-289 (Alberta).
[17] Blackstock Affidavit, Exhibit "1" at page 2.
[18] Nepton CX at p. 31, lines 4-9.
[19] There are two important facts to keep in mind regarding the CWJI fund: (i) depending on the year, 10-21% of Non-Agency Communities have received no CWJI funding, while others may only have received funding for initiatives to draw down jurisdiction over child and family services.; and (ii) the amount of CWJI funding is not needs-based and access to the funding depends on decisions made at regional tri-partite tables (federal, provincial/territorial, and regional First Nations leadership).

A. Evidence related to Federal-Provincial and Federal-Territorial Agreements

16. The evidence proffered on this motion and led in the case writ large demonstrates that immediate relief in keeping with the Merits Decision (and the orders that have followed) has not been made substantively or equitably available to all Non-Agency Communities.

17. The table appended to Ms. Nepton at Exhibit NN-3 depicts funding provided to the governments of Newfoundland and Labrador, Ontario, Alberta, British Columbia and Yukon from 2015/16 to 2018/19. Overall, this table depicts an increase of funding to these provinces of $15.9 million, though it is unclear how much of this increase relates to maintenance expenditures.[20] Of concern, however, is the data for Alberta, which indicates a 49% funding decrease from 2017/18 to 2018/19, with the 2018/19 level being a 38% decrease relative to 2015/16 (i.e., funding before the Decision on the Merits.

Fiscal Year	Funding Provided to Alberta	Increase/Decrease from prior year	Citation	Non-Agency Communities (UT #1)
2015/2016	$26,976,918	-	NN Aff, Exh NN-3	-
2016/2017	$30,775,341	+$3,798,423	NN Aff, Exh NN-3	9
2017/2018	$32,749,248	+$1,973,907	NN Aff, Exh NN-3	9
2018/2019	$16,660,394	-$16,088,854	NN Aff, Exh NN-3	9

18. Of note, in British Columbia, a funding gap for Non-Agency Communities that existed at the time of the 2013-2014 hearings has still not been closed. During her evidence speaking to the 2013-2014 Service Agreement between the Department and Ministry for Children and Family Development in the Province of British Columbia, Dr. Blackstock noted a difference in views recorded in the Service Agreement, to the effect that there was a shortfall in funding of $12.9 million, wherein British Columbia took the position that its costs were $42 million, while Canada funded $29.1 million.[21] This disagreement was recorded at Article 7.6 of the Service Agreement, with the Department and British Columbia agreeing to "continue to collaborate on the articulation of costs."[22] That same disagreement is memorialized in Article 7.6 of the British Columbia Service

[20] Nepton Affidavit at Exhibit NN-3.
[21] Recalled examination of Dr. Blackstock, February 12, 2014 at pp 218-221; CHRC Book of Documents, Tab 399, B.C. Service Agreement 2013-2014 at pp 7 and 13.
[22] CHRC Book of Documents, Tab 399, B.C. Service Agreement 2013-2014 at p 7.

Agreements for 2015/16 through 2018/19, all referencing a 2010/11 costing exercise.[23] As such, while annual funding has increased from by $7.1 million, from $29.1 million to $36.2 million in 2020/21,[24] the gap has still not closed, but has in fact widened. Indeed, accounting for inflation at the Bank of Canada rate, $42 million in "2010-2011" dollars would account for $49.1 million in "2020-2021 dollars".[25]

19. With respect to the Yukon, prior to the Merits Decision, the Government of Yukon was funded on the basis of Directive 20-1.[26] While Ms. Nepton's evidence was that Directive 20-1 was no longer in use, she was unable to confirm that the "EPFA funding stream" applied in the Yukon starting in 2016/17 was the same one that this Tribunal ruled discriminatory little more than two months earlier in the Merits Decision.[27] Grand Chief Johnston's evidence (regarding the Bilateral Agreement that provided the EPFA funding) was that the Council of Yukon First Nations and the Yukon First Nations involved "had no involvement or input into the determination of the funding amounts set out in the Bilateral Agreement or how they would be spent by the Yukon government."[28] While those amounts would later be allocated to Yukon First Nations,[29] Grand Chief Johnston's evidence was that Yukon First Nations are "still working within a fixed budget that was not developed in response to the communities' cultural, geographical and historical needs and circumstances."[30]

20. To the extent that this "fixed budget" has been set based on the discriminatory EPFA, imposed without consultation, it appears that Canada has taken a unilateral approach without

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[23] Blackstock Affidavit at Exhibit 6A (page 5), Exhibit 6B (page 20 of 26), Exhibit 6C (page 5) and Exhibit 6D (page 5).
[24] Nepton Affidavit at para 41.
[25] See Bank of Canada Inflation Calculator: https://www.bankofcanada.ca/rates/related/inflation-calculator/.
[26] Nepton Affidavit at para 43. See also, for example: CHRC Book of Documents Tab 317, Email from Mary Quinn to Michel Roy and Michael Wernick, dated March 25, 2009 re "Yukon FNs coming Wednesday (note M6408)".
[27] Nepton Affidavit at para 44; Nepton CX at p 82 line 10 to p 83 line 20 and at p 86 lines 8-25.
[28] Affidavit of Grand Chief Peter Johnston, affirmed October 30, 2020 at para 15 [**Grand Chief Johnston Affidavit**].
[29] Grand Chief Johnston Affidavit at paras 16-17.
[30] Grand Chief Johnston Affidavit at para 17.

regard to the Merits Decision. As a result, there is a clear need for the Tribunal's intervention to provide immediate relief to ensure its orders are effective in the Yukon.

21. As evidenced by the agreements tendered during the hearing on the merits and appended to Dr. Blackstock's affidavits, all of Canada's provincial/territorial agreements remain bilateral in nature and are not formulated in consultation with affected First Nations. More than five years after the Merits Decision, Canada has not provided any evidence that it consults affected First Nations on their needs and the funding agreements signed with the provinces/territory to serve their children and families. Indeed, Ms. Nepton was unable to confirm this was the case when asked directly on cross-examination, and her answers on this point were vague and not in keeping with the well-established principles of consultation.[31]

22. Finally, as part of the evidence led on this motion, Canada has suggested that it is at the "forefront" of prevention funding, based in part on Ms. Nepton's review of various provincial and territorial legislation.[32] In response to the Caring Society's request for analysis demonstrating that this is the case, Canada advised that it had concluded by reviewing legislation "that very few jurisdictions have revised their legislation to account for the shift in emphasis toward prevention work. ISC assumes from this that there is a lack of provincial/territorial investment in prevention."[33] The Caring Society does not agree with Canada's characterization of the state of the law in this regard, specifically with reference to various child protection legislation across the country.[34] Indeed, it is curious that Canada now says that provinces and territories have yet to make a "shift" to prevention, when its August 29, 2012 presentation "The Way Forward" cited a "Provincial/Territorial Shift to Prevention" as one of the drivers of FNCFS Program reform.[35] In

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[31] Nepton CX at p. 41 line 25 to p. 43 lines 5.
[32] Nepton Affidavit at para 55; Nepton CX at p. 100 line 11 to p. 101 line 16, p. 107, lines 10-23.
[33] Nepton CX Undertaking Responses at #6.
[34] See for example *Children and Family Services Act*, S.N.S. 1990, c. 5, Preamble, ss. 9(b) and 9(c); *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1, Preamble, ss. 1(2), 35(1)(c); *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46, ss. 2(c), 3(c.1), 16(2)(b.1), 93(1)(a); *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, ss. 2(1)(i), 6(3)(a)(i); *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, ss. 3, 5(b); *The Child and Family Services Act*, C.C.S.M., c. C80, Declaration of Principles 7, ss. 7(1)(b), 10(1), 10(2); *Child and Family Services Act*, S.Y. 2008, c 1, ss. 2(l), 11(1), 14(1), 15(1), 29.
[35] CHRC Book of Document, Tab 248, AANDC Presentation to Françoise Ducros – The Way Forward at p 5.

any event, as Ms. Nepton admitted on cross-examination, a higher level of Canada's spending on prevention for First Nations children and families on-reserve and in the Yukon reflects the fact that these are the communities with the greatest need.[36]

A. The Community Well-Being and Jurisdiction Initiative

23. It is not disputed that the CWJI did not exist until Canada announced Budget 2018 on February 27, 2018, and was not made available to communities July 2018, after a methodology had been agreed upon at the Consultation Committee on Child Welfare ("**CCCW**").

24. As Ms. Nepton acknowledged during her cross-examination, this funding stream is not needs-based, but rather is set as a "fixed pot" amount.[37]

25. The CWJI funds First Nations communities whether or not they are affiliated with an FNCFS Agency,[38] and can fund projects related either to direct provision of prevention services by the community, or projects that support the community's efforts to draw down jurisdiction over child and family services, or to provide COVID 19 measures.[39] Indeed, many CWJI examples cited in Ms. Nepton's affidavit relate to First Nations who are also served by an agency.[40]

26. The CWJI does not fund activities related to child protection, meaning that areas such as intake and investigation, legal fees related to children in care, and building repairs to child and family services facilities are not eligible for funding.[41] For Non-Agency Communities, those areas are funded by provinces or the Yukon, pursuant to the applicable Federal-Provincial or Federal-Territorial Agreement.[42]

27. The CWJI "fixed pot" is distributed by tripartite tables (federal-provincial-territorial) in each province and in the Yukon.[43] However, not all of the CWJI's "fixed pot" of funding is distributed by the regional tables, as part of the CWJI envelope is allocated to "pilot projects"

[36] Nepton CX at p. 104, lines 1-19.
[37] Nepton CX at p. 11, lines 7-13, p. 65 line 22 to p. 66 lines 2.
[38] Nepton CX at p. 60 line 15 to p. 61 lines 2.
[39] Nepton CX at p. 69 line 21 to p. 70 line 23.
[40] Nepton CX at p. 78 line 8 to p. 80 line 3.
[41] Nepton CX at p. 66, lines 13-24.
[42] Nepton CX at p. 67, lines 8-22.
[43] Nepton Affidavit at para 22; Nepton CX at p. 60 line 15 to p. 61 line 2.

agreed to during Minister Bennett's Minister's Special Representative's ("**MSR**") tour in 2016.[44] The amount of the CWJI fixed pot was established unilaterally by Canada in Budget 2018, though the amount of the fixed pot was criticized at the CCCW after it was announced.[45] The CCCW was, however, consulted by Canada regarding the distribution methodology of Canada's fixed pot amongst the regions in June 2018.[46]

28. Indeed, as Ms. Nepton acknowledged in her cross-examination, the First Nations parties at the CCCW did not agree that the total amount of funds available via the CWJI was sufficient. To the contrary, the initial distribution of $80,000,000 proposed by ISC was criticized by the First Nations parties for not providing any CWJI funding for Ontario.[47] Including Ontario in the model led to a reduction of $17,600,000 in funding to First Nations located in nine other provinces and the Yukon. The Caring Society in particular urged Canada to increase the amount of funding made available via the CWJI to account for Ontario; however, Canada refused and the amount of funding remained stagnant.[48]

29. Ms. Nepton advised that CWJI funding will increase gradually to a fixed amount of $140,000,000 in 2022/23, after which it will expire.[49]

30. In 2018/19, 107 of 136 Non-Agency Communities received CWJI funding (79%). In 2019/20, 111 of 138 Non-Agency Communities received CWJI funding (80%), and in 2020/21, 124 of 138 Non-Agency Communities received CWJI funding (90%).[50] However, Ms. Nepton was unable to confirm which Non-Agency Communities received funding for prevention, as opposed to jurisdiction initiative or other funding purposes.[51]

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[44] Nepton Affidavit at para 22.
[45] Supplementary Record of Documents at Tab 2, June 22, 2018 Consultation Committee on Child Welfare Record of Decision at item 6(a).
[46] Exhibit C-1 to the Nepton CX at Tab 1, June 14, 2018 email from Paula Isaak to CCCW members re "ramp up approach and community well-being and jurisdiction initiatives".
[47] Nepton CX at p. 61, lines 3-13; Supplementary Record of Documents at Tab 2, June 22, 2018 Consultation Committee on Child Welfare Record of Decision at item 6(a).
[48] Exhibit C-1 to the Nepton CX at Tab 2, June 15, 2018 letter from David Taylor to Robert Frater, Q.C. See also: Cross-examination of Paula Isaak, October 30, 2018 at page 48 line 19 to page 49 line 19.
[49] Nepton Affidavit at para 21.
[50] Nepton CX Undertaking Responses at #1 and #2.
[51] Nepton CX at p. 72 line 22 to p. 73 line 19.

B. Long-term Reform for Non-Agency Communities

31. The Institute of Fiscal Studies and Democracy ("**IFSD**") considered the needs of Non-Agency Communities in Part V of its September 2020 report. In that report, IFSD noted that most Non-Agency Communities are small, with the majority having on-reserve populations less than 500.[52] IFSD learned that some Non-Agency Communities are considering drawing down jurisdiction pursuant to Bill C-92, while others seek to provide prevention services directly with protection services being provided by the provincial government.[53] IFSD conducted two case studies of Non-Agency Communities: Esquimalt First Nation and "First Nation W", a self-governing modern treaty nation.[54] In order to inform long-term reform, IFSD recommended a needs-assessment for Non-Agency Communities, use of a holistic performance framework, and the adoption of variable approaches to prevention programming.[55]

32. As Ms. Nepton indicated in her cross-examination, ISC has yet to accept the IFSD Report and states further discussions will be required among the parties prior to long-term reform of the FNCFS Program moving forward.[56]

33. Ms. Nepton's affidavit also points to the assumption of jurisdiction via the mechanism provided in Bill C-92. To the extent ISC seeks to imply Bill C-92 is a mechanism to relieve discrimination in Non-Agency Communities and is a tool for long-term reform as ordered by the Tribunal, it must be noted that ISC has also communicated the position that the Tribunal's orders will not apply to First Nations who exercise their jurisdiction over child and family services.[57] This position is concerning to the Caring Society, as Canada has not publicly disclosed this information on its website or in its technical documents including its most recent draft circulated

[52] Blackstock Affidavit, Exhibit "11" at p 231.
[53] Blackstock Affidavit, Exhibit "11" at p 232.
[54] Blackstock Affidavit, Exhibit "11 at pp 235-242 (Esquimalt) and 243-250 (Nation W).
[55] Blackstock Affidavit, Exhibit "11" at p 253.
[56] Nepton CX at p. 110 line 15 to p. 111 line 22.
[57] Email chain between Isa Gros-Louis to Cindy Blackstock re "Technical document on C-92", dated January 22, 2021 to January 29, 2021 appended to the Nepton CX Undertaking Responses.

for feedback in January of 2021.[58] Indeed, six of 138 non-Affiliated First Nations have provided notice under Bill C-92.[59]

III. Argument

A. The orders made in the Tribunal's Merits Decision apply to Non-Agency Communities

34. It should be evident on the face of the Merits Decision that the orders made by the Tribunal apply to the entirety of the child and family services delivered pursuant to the FNCFS Program, whether provided by an FNCFS Agency or by a provincial or territorial government via a Federal-Provincial or Federal-Territorial Agreement. Indeed, the Tribunal recognized as much in its September 2016 immediate relief order when it ordered INAC (as it then was) to reform its agreements under the FNCFS Program.

35. Convincingly, the Merits Decision mentions the "Yukon" 62 times; First Nations in the Yukon have always received child and family services via a provincial/territorial agreement per the FNCFS Program. Indeed, during the hearing on the merits, evidence emerged that Carcross First Nation in the Yukon wanted to establish an FNCFS Agency, but Canada refused to support it.[60]

36. The essential component of the Merits Decision was that, in order to ensure substantive equality in child and family services, those services had to be delivered in a way that accounted for the best interests and needs of the child and for each First Nations community's historical, cultural and geographical needs and circumstances. It was clear on the evidence that Canada's use of multiple discriminatory funding approaches meant that positive measures to remediate the discrimination and achieve substantive equality would have to account for the different "starting" positions of First Nations.

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[58] Email chain between Isa Gros-Louis to Cindy Blackstock re "Technical document on C-92", dated January 22, 2021 to January 29, 2021 appended to the Nepton CX Undertaking Responses; *An Act respecting First Nations, Inuit and Métis children, youth and families: Technical information package*, available online at: https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-SOCIAL/STAGING/texte-text/tech-info-pkg-Act-respecting-FN-Inuit-MetisChildren_1579795374325_eng.pdf.

[59] Nepton CX Undertaking Responses at #4.

[60] CHRC Book of Documents, Tab 323, draft letter from Michael Wernick to Khà Shâde Héni Mark Wedge; Recalled examination of Dr. Blackstock, February 11, 2014 at pp 88-90 and 92-93.

37. Indeed, with regard to Non-Agency Communities, while Newfoundland and Labrador and the Yukon received funding pursuant to Directive 20-1,[61] the British Columbia and Alberta federal-provincial agreements provided levels of funding that were more favourable than what FNCFS Agencies in these same regions received.[62]

38. The fundamental requirement of the orders made in the Merits Decision was that First Nations children and families living on-reserve and in the Yukon be treated in a manner that allowed them to receive child and family services that were substantively equal to those available to Canadian children living off-reserve. This requirement was not made conditional on the manner in which these children and families received those services (i.e. via FNCFS Agencies as opposed to from provincial and territorial governments). The Tribunal made the following important comments in the Merits Decision:

> [383] The FNCFS Program, corresponding funding formulas **and other related provincial/territorial agreements** intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services […] However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program **and other funding methods** [emphasis added].
>
> [394] […] the adverse effects generated by the FNCFS Program, corresponding funding formulas **and other related provincial/territorial agreements** perpetuate disadvantages historically suffered by First Nations people [emphasis added].
>
> [458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas **and the other related provincial/territorial agreements** have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserve [emphasis added].
>
> [459] The FNCFS Program, corresponding funding formulas **and other related provincial/territorial agreements** only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage

[61] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 124.
[62] Caring Society August 2014 closing submissions at para 216.

> and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system [emphasis added].[63]

39. The Merits Decision imposed a general obligation to cease discrimination with respect to child and family services provided to First Nations children and families on-reserve and in the Yukon. The Merits Decision makes clear that Non-Agency Communities are included in long-term reform; as such, there is no reason for those communities to be excluded from immediate relief. Indeed, it is clear from the Tribunal's September 2016 immediate relief decision that it was the Tribunal's expectation that First Nations children from Non-Agency Communities would not have to wait for long-term reform to be relieved of Canada's ongoing discrimination. The Caring Society submits that a clear direction from the Tribunal on this point is essential to addressing the ongoing discrimination facing Non-Agency Communities.

B. The introduction of the CWJI was not sufficient to provide immediate relief to Non-Agency Communities

40. Ms. Nepton's affidavit points to the CWJI as a mechanism for addressing the needs of Non-Agency communities. However, as noted above, the CWJI was not available until July 2018, has not been provided to all Non-Agency Communities and it is not tailored to meet the historical, cultural and geographic needs and circumstances of the affected children and families.

41. As has already been determined by the Tribunal, the amounts included for the FNCFS Program in Budget 2016 amounts were determined prior to the Tribunal's Merits Decision.[64] Accordingly, any such amounts cannot serve as a basis for stating that Non-Agency Communities had any immediate relief prior to the CWJI being enacted.

42. Indeed, Ms. Nepton does not explain how Canada implemented the orders with respect to Non-Agency Communities between January 2016 to July 2018 when the CWJI began to be rolled out.

43. Between 2016 and 2018, the only additional prevention funding available to Non-Agency communities outside of the Yukon was via the MSR process, which was launched in October 2016 with no consultation with the Parties or with First Nations and was not targeted specifically to

[63] *FNCFCSC et al v AGC*, 2016 CHRT 16 at paras. 383, 394, 458, 459.
[64] *FNCFCSC et al v AGC*, 2018 CHRT 4 at para 100.

Non-Agency Communities.[65] The funds available via the MSR process were not publicly advertised by Canada meaning only those who met with the MSR and met some unknown criteria were able to access the funding.[66] In their December 2016 meeting, the AFN Chiefs in Assembly passed AFN Res. 83/2016, a unanimous resolution expressing concern about the MSR, its lack of terms of reference and accountability.[67] When Canada announced the CWJI funding, it rolled over the MSR generated funding agreements, including those signed with communities served by FNCFS Agencies, into this fixed pot of money, meaning the budget was partially spent when it was announced.

44. While Ms. Nepton was unable to confirm if it was made clear to First Nations participating in the MSR's tour that funding opportunities were available,[68] there is evidence before the Tribunal that it was not. Indeed, the draft communique from Regional Directors General associated with the MSR's tour, provided in response to an undertaking given during the 2017 cross-examination of Cassandra Lang (then a Director in the Children and Families Branch), makes no mention of funding opportunities. Instead, it was focused on canvassing "the views of a range of partners on how best to meet the needs of children and families on reserve" and "hearing your ideas about wise/promising practices in child welfare and prevention, and on short- and long-term concrete solutions."[69] As such, there is no evidence before the Tribunal that the "pilot projects" flowing from the MSR's 2016 tour were an adequate means of responding to the Tribunal's orders.

45. Furthermore, not all Non-Agency Communities received CWJI funding. In its first two years, one in five Non-Agency Communities did not receive any CWJI funding, while in the current fiscal year one in ten Non-Agency Communities does not receive any such funding.

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[65] Affidavit of Cassandra Lang, sworn January 25, 2017 at paras 15-16 [**Lang Affidavit**].
[66] Indeed, in the Lang Affidavit, it was noted at para 19, that as a result of discussions held at MSR meetings, the Department was exploring agreements with Esketemc First Nation, Shuswap Tribal Council and Chippewas of the Thames to put possible pilot projects in place. The Lang Affidavit advised that "[m]ore community-based best practices/approaches will be identified, shared and further developed as they are raised by partners during the engagement process, either through discussions with the Minister's Special Representative, through regional or national engagement tables, or by individual communities or agencies" (at para 19).
[67] See Affidavit of Jonathan Thompson, affirmed December 20, 2016, Exhibit "E" at H and I.
[68] Nepton CX at p. 77 line 20 to p. 78 line 4.
[69] Response to undertakings arising from the February 2017 cross-examination of Cassandra Lang, dated March 3, 2017, Lang #31(a).

46. What is more, Ms. Nepton was unable to confirm that all of the Non-Agency Communities that receiving CWJI funding had access to prevention funding, as opposed to funding for other initiatives.

47. In any event, CWJI is a fixed pot of money that was not designed with Non-Agency Communities specifically in mind. Indeed, a number of the "success stories" presented in Ms. Nepton's affidavit relate to Manitoba, a jurisdiction that has no Non-Agency Communities.

48. Additionally, statements that the CWJI's "fixed pot" regional allocations are distributed to regions based on a methodology agreed to at the CCCW require additional context.[70] The amount of the "fixed pot" and the purposes of the CWJI program were decided unilaterally by Canada. When a greater need for CWJI funding was identified by First Nations parties at the CCCW, particularly as Canada excluded First Nations from Ontario from its original CWJI formulation, ISC's response was to decrease the amounts allocated to other regions in order to fund First Nations in Ontario instead of increasing the fixed pot. As Ms. Nepton acknowledged, the amount of funding available in the CWJI "fixed pot" is not needs-based.[71]

49. As a result, the Caring Society is of the view that the CWJI fund, while potentially offering an avenue for some prevention funding to some Non-Agency Communities, does not answer the requirements of the Tribunal's clear direction that funding be based on the needs of First Nations children and families and that the discrimination cease for all First Nations children and families living on-reserve and in the Yukon.

50. Ms. Nepton's evidence also gives no indication as to the sufficiency of CWJI funding and whether it meets the needs identified by the Tribunal and addresses the discrimination for children and families in the 124 Non-Agency Communities that received such funding.

51. For instance, in British Columbia and Alberta (representing 94 of 138 Non-Agency communities (68%)), Non-Agency Communities and communities served by FNCFS Agencies, who have access to the "funding at actuals" process established pursuant to the Tribunal's February 2018 orders, receive the same base amount of CWJI funding. As a matter of logic, it would stand

[70] Exhibit C-1 to the Nepton CX at Tab 1, June 14, 2018 email from Paula Isaak to CCCW members re "ramp up approach and community well-being and jurisdiction initiatives".
[71] Nepton CX at p. 65 line 12 to p. 66 line 2.

to reason that communities that have no access to an actuals-based funding process and do not have the benefit of an Agency's service infrastructure would have greater needs. In British Columbia, no set criteria are provided for going above the base CWJI allocation. For Alberta, additional amounts are provided based on child population, and not based on needs given lack of access to an actuals-based funding process. Indeed, similar to the flaws in Canada's discriminatory Directive 20-1 funding approach, the reliance on child population is likely to disadvantage Non-Agency Communities as they are more likely to have small populations.[72]

52. There is no indication in the evidence that the tripartite regional tables are truly doing needs-based assessments when they consider how to allocate the funds within their province or territory. This also stands to reason because, as Ms. Nepton agreed, these tripartite tables are working with a fixed pot formula, and not a needs-based formula.

53. Furthermore, in terms of child and family service provision, the CWJI only funds prevention activities. As such, the CWJI provides no capacity for Non-Agency Communities to ensure that actual needs are met in the areas of intake/investigation, building repairs, and legal fees. Indeed, while those activities fall to provincial and territorial governments pursuant to the applicable agreements, there is evidence that, at least in the Yukon, First Nations wish to become more involved in the delivery of these services to ensure that they meet communities' needs.[73]

54. In summary, while Ms. Nepton was clear that CWJI was not adopted pursuant to a specific Tribunal order, Canada's numerous citations of it in submissions to the Tribunal suggest it is relevant to Canada's implementation of the orders. However, the CWJI is of questionable effectiveness, as there are a number of Non-Agency Communities who have yet to receive any funding under the CWJI, and it is unknown how many have actually received prevention funding under CWJI (or if so, how much). The CWJI does not take a needs-based approach, nor does it cover all of the areas noted for immediate action by the Tribunal.

C. Long-term reform of the FNCFS Program or pursuant to Bill C-92 will not provide immediate relief to Non-Agency Communities

[72] Blackstock Affidavit, Exhibit "11" at p 231.
[73] Grand Chief Johnston Affidavit at para 20.

55. Since Bill C-92 was introduced, Canada has characterized the new federal child welfare legislation, in its submissions and evidence to the Tribunal, as an important component to the long-term reform of the FNCFS Program. Joanne Wilkinson, former Assistant Deputy Minister of Child and Family Services Reform Branch at ISC, stipulated that Bill C-92 (now *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*) is a significant step forward towards long-term reform and the work done through the implementation of Bill C-92 could help "guide future funding methodologies".[74] In relation to Non-Agency Communities, Ms. Nepton stated:

> ISC is committed to the long-term reform of the FNCFS Program, but it must be done in cooperation with First Nations partners and in accordance with the principles of the *Act*, which affirms the rights of First Nations, the Métis and the Inuit over child and family services, and establishes national principles and minimum standards applicable to the provision of child and family services in relation to Indigenous children. As part of this process, ISC will examine how it can best continue to support First Nations in shifting child and family services in their respective communities towards a prevention model which respects the principles of the *Act*.[75]

56. However, when asked directly under cross-examination whether Canada will provide funding under the FNCFS Program to those drawing down their jurisdiction under Bill C-92, Ms. Nepton was not able to directly answer the question,[76] raising further concern as to why Canada continues to tout Bill C-92 as a tool for long term reform, particularly in relation to Non-Agency Communities.

57. Canada's answers to undertakings arising from Ms. Nepton's cross-examination provide a clearer answer to how Bill C-92 fits into the overall reform of the FNCFS Program for Non-Agency Communities: while some First Nations which may choose to adopt a model that includes protection services delivered by an agency where an agency is already established, First Nations that do not have an agency or choose to pursue an independent service model will not have access to funding under the FNCFS Program.[77] This is made all the more concerning by the information recently received by the Caring Society on January 29, 2021, appended to the responses to undertakings flowing from Ms. Nepton's cross-examination, that Canada is of the view that the

[74] Affidavit of Joanne Wilkinson, affirmed April 16, 2019, at paras. 53-58.
[75] Nepton Affidavit at para. 21.
[76] Nepton CX at p. 93 line 21 to p. 95 line 17.
[77] Nepton CX Undertaking Responses at #5.

Tribunal's orders in this case will not apply where First Nations have drawn down jurisdiction via Bill C-92:

> Canada acknowledges that discussions on funding are an essential part of discussions with First Nations planning to exercise their jurisdiction. However, since the Act [Bill C-92] falls outside the scope of the CHRT orders, the CHRT orders will not apply to a First Nation that has assumed jurisdiction. Coordination agreement tables will discuss fiscal arrangements relating to the provision of child and family services by the Indigenous governing body, that are sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities and to support the capacity of the Indigenous group, community or people to exercise the legislative authority effectively.[78]

58. The Caring Society supports First Nations exercising their inherent jurisdiction via the mechanism provided in Bill C-92, so that they may determine for themselves the best pathway to protecting and supporting their children, families and communities. However, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*, First Nations have the right to free prior and informed consent and Canada, therefore, has a duty to disclose all relevant information including its views on the applicability of the Tribunal's orders.[79] Six Non-Agency Communities have already given notice of their interest in affirming their own child welfare laws pursuant to Bill C-92, all of which would be impacted by this motion for immediate relief.[80] Canada has not provided any evidence that it has clearly informed these First Nations of its views regarding the applicability of the CHRT Decisions after First Nations have drawn down jurisdiction via Bill C-92.

59. To date, Canada has led evidence in this case that Bill C-92 is an important ingredient for long-term reform. Canada has built a narrative that the new federal legislation is part of the long-term reform of the FNCFS Program – presumably it is for this reason that Canada as led evidence on Bill C-92 on this motion. To only learn now that not all funding will flow through the FNCFS Program and will not be subject to the CHRT Orders will likely come as a surprise to many First Nations across the country. Indeed, this information was not shared in the Technical Guide

[78] Email chain between Isa Gros-Louis to Cindy Blackstock re "Technical document on C-92", dated January 22, 2021 to January 29, 2021 appended to the Nepton CX Undertaking Responses.
[79] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 at Article 19.
[80] Exhibit C-1 to the Nepton CX at Tab 3; Nepton Undertaking Responses at #4.

authored and published by Canada that has been relied on by many Indigenous groups in their navigation of this process.[81]

60. Ms. Nepton's affidavit suggests (although it does not directly state) that the opportunity to draw down jurisdiction through the mechanism provided by Bill C-92 will allow Non-Agency Communities to access substantively equal child and family services.[82] However, at a minimum, the funding arrangements that would follow the drawing down of such jurisdiction remains unclear.[83]

61. There is no immediate prospect of Non-Agency Communities being able to access substantively equal child and family services via Bill C-92. Only six of 138 Non-Agency Communities have given notice under Bill C-92 (4%). As such, even if it were clear that Canada would ensure funding sufficient to provide substantively equal services would be available when drawing down jurisdiction, the vast majority of Non-Agency Communities are not yet moving in this direction.

62. Furthermore, as Ms. Nepton confirmed in her cross-examination, ISC has still yet to confirm whether it accepts the recommendations in the IFSD report.[84] As such, there is also no immediate prospect of long-term reform of the FNCFS Program making substantively equal child and family services available to Non-Agency Communities.

D. A brief consultation period in order to provide a mechanism to meet Non-Agency Communities' actual needs is an appropriate remedy on this motion

63. As the Tribunal has already decided on more than one occasion in decisions that Canada has not judicially reviewed, it may order, pursuant to section 53(2)(a) of the *CHRA*, that Canada consult with the Parties, the Interested Parties and the Commission regarding the mechanism to implement appropriate remedies. In fact, in its February 2018 Decision the Tribunal ordered this very remedy, including ordering Canada to consult the Parties, the Interested Parties and the Commission regarding the development and implementation of the methodology for funding the

[81] Technical Information Package: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families: https://www.sac-isc.gc.ca/eng/1579468554846/1579468577638.
[82] Nepton Affidavit at paras 57-58.
[83] Nepton CX at p 93 line 8 to p 95 line 22; Nepton CX Undertaking Responses at #5.
[84] Nepton CX at p. 110 line 15 to p. 111 line 22.

actual costs for prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services as determined by FNCFS Agencies to be in the best interests of the child.[85]

64. If the Tribunal grants the Caring Society's motion, the consultation period need not be lengthy. There is already a plethora of information available to ISC, both with regard to actual needs of communities as identified by the actuals funding process that has now been in place for more than three years, and through the prevention projects that have been funded for Non-Agency Communities through the CWJI, limited though they may be.

65. Indeed, providing funding directly to First Nations, as opposed to provincial or territorial governments, provides ISC a straightforward vehicle for providing immediate relief to over 135 First Nations communities that have yet to receive relief pursuant to the Tribunal's orders. Ensuring that this funding is structured based on consultations with the Caring Society, the AFN, COO (in the case of Ontario) and the Innu Nation (in the case of Newfoundland and Labrador) will ensure that the vehicle for delivering immediate relief considers all of Non-Agency Communities' needs and circumstances, including the need to build capacity given these communities' lack of affiliation with an FNCFS Agency.

IV. Order sought

66. As such, the Caring Society seeks an order on the following terms:

a. A declaration that Canada has failed to comply with the Tribunal's Orders by not taking sufficient measures to cease its discrimination under the FNCFS Program with respect to First Nations children and families receiving services from provincial/territorial agencies and/or service providers on reserve and in the Yukon;

b. An Order that, within 30 days of the Order, in consultation with the Caring Society, the AFN, the Commission, the Chiefs of Ontario (regarding Ontario) and the Innu Nation (regarding Newfoundland and Labrador), Canada shall develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees and building repairs services for First

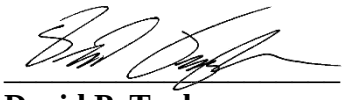
[85] *FNCFCSC et al v AGC*, 2018 CHRT 4 at para. 410.

Nations children and families living on-reserve and in the Yukon who are served by provincial/territorial agencies and/or service providers on the same basis as the current funding practices pursuant to paragraphs 410-413 of 2018 CHRT 4, by fully reimbursing actual costs for these services, as determined in consultation with the First Nation involved to be in the best interests of the child;

c. An Order that, within 90 days of the Order, Canada shall provide reimbursement retroactive to January 26, 2016 for all child and family prevention/least disruptive measures, intake and investigation, building repairs, and legal fees on the same terms as referenced in paragraph 3(b) above; and

d. A declaration that Canada may fulfill the requirements of the above Orders through nation-specific funding agreements, rather than through amendments to provincial/territorial agreements.

All of which is respectfully submitted this 3rd day of February, 2021.



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