

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: DOCUMENTS AND SUBMISSIONS PROVIDED BY
CANADA ON MARCH 4, 2020 IN RESPONSE TO THE TRIBUNAL'S FEBRUARY 20,
2020 INFORMATION REQUEST**

April 9, 2020

**David P. Taylor
Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9**

**Sarah Clarke *Clarke Child & Family Law*
Anne Levesque *University of Ottawa*
Barbara McIsaac, Q.C. *Barbara McIsaac Law***

**Tel: 613-288-0149
Email: dtaylor@conway.pro**

I. Overview regarding the FNCFS Program

1. On February 20, 2020, the Tribunal requested that Canada provide:
 - a. A copy of the most recent version of the Social Programs National Manual;
 - b. The most recent version of the FNCFS Program Terms and Conditions;
 - c. A copy of the FNCFS Program Capital Directive;
 - d. A copy of ISC’s plan to eliminate the lack of coordination in federal programs and services adversely impacting First Nations children; and
 - e. A copy of any documented plan to reform inequalities in the FNCFS Program.

2. In response, Canada provided several documents related to the FNCFS Program and identified the following “facets” of its plan to reform child and family services for First Nations children and families:
 - a. Dissolving INAC and creating ISC (occurred in 2017);
 - b. Establishing “permanent bilateral mechanisms” (occurred in 2017);
 - c. Engaging in consultations at the CCCW (ongoing since 2018) and the NAC (ongoing since 2016); and
 - d. Co-developing, enacting and implementing *An Act respecting First Nations, Inuit and Métis children, youth and families* (ongoing since 2018).

3. The “facets” identified above are a process, not a plan. In the case of some “facets”, such as the dissolution of INAC and the creation of ISC, no evidence has been tendered by Canada that this was done in consultation with First Nations or the Parties nor that it was directly linked to the CHRT decisions.

4. While Canada has made improvements to the FNCFS Program since January 2016, the reform of the FNCFS Program remains very much at an interim stage with no articulated plan or roadmap to bring the program into long-term compliance with the Tribunal’s orders. In particular, there is no funding approach in place to ensure that FNCFS Agency funding accounts for “the distinct needs and circumstances of First Nations children and families living on-reserve – 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 Nor is there a timeframe in which such a funding approach, or accountability mechanisms to ensure that it operates as intended, will be in place.

5. To return to the metaphor the Tribunal employed in its January 2016 decision,² Canada has, as a result of the Tribunal’s order, exposed the foundation of the FNCFS Program and has applied some repairs to the weakest aspects of the foundation. However, there are many repairs remaining and there is no roadmap or timeframe for completing the project, so that the FNCFS Program can stand on its own.

6. While fora like the Consultation Committee on Child Welfare (CCCW) and the National Advisory Committee on Child Welfare (NAC) have been useful tools for providing input into the repairs made so far, they have not been driving long-term reform. Many issues raised as problematic by the parties are either rebuffed without serious consideration or without reasonable alternatives being proposed, or remain outstanding, without a clear sense of the path to resolution. Moreover, ISC often does not respond to specific questions and instead relies on vague responses or takes an unreasonable amount of time to respond.

7. There are many instances when ISC defaults to what the Tribunal has described as the “old mindset” by giving supremacy to ISC policies even when they are well aware that the parties and other First Nations experts have serious concerns about those policies. Canada’s response to a Caring Society comment on the Draft Prevention Guide (listed on page 7 of Exhibit 4A to the March 4, 2020 Affidavit of Lori Warner) is illustrative. The Caring Society comment said “See previous comments- this is inconsistent with child welfare law” and ISC replied “No changes as the language used is consistent with the Terms and Conditions.” As will be described later in these submissions, Canada adopted outcomes in the Terms and Conditions despite objections from the NAC and the Caring Society.

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

² *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 463: “This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. [...] By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a **REFORM** of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve [emphasis in original].”

8. With particular regard to *An Act respecting First Nations, Métis and Inuit children, youth and families*, despite its requests, the Caring Society has not been invited to attend all meetings of the technical table regarding the implementation of this legislation. The Caring Society was advised it would be invited to attend as a guest several weeks ago, but has yet not received a meeting invitation. Moreover, the Caring Society has not received the minutes of the meetings held to date.³ As such, the Caring Society is unable to provide much comment on the realistic prospect that the implementation of this legislation will contribute to greater compliance with the Tribunal's orders, or to long-term reform. Relevant to these proceedings, during the legislative process, Canada failed to adopt the Caring Society's suggestion that the CHRT decisions funding principles be adopted into the then-draft legislation.⁴ As it stands, there is no clear positive funding obligation for Canada to fund child welfare pursuant to Indigenous laws.

II. The uncertain road to long-term reform of the FNCFS Program

9. Perhaps the most essential barrier to developing a new funding approach is ISC's slow pace in providing necessary supports and data to enable IFSD's phase two report, which is critical to informing medium and long-term reform.

10. Following the completion of IFSD's first report regarding FNCFS Agency needs, IFSD and the parties identified that further work was required in order to develop a new funding approach. As such, the AFN submitted a proposal from the IFSD to Canada on March 6, 2019 that envisaged a one-year timeline for completing that work.⁵ However, the report was not approved until May 2019,⁶ and there have been further delays since. Indeed, a contract was not in place for IFSD until the summer of 2019,⁷ and there are significant delays in ISC providing information to IFSD. Canada was supposed to deliver the required data in the fall of 2019 and only recently delivered part of the required information making it impossible for IFSD to complete its work by March 31, 2020 as originally scheduled.⁸

³ Affidavit of Cindy Blackstock, affirmed on April 9, 2019 at para 11 [Blackstock Affidavit].

⁴ Blackstock Affidavit at para 8.

⁵ Blackstock Affidavit at para 13.

⁶ Blackstock Affidavit at para 13.

⁷ Blackstock Affidavit at para 13.

⁸ Blackstock Affidavit at para 13.

11. While IFSD has completed its FNCFS agency case studies and surveys, it is currently targeting completion of its second report for July 31, 2020; however, this is contingent on the outstanding data requests from ISC being fulfilled in a timely manner.⁹

12. ISC has not informed the parties of what it will do after the report is received.¹⁰ The Caring Society is concerned that Canada's long history of commissioning reports and then not implementing the findings properly, allowing discrimination to linger and grow even stronger in force and tragic effect.

13. Given the current state of affairs, and the lack of a plan by ISC to achieve long term reform and prevent the recurrence of discrimination, it is highly unlikely that a non-discriminatory funding approach for the FNCFS Program will be in operation by 2021. To be clear, this delayed timeline cannot be reasonably explained by the COVID situation as ISC has been very slow to move over the 1,503 days spanning from the date of the decision (January 26, 2016) to the date the World Health Organization declared COVID 19 a pandemic (March 11, 2020).

14. In the meantime, FNCFS Agencies operate with the base amounts provided in Budget 2016 and Budget 2018, as supplemented by requests for funding based on actuals pursuant to this Tribunal's February 1, 2018 order. However, this process has proven to be slow, with nearly \$200 million in funding pending approval as of February 14, 2020 (the date of the most recent update provided to the parties):

- a. Value of total remaining claims to be paid for retroactive reimbursement of expenses from Jan. 26, 2016 to Mar. 31, 2018: **\$92,483,736.69** (*74 claims in process*)
- b. Value of total remaining claims to be paid for actual expenses from Apr. 1, 2018 to Mar. 31, 2019: **\$47,887,430.00** (*56 claims in process*)
- c. Value of total remaining claims to be paid for actual expenses from Apr. 1, 2019 to Mar. 31, 2020: **\$50,468,461.66** (*55 claims in process*).¹¹

15. It is also apparent that the 15-business day timeline for the payment of expenses at actuals that the Tribunal set out in Annex B to 2018 CHRT 4 on September 7, 2018 is not being followed.

⁹ Blackstock Affidavit at para 14.

¹⁰ Blackstock Affidavit at para 15.

¹¹ Blackstock Affidavit at Exhibit 4.

ISC's reports on claims at actuals dated January 24, 2020, February 7, 2020 and February 14, 2020 confirms the problem. Between January 31, 2020 and February 14, 2020 ISC processed only 20 retroactive claims (expenses between January 26, 2016 and February 4, 2018), six claims for 2018-2019 actuals expenses, and seven claims for 2019-2020 actuals expenses.¹² Indeed, the actual timeframe in which claims are being paid remains unclear as ISC is unilaterally "pausing the clock" on claims it deems incomplete.¹³

16. Additionally, the FNCFS Program is guided by Terms and Conditions that include outcomes that were objected to by the First Nations members of the CCCW, the National Advisory Committee (NAC), and by the Caring Society¹⁴ and yet Canada continues to tie funding for capital and prevention to these flawed outcomes.¹⁵ The Caring Society remains concerned that these Terms and Conditions and the Directives are not in full compliance with the Tribunal's orders to date.

17. With respect to the Terms and Conditions, the Caring Society has long identified two central concerns: (a) the FNCFS Program will only fund FNCFS Agencies delivering services pursuant to delegation under provincial child welfare laws, and not pursuant to First Nations laws or jurisdiction (*concern identified in May 2018*); and (b) the Terms and Conditions set outcomes for the FNCFS Program that are not based in evidence (*concern identified in May 2018*) and links said outcomes to the provision of funding to FNCFS Agencies.¹⁶

18. In terms of First Nations jurisdiction, Canada has pointed to "[f]unding for Community Well-Being and Jurisdiction Initiatives [to] further the work undertaken related to First [N]ations

¹² These figures are approximate and are based on the number of claims noted as "in process" in the January 31, 2020 and February 14, 2020 reports from ISC. For the Tribunal's reference, the January 31, 2020 and February 7, 2020 ISC reports are included as Exhibits "2" and "3" of the Blackstock Affidavit.

¹³ See for example Exhibit 4 at note 6 to the table regarding requests for retroactive reimbursements, note 5 to the table regarding 2018-19 requests, and note 4 to the table regarding 2019-20 requests. See also the March 4, 2020 affidavit of Lori Warner at Exhibit 2A (2018-19 National Recipient Guide) at p 21 and at Exhibit 2B (January 2020 National Recipient Guide) at p 26 ("Warner Affidavit"). The National Recipient Guide's timeline for reimbursement states "If the Recipient claim is not complete, and ISC is awaiting the revised Recipient claim, the 15 business days will stop, and will re-start once the Recipient claim is completed and received" (Warner Affidavit at Exhibit 2B, p 26).

¹⁴ Blackstock Affidavit at para 18 and Exhibit 5; Warner Affidavit at Exhibit 6C, pp 7-10.

¹⁵ Warner Affidavit, Exhibit 7A at p 7 (re Capital Directive); Blackstock Affidavit, Exhibit 7 at p 3 (re Prevention Directive).

¹⁶ Blackstock Affidavit, Exhibit 5.

jurisdiction over child and family services.”¹⁷ However, all CWJI funds for this fiscal year (2019-20) and next (2020-21) have been allocated.¹⁸ There is no plan to expand the Terms and Conditions to fund FNCFS Agencies delivering child and family services pursuant to First Nations laws contemplated in the *Act respecting First Nations, Inuit and Métis children, youth and families*. Indeed, Canada refused the Caring Society’s suggestion to include First Nations jurisdiction as an eligible funding model when the Terms and Conditions were being re-drafted in May-June 2018.

19. With regard to the FNCFS Program’s outcomes, Canada has been citing its commitment “to continuing to engage with the CCCW and the NAC to discuss indicators and outcomes”¹⁹ for many months, without providing any details as to what “engagement” means (including whether that is different than “consultation”) and what plan they have for the “engagement” to happen or move forward. Indeed, as recently as March 13, 2020, ISC’s plan related to the FNCFS Program’s outcomes remains at the level of expressing its agreement “that more work needs to be done by the Program in collaboration with the Parties to ensure that the outcomes are articulated in a different way.”²⁰ A similar message was communicated at the March 27, 2020 CCCW meeting, though ISC also noted that Treasury Board approval would be required to bring forward further changes to the FNCFS Program’s outcomes.²¹

20. As the Caring Society has expressed on numerous occasions over the last 22 months, there is no evidence base to the outcomes listed in the Terms and Conditions:

- a. Immediate (one to two years):
 - i. First Nations families have greater access to culturally-appropriate prevention and early intervention services;
 - ii. First Nations service providers have adequate and predictable resources that allow for the development and delivery of culturally based child welfare standards and services including prevention services;
- b. Intermediate (three to five years):

¹⁷ March 4, 2020 Affidavit of Lori Warner, Exhibit 6C at p 1.

¹⁸ Blackstock Affidavit, Exhibit 9.

¹⁹ Warner Affidavit, Exhibit 6C at p 7.

²⁰ Blackstock Affidavit, Exhibit 7.

²¹ Blackstock Affidavit at para 22.

- i. Continuity of family, community and cultural connections is preserved for First Nations children in care;
 - ii. First Nations children in care achieve permanence and stability;
 - c. Ultimate (five years and beyond):
 - i. The over-representation of First Nations children in care is decreased compared to the proportion of non-Indigenous children in care in the overall population of children in Canada; and
 - ii. The safety and well-being of First Nations children are improved.²²

21. The Caring Society has repeatedly voiced its concerns that these outcomes are not evidence based. When the Caring Society requested ISC to provide peer reviewed evidence to support these outcomes, Canada failed to provide any evidence at all. Canada continues to link vital program funding to these outcomes. The Caring Society is particularly concerned that a focus on the reduction of the number of children in care may lead to reducing the number of children in care without improving the health and safety of children and their families. The Caring Society has repeatedly suggested alternate interim measures, such as monitoring reductions in inequalities, in access and quality, in services such as trauma supports, housing, and water.²³

22. As Canada was unwilling to amend the Terms and Conditions to reflect evidence-based outcomes and was proceeding to link funding for prevention and capital to these outcomes, the Caring Society proposed that Canada add a contextual statement to the outcomes, as follows:

ISC acknowledges that the recipient reporting outcomes in this document are for information purposes only and are not linked to the eligibility for, or the provision of, funding pursuant to the First Nations Child and Family Services Program, Jordan's Principle or other federal funding programs or their antecedents. Moreover, ISC will ensure any reporting on the current outcomes clearly indicates the shortcomings in the reliability and validity of the current outcome measures.

Further research is required in order to identify reliable and valid outcome measures to promote healthy First Nations families and children and to contextualize these measures in the distinct cultures, context and aspirations of First Nations and First Nations Child and Family Service Providers. Due attention must also be given to ensuring compliance with the OCAP (Ownership, Control/Access/Possession)

²² Warner Affidavit, Exhibit 6B at pp 4-5.

²³ Blackstock Affidavit, Exhibit 5.

principles. The National Advisory Committee and the Child Welfare Consultation Committee will be overseeing this research.²⁴

23. Canada's response focused on the necessity of compliance with the FNCFS Program's Terms and Conditions, without reflecting on whether those measures impeded delivery of services in keeping with the Tribunal's orders:

Partially accepted.

The section on linking projects to program outcomes has been adjusted to explain why this is necessary as per the Treasury Board of Canada's Policy on Results but also emphasizes the program's commitment to continue to work with partners on result's measures as they wish [emphasis in original].²⁵

24. Canada has yet to change the outcomes nor have they provided a date by which they will do so. However, they have added the following statement to the final version of the Prevention Directive, received on March 13, 2020:

Parties to the Tribunal have expressed that they do not agree with the Program outcomes and that until Canada produces quality independent peer review evidence to validate current Program outcomes, they do not consider them valid.

ISC acknowledges the Parties['] comments and is committed to working with them to develop new outcomes and indicators to better support the FNCFS Program's objective to strengthen the safety and well-being of First Nations children and their families ordinarily resident on reserve by funding culturally appropriate prevention and protection services for child welfare.²⁶

25. As noted above, ISC has no plan to give effect to their stated intention to work with the Parties to create new outcomes and indicators. Indeed, the Caring Society is concerned that its most material suggestions will be rejected, as was the case in May and June 2018 when the Caring Society commented on the first version of the Terms and Conditions. The Caring Society has no assurance from ISC that the pattern seen on so many other occasions in the FNCFS Program in the more than four years since the January 2016 decision – continued delays with no plan to resolve them and no way of resolving the dispute other than returning to the Tribunal for further orders.

²⁴ Warner Affidavit, Exhibit 7B at pp 6-7.

²⁵ Warner Affidavit, Exhibit 7B at pp 5-6.

²⁶ Blackstock Affidavit, Exhibit 8.

The Caring Society is concerned that this is another example of Canada hearing the parties' concerns, and then doing what it wants.

26. Canada's failure to make improvements to the FNCFS Program's outcomes is particularly problematic, as ISC has tied the Directives on Prevention and Capital to these outcomes. As the Tribunal concluded in its January 2016 decision, "the manner and extent of [ISC's] funding significantly shapes the child and family services provided by the FNCFS Agencies".²⁷ ISC has yet to provide a satisfactory answer to as to why it would choose to drive CFS practice in a non-evidence-based direction.

27. Indeed, the Capital Directive explicitly states that it is subject to the FNCFS Program Terms and Conditions.²⁸ The Capital Directive incorporates the outcomes set out in the Terms and Conditions as part of the "Minimum Program Requirements", stating that "FNCFS Agencies are expected to demonstrate in the proposal as to how the proposed capital project links to the FNCFS Program's ultimate outcome of decreasing the over-representation of First Nations children in care [emphasis added]".²⁹ This imposes a restriction on capital projects under the FNCFS Program that is not in keeping with sound child welfare or social work practice.

28. The Prevention Directive also makes explicit links to the Outcomes listed in the Terms and Conditions, noting that "[p]revention/least disruptive measures and activities must clearly link to the Program's outcomes and address the risks identified and strengthen protective factors to support a child and a family where if no intervention is taken, the child will be at risk of being taken into care."³⁰

29. It is unclear how, or when, the Caring Society's concerns regarding Canada's outcomes and the tying of these outcomes to funding will be addressed and, in the interim, Canada has provided no assurances that its adherence to non-evidence-based outcomes will not perpetuate the discrimination found by the Tribunal.

²⁷ *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 71, see also at para 113.

²⁸ Warner Affidavit, Exhibit 7A at p 3.

²⁹ Warner Affidavit, Exhibit 7A at p 7.

³⁰ Warner Affidavit, Exhibit 4 at p 6.

III. Gaps in Canada's FNCFS Program documentation

A. National Program Manual

30. The Caring Society notes that the National Program Manual appended to Ms. Warner's affidavit is from 2017/18. This is concerning as, by definition, the Guide dates from before both the Tribunal's May 2017 order regarding Jordan's Principle and its February 2018 order regarding the FNCFS Program. While the chapter addressing the FNCFS Program is listed as "under review", there are still other portions of the National Program Manual that the Caring Society reads as applying to the FNCFS Program.

31. For instance, section 10.0 "Federal-Provincial and Territorial Agreements" in Chapter 1 of the National Program Manual specifies that the obligations in agreements with the provinces "are to be read first and take precedence over the delivery requirements and standards of the social programs".³¹ As such, agreements like the 1965 Agreement and the Alberta Arrangement for the Funding and Administration of Social Services take precedence over the revised Terms and Conditions, as well as the Directives on Capital and Prevention. There is no inventory of provincial/territorial agreements, nor is there any indication (other than the Ontario Special Study) of any work that has gone into ensuring that such agreements comply with the Tribunal's orders.

32. Indeed, one of the Caring Society's continuing concerns with respect to long-term reform of the FNCFS Program is whether Canada has taken any steps to ensure that First Nations children and families currently served by provincial/territorial governments per federal funding arrangements are receiving non-discriminatory services that are based on their needs and that are substantively equal and culturally appropriate. This concern applies for all First Nations in the Yukon, approximately 85 First Nations in British Columbia, and some First Nations in Alberta, Saskatchewan, Quebec, and Newfoundland and Labrador.

33. For example, in the Yukon, which, as the Tribunal found, fell under Directive 20-1's discriminatory provisions,³² in response to a Caring Society inquiry about amounts allocated to the

³¹ Warner Affidavit, Exhibit 1 at p 9.

³² *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 248.

Yukon for child and family services from fiscal years 2016/17 to 2018/19, ISC confirmed that the supplementary prevention funding included:

[...] Budget 2018, ramp-up and remoteness funding. Regional allocations for prevention funding were determined by HQ in consultation with the parties during the May 2018 CCCW meeting. The Trilateral Table on the Well-being of Yukon First Nations Children and Families then determined funding approaches and allocations from Yukon from 2018/2019 and going forward.³³

34. There was no mention of how this approach fulfills the Tribunal's orders that prevention be based on the child's needs, be culturally appropriate, and responsive to distinct geographical circumstances. Indeed, Canada's response to one of the Caring Society's comments on the Terms and Conditions regarding services in the Yukon was that "Canada's funding relationship with the Yukon Government remains unchanged."³⁴

35. The Caring Society has been advised by ISC that no requests for funding at actuals have been received with respect to child and family services in Yukon.³⁵

B. 2018/19 and January 2020 National Recipient Guides

36. As noted above, both versions of the National Recipient Guide list a processing time of 15 business days for FNCFS Agency actuals claims, consistent with the Tribunal's September 7, 2018 amendment to its order. However, despite the Caring Society having repeatedly raised the need for better compliance reporting, ISC continues to not reporting the time frames for processing each request. Instead, it produces average rates for each region. It is unclear why ISC is unable or unwilling to provide such information despite being able to do so under Jordan's Principle, which involves greater sums of money and substantially more requests.

37. Furthermore, while the January 2020 National Recipient Guide refers to an escalation and appeals process at sections 7 and 8 and states that these processes were developed in discussion/consultation with the parties,³⁶ it should be noted that the Caring Society does not approve of the current ISC CFS appeals process. More specifically, the Caring Society has

³³ Blackstock Affidavit, Exhibit 11.

³⁴ Warner Affidavit, Exhibit 6C at p 2.

³⁵ Blackstock Affidavit, para 27 and Exhibit 12.

³⁶ Warner Affidavit, Exhibit 2B at p 12.

repeatedly raised concerns about Canada's CFS appeals procedure including, but not limited to, the lack of clarity in the appeals process, the lack of independence in the appeals process, and the lack of child welfare expertise among those determining the child welfare appeals. Indeed, at the CCCW's April 2, 2019 meeting, the Caring Society requested to participate in CFS appeals as an observer to better understand Canada's appeal procedure,³⁷ but was not permitted to do so by ISC. ISC's rationale was that such participation was not feasible as the appeal decisions were made by public servants applying the FNCFS Program's Terms and Conditions.³⁸ The Caring Society has repeatedly informed ISC of its concerns since September 2018.

C. 2018/19 Ontario Region Guide

38. The Ontario Region Guide does not refer to section 10.0 of the National Program Manual's Chapter 1, which indicates that the 1965 Agreement takes precedence over program implementation documents. It is, as such, unclear how the National Program Manual interfaces with the Ontario Region Guide, particularly given that the National Program Manual was developed before the Tribunal's February 2018 order.

D. Prevention Directive

39. Similar to the concerns raised above, the Prevention Directive appears to apply only to FNCFS Agencies and not to First Nations receiving services by federally-funded provincial/territorial child welfare providers. This raises the question of what is used to guide the provision of prevention services to First Nations children who receive services directly from provincial or territorial governments, as is the case for all First Nations in the Yukon, approximately 85 First Nations in British Columbia, as well as some First Nations in Alberta, Quebec, and Newfoundland and Labrador.

40. As noted above, the Prevention Directive embeds the outcomes articulated in the Terms and Conditions. The Prevention Directive both requires prevention services to be clearly linked to these outcomes, and lists program performance indicators based on those outcomes. For clarity,

³⁷ Warner Affidavit, Exhibit 8 at p 25 (p 9 of 9 of the April 2, 2019 Record of Decisions).

³⁸ Warner Affidavit, Exhibit 8 at p 36 (p 4 of 5 of the September 9, 2019 Record of Decisions).

both the Caring Society and the NAC have called for evidence-informed outcomes and indicators. ISC has made no meaningful action toward this end.

41. The Caring Society is of the view that ISC continues to operate from a bureaucratic mindset, rather than recognizing its key role in ensuring its program does not perpetuate discrimination and ensuring the program responds to the needs and best interests of First Nations children and families. Indeed, it appears to the Caring Society that ISC continues to either have inadequate knowledge or understanding of basic child welfare principles and/or remains unable to comprehend the adverse impact ISC policies and directives are having on the children, youth and families and the agencies that serve them.

42. A review of ISC's responses to the Caring Society's comments on the Prevention Directive illustrates these concerns. For example, in response to the Caring Society's proposed changes that would define prevention services broadly enough to address all forms of child maltreatment (as opposed to "specific concerns identified" and "notifications and incidents reported"), ISC simply responded that "[r]emediating all forms of maltreatment goes above and beyond the scope of the program",³⁹ without providing an explanation. Furthermore, in response to the Caring Society's comment that it was inconsistent with child welfare law for the Prevention Directive's to state that prevention initiatives should be targeted to "those most at risk or those who most need it first", ISC simply cited the consistency of this language with the Terms and Conditions, and did not engage in any substantive analysis.⁴⁰

43. Finally, the version of the Caring Society's comments provided in Ms. Warner's affidavit is not the most up-to-date version. The Caring Society provided further comments on the January 2020 revision to the Prevention Directive on January 16, 2020 and in further email communications up to and including February 16, 2020.⁴¹ The parties were provided with ISC's finalized Prevention Directive on March 13, 2020.⁴²

³⁹ Warner Affidavit, Exhibit 4B at p 2.

⁴⁰ Warner Affidavit, Exhibit 4B at p 4.

⁴¹ Blackstock Affidavit, Exhibit 6.

⁴² Blackstock Affidavit, Exhibit 8.

E. Community Wellbeing and Jurisdiction Initiatives Guidelines

44. As noted above, the funding amounts provided under the CWJI have all been allocated through to the end of fiscal year 2020-21.

45. The Caring Society remains concerned that Canada has not revisited the fixed-budget approach that it opted for in Budget 2018. The Caring Society has repeatedly raised concerns regarding this fixed-budget approach, such as when funds to the CWJI were not increased to correct for the initial exclusion of First Nations in Ontario from CWJI funding in June 2018.⁴³ The Caring Society is also concerned that this fund has been cited as the source of funding for First Nations to enact their own laws under *An Act respecting First Nations, Métis and Inuit children, youth and families*, without any increase in funding to reflect increasing demand since the Act came into force on January 1, 2020.

F. Terms and Conditions

46. The Caring Society reiterates its concerns about the lack of evidence informed outcomes and indicators and the exclusion of First Nations laws as an eligible jurisdictional model under the FNCFS Program's Terms and Conditions.

47. The Terms and Conditions also fail to specify how child and family services are to be provided to First Nations children served directly by provincial/territorial governments, and not by an FNCFS Agency (Yukon, much of British Columbia, parts of Alberta, Saskatchewan, Quebec and Newfoundland and Labrador). Indeed, "Provinces and Yukon territory" are noted as eligible recipients under the FNCFS Program under part 4 of the Terms and Conditions.⁴⁴ However, the Terms and Conditions are devoid of information regarding how Canada is implementing the Tribunal's orders to meet the needs of First Nations children served by federally-funded provincial/territorial entities outside of Ontario.

⁴³ Warner Affidavit, Exhibit 8, p 11.

⁴⁴ Warner Affidavit, Exhibit 6B, p 5.

48. Finally, while pages 10 and 12 of the Terms and Conditions list “[p]urchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services”,⁴⁵ no reference is made to the numerous restrictions imposed on such expenditures pursuant to the Capital Directive.

G. Capital Directive

49. In addition to the restrictions outlined above, the Caring Society is also concerned that ISC is refusing prevention-related capital requests, with little explanation as to how this decision is in keeping with the overall need to protect First Nations children and work to keep them safely in their homes whenever possible. For instance, Canada has denied agency requests for reimbursement for prevention-related capital requests for projects designed to improve housing in order to prevent First Nations children from being taken into care.

50. The Caring Society has been advised of two continuing examples of such denials, one in Ontario and one in New Brunswick, and understands from its participation in the NAC that this is an ongoing concern across the country. Such requests ought to be eligible for Prevention funding at actuals, as they are designed to avoid First Nations children coming into care.

51. The Caring Society also remains concerned regarding the “total project cost cap” of \$2.5 million.⁴⁶ This amount does not reflect varying geographic circumstances (such as variable building costs depending on location), variation in the adequacy of existing capital among communities, child population, child needs, or FNCFS Agency requirements.

52. The Caring Society also notes that the Capital Directive applies only to expenditures within the FNCFS Program. The Caring Society is not aware of any additional or formalized information with respect to requests for the provision of capital for Jordan’s Principle beyond being advised that capital is not within the current Jordan’s Principle Treasury Board authorities.

H. Minister of Indigenous Services’ Mandate Letter

53. The Caring Society notes that Minister Miller’s mandate letter speaks to the government’s “starting point” as being its platform “*Forward: A Real Plan for the Middle Class*”. It is difficult

⁴⁵ Warner Affidavit, Exhibit 6B, pp 10 and 12.

⁴⁶ Warner Affidavit, Exhibit 7A, pp 4-5.

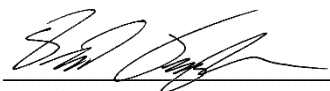
to see how this starting point is immediately responsive to the needs of First Nations children in care or at risk of coming into care, as poverty is the main driver of the over-representation of this population in care.

54. The Caring Society has reviewed the specific initiatives covered in the bulleted list on pages 2-3 of Minister Miller’s mandate letter. These initiatives mention the full implementation of Jordan’s Principle and the payment of “fair and equitable compensation to First Nations persons who were harmed by the discriminatory underfunding of child and family services on reserve”.⁴⁷ However, there is no mention of completing medium- or long-term reform of the FNCFS Program or otherwise ensuring that the Tribunal’s orders regarding child and family services are implemented and that safeguards are in place to prevent the recurrence of the discrimination.

55. Overall, while some progress towards compliance has been made since the Tribunal’s January 2016 decision, the Caring Society remains concerned that Canada is either unable or unwilling to address its old mindset in order to fundamentally shift its own approach to the FNCFS Program. The result is that First Nations children remain highly vulnerable in a system that has yet to take a comprehensive approach to meeting their needs. Without a marked departure from its “business as usual” approach, ISC will continue to compound the evident gaps under the FNCFS Program, to the detriment of First Nations children, youth and their families.

56. The Caring Society has demonstrated that it is ready to take up the important work of long-term reform. It hopes that Canada is prepared to pivot from its current approach and join the parties in taking rapid action to reform the system to promote, protect and ultimately deliver on the promise of substantive and culturally appropriate equality for First Nations children.

All of which is respectfully submitted this 9th day of April, 2020.



David P. Taylor

Sarah Clarke

Counsel for the Caring Society

⁴⁷ Warner Affidavit, Exhibit 11 at p 2.