

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 (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)**

Respondent (Responding Party)

- and -

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA
and NISHNAWBE ASKI NATION**

Interested Parties

**WRITTEN SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS
REGARDING NON-FIRST NATIONS AGENCIES**

ASSEMBLY OF FIRST NATIONS

Stuart Wuttke

Adam Williamson

55 Metcalfe Street, Suite 1600

Ottawa, ON K1P 6L5

T: (613) 241-6789

F: (613) 241-5808

swuttke@afn.ca

awilliamson@afn.ca

Co-Counsel for the Complainants, Assembly
of First Nations

PART I – STATEMENT OF FACTS	1
A. Overview	1
B. Complaint Substantiated	2
C. The Panel’s Main Findings	2
D. The Panel’s Remedial Orders	3
E. Update to Remedial Order.....	4
F. Payment Based on Actual Costs.....	4
PART II – STATEMENT OF ISSUES	5
PART III – STATEMENT OF ARGUMENT.....	6
1. Prevention.....	6
a) What is the Panel’s immediate relief orders regarding prevention?	6
b) Has ISC complied with this order?	8
c) Canada has not updated its bilateral agreements with Provinces and Territories	10
2. Is ISC obligated to comply?	11
3. Bill C-92	12
PART V – NATURE OF THE ORDER SOUGHT.....	13
PART VI – TABLE OF AUTHORITIES.....	15

PART I – STATEMENT OF FACTS

A. Overview

1. The First Nations Child and Family Caring Society of Canada (“Caring Society”) brings a motion to enforce compliance by the Respondent, now known as Indigenous Services Canada (“ISC”), with this Panel’s Decisions, 2016 CHRT 2, 2016 CHRT 16, 2018 CHRT 4, and the remedial orders for immediate relief contained in those Decisions. The Caring Society alleges that Canada has failed to take sufficient steps to redress the discrimination experienced by First Nations children and their families receiving services under the First Nations Child and Family Services Program (FNCFS Program) who are covered by provincial and/or territorial agreements and has failed to amend those agreements in a manner that ceases the discrimination, as per the *Decision on the Merits* and subsequent Orders.
2. The Assembly of First Nations (AFN) is particularly concerned with ISC’s continued narrow reading of this Panel’s decisions, whereby Canada asserts the Panel’s orders only apply to First Nations child welfare agencies (“CFS Agencies”) operating under the FNCFS Program and not those being operated by Non-First Nations Agencies providing services under said program. As a result, ISC continues to fund certain agencies and services at levels below those ordered by this Panel.
3. The provincial and/or territorial agreements have been found to be discriminatory in that: First Nations children and families are denied adequate services; they fail to fund prevention services on the basis of need and in light of the historically disadvantaged circumstances of First Nations children and families on reserve; and as they disrupt the transmission of First Nations cultures and languages from one generation to another. These agencies are reimbursed for services covered under their agreement, and only to the extent or amounts outlined in the agreement. However, under these agreements ISC fully funds apprehensions, a fact which continues to act as a perverse incentive to promote the removal of First Nations children from their on-reserve families and homes.

4. It has now been over five years since this Panel rendered its Decision, 2016 CHRT 2, ordering ISC to cease its discriminatory practices. However, ISC continues to fund Non-First Nation agencies serving First Nation communities pursuant to outdated agreements that have not been updated to comply with this Panel’s Orders and does not fund prevention services based on need.
5. The conduct of the Respondent cannot be pardoned. Therefore, the AFN seeks a clear order that ISC must comply with the Panel’s Orders and take such appropriate and immediate measures as necessary to ensure that First Nations not served by agencies receive funding to provide services consistent with those standards directed by this Panel. In particular, that funding of prevention services on-reserve and in the Yukon must be provided on the basis of the needs of First Nations children and families.

B. Complaint Substantiated

6. On January 26, 2016, this Panel substantiated the complaint in its decision, 2016 CHRT 2¹ (hereinafter the “Main Decision”), finding a *prima facie* case of discrimination was established against the Respondent, ISC. ISC was found to be discriminating against First Nations children and families living on-reserve and in the Yukon through its FNCFS Program and other related provincial/territorial agreements, by denying and/or differentiating adversely in the provision of child and family services, in violation of subsections 5(a) and 5(b) of the *Canadian Human Rights Act*^{2,3}

C. The Panel’s Main Findings

7. This Panel’s main findings addressing the need to reform and redesign the FNCFS Program

¹ *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2. [“2016 CHRT 2” or “Main Decision”]

² *Canadian Human Rights Act*, RSC, 1985, c. H-6, ss. 5(a) and 5(b) [“CHRA”].

³ *Supra*, note 1, paras 456-467.

are summarized at paragraph 389 of the Main Decision:

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.⁴ (emphasis added)

D. The Panel's Remedial Orders

8. The complaint against ISC was substantiated, which allowed this Panel to make an order against ISC pursuant to subsection 53(2) of the CHRA. This Panel issued the following remedial order addressing the need for immediate relief:

[481] AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.⁵ (Panel's emphasis)

⁴ *Supra*, note 1, paras 384.

⁵ *Ibid*, para 481. (Panel's emphasis)

E. Update to Remedial Order

9. On September 14, 2016, this Panel updated its remedial orders against ISC in its decision 2016 CHRT 16.⁶ This Panel's update to its remedial order included additional immediate measures to be taken by ISC, provided for additional reporting, as well as for the disclosure of additional information by ISC to the Complainants, the Interested Parties and the Commission. It further provided for the Panel's continued jurisdiction over the remedies in this matter.⁷
10. In 2016 CHRT 16, the Panel wrote the following about ISC funding the FNCFS Program at paragraph 33:

[33] That is, the Panel analyzing is not concerned with the specific amount of funding per se, but rather the way in which it is determined. It is the way in which the FNCFS Program is delivered and funding is determined that results in discriminatory effects for First Nations children and families. The Panel's focus is on whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and their communities. While other key factors come into play in determining whether the amount of funding provided to FNCFS Agencies is adequate to address the needs of the communities they serve, such as remoteness and the extent of travel to meet children and families (which will be addressed later in this ruling), the assumptions about the number of children in care, the number of families in need of services and population levels are the starting point for addressing the discriminatory impacts of ISC's funding formulas.⁸ (emphasis added)

F. Payment Based on Actual Costs

11. In 2018, this Panel noted that the objectives of the *CHRA* are not only to eradicate

⁶ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16. ["2016 CHRT 16"]

⁷ *Ibid*, at paras 157-161.

⁸ *Ibid*, para 33.

discrimination, but also prevent discriminatory practices from re-occurring. Where the same behaviours and patterns that led to systemic discrimination continue to occur, the Panel must intervene.⁹

12. This Panel found that ISC's continued practice of reimbursing agencies at costs for the removal of First Nations children, while concurrently limiting the funding for least disruptive measures was harming First Nations children.¹⁰ This Panel took exception to Canada's practice of paying "enormous amounts of money" for placing First Nations children into care when the costs and harms associated with apprehensions was much higher than prevention programs to keep the child in the home.¹¹ This practice was based on colonial views and perpetuates historical harms against First Nations peoples.¹²
13. As a result, this Panel ordered ISC to fund least disruptive measures based on a community's specific needs and at actual costs. This Panel required Canada to develop an alternative system for funding prevention and least disruptive measures, intake and investigation, legal fees, and building repairs based on the actual needs of First Nations.¹³

PART II – STATEMENT OF ISSUES

14. The AFN submits the following statement of issues:

Is Canada in breach of this Tribunal's Orders by failing to redress the discrimination experienced by First Nations children and their families receiving services under the First Nations Child and Family Services Program (FNCFS Program) covered by provincial and/or territorial agreement?"

⁹ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2018 CHRT 4, at para 165.

¹⁰ *Ibid*, note 9, at para 119.

¹¹ *Ibid*, at para 150.

¹² *Ibid* at para 121.

¹³ *Ibid* at para 233.

PART III – STATEMENT OF ARGUMENT

1. Prevention

a) What is the Panel’s immediate relief orders regarding prevention?

15. The lack of prevention services offered under the FNCFS Program is one of the main elements of the AFN’s and Caring Society’s complaint. Prevention services are aimed at assisting families during a crisis or where risks to a child have been identified. As opposed to separating a child from his/her family, prevention services are designed to provide relief through “least disruptive measures” which attempt to mitigate the risks of separating a child from his or her family and to safely reunify children in care with their families.¹⁴ Prevention services provide family supports that keep children within their family environment, which is required by provincial and territorial legislation before a child is placed in care.
16. The Panel found that the lack of prevention services in the FNCFS Program was one of the main adverse impacts of the FNCFS program.¹⁵ Inadequate prevention funding provides a perverse incentive where services can be provided to children brought into state care, as prevention-like services are reimbursed at cost under maintenance.¹⁶
17. The Panel ordered the Respondent to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the findings in this decision. This included immediate measures to address the assumptions and flaws in its funding formulas related to prevention services.¹⁷

¹⁴ *Supra*, note 1 at para 116.

¹⁵ *Ibid*, para 458.

¹⁶ *Ibid* at para 344.

¹⁷ *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10, paras 20 and 23.

18. This Order was updated in 2018 where this Panel made the following Orders:

[233] The Panel, pursuant to Section 53 (2) (a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families on-reserve and in the Yukon. This system is to be based on actual needs and operate on the same basis as Canada's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child. Canada is to develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[234] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of prevention/least disruptive measures, building repairs, intake and investigations and legal fees. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare to be reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.¹⁸

19. Despite being ordered to cease its discriminatory practices, the AFN submits that ISC's Prevention Directive appears to apply only to First Nations CFS Agencies. From the evidence submitted by the Parties, it appears that the Prevention Directive is not being applied to Non-First Nations agencies offering services to First Nations communities. The AFN is concerned the lack of application of the Prevention Directive to Non-First Nation agencies will adversely impact those First Nations children who receive services directly from

¹⁸ *Supra*, note 9 at para 233-234.

provincial or territorial governments, namely: Yukon First Nations, 85 First Nations in British Columbia, a handful in Alberta, Quebec, and Newfoundland and Labrador.

b) Has ISC complied with this order?

20. Despite the Panel's orders, First Nations children and families are unable to access the full array of prevention and least disruptive services where child protection services are being administered pursuant to federal-provincial agreements.
21. Grand Chief Joel Abram notes that 13 First Nations in Ontario do not have their own designated child and family service agency to provide them with child and family services.¹⁹ These First Nations are served by a provincial children's aid society. Grand Chief Abram states that where First Nations children and families receive prevention services from a "mainstream" Children's Aid Society, neither the First Nation nor the mainstream Children's Aid Society are able to be reimbursed for providing the services at actual costs under ISC's Terms and Conditions.²⁰
22. The provision of prevention services in Ontario is somewhat unique. First Nations directly provide prevention services to their citizens.²¹ However, First Nations in Ontario are not eligible to apply for and/or receive funding for prevention services at their actual costs. In order to be reimbursed for their actual costs under the Ontario 1965 Agreement, Ontario First Nations must provide the prevention services through a First Nations Child and Family Service Agency.²²
23. In Labrador, the Innu Nation is with provided child welfare services through the Province of Newfoundland. Germaine Benuen, Executive Director of the Innu Round Table Secretariat, asserts that Newfoundland's child protection services is not culturally appropriate and is

¹⁹ Affidavit of Grand Chief Joel Abram, affirmed October 30, 2020, at para 9.

²⁰ Ibid, at para 10.

²¹ Ibid at para 12.

²² Ibid at para 13.

often damaging to Innu families.²³ She notes that the removal of children and youth occurs too often and many Innu children and youth have experienced trauma, loss of identity, culture, language and loving relationships due to being placed away from home.

24. Ms. Benuen notes that the Province of Newfoundland and Labrador does not provide prevention services as part of its child protection system.²⁴ In addition, Canada did not fund any prevention services to the Innu Nation prior to 2016-17 fiscal year.²⁵ Prior to this period, no entity in Newfoundland and Labrador provided such services to the Innu and the number of Innu children being placed into care rose year after year.²⁶
25. Despite the lack of funding, the Innu Nation was able to address the gap in prevention services by accessing health and healing programs offered by the First Nations. Ms. Benuen states this was accomplished by directly working with partner organizations, students and others.²⁷ However, many Innu children and families at risk continue to be denied prevention services.²⁸
26. The Innu Nation has been able to access some funding for prevention since 2017. However, the Innu Nation's funding is fixed, limited and not able to meet the needs of their communities.²⁹ It appears that prevention funding is based on a formula and criteria that this Panel has found to reflect colonial attitudes and is discretionary in nature.³⁰ Most disturbing is that while Canada is not providing the Innu with prevention services at their

²³ Affidavit of Germaine Benuen, affirmed October 30, 2020, at para 21(c).

²⁴ Ibid at para 23.

²⁵ Ibid at para 25.

²⁶ Ibid para 26.

²⁷ Ibid at para 37.

²⁸ Ibid para 40.

²⁹ Ibid at paras 42-43 and 59.

³⁰ Ibid at para 81.

actual cost, it continues to reimburse the Province at actual costs for the apprehension of Innu children and youth.³¹

27. In Yukon, the federal and territorial government entered into a bilateral enhanced prevention funding agreement in 2016. The agreement provides some funding to Yukon First Nations to administer prevention programs. However, the funding is limited and fixed on an annual basis. Grand Chief Peter Johnston notes that commencing in 2018-19, Yukon First Nations received \$120,000 per year to fund prevention services for their members.³²
28. Yukon First Nations have been able to access additional funding for prevention like services through Canada's Community Well-being and Jurisdiction Initiatives ("CWJI"). Funding available to the Council of Yukon First Nations ranged from \$1.1 to \$1.3 million dollars from 2018 to 2021.³³ Grand Chief Johnston notes that these amounts are not sufficient to address the needs of First Nations in the Yukon.³⁴
29. The AFN is concerned that Canada's funding arrangement with the Yukon has not evolved past the EPFA program that this Panel has found to be discriminatory. As a result, prevention funding allocated to CFS agencies in the Yukon continue to be based on formulas and do not take into account the best interests of children, nor their cultural and geographical needs.³⁵

c) Canada has not updated its bilateral agreements with Provinces and Territories

30. Canada has failed to amend its agreements with provincial governments and the Yukon, despite the various rulings of this Panel to cease its discriminatory practices. This was confirmed by Ms. Nathalie Nepton, Director General of ISC's Children and Families Branch,

³¹ *Supra*, note 23 at para 84.

³² Affidavit of Grand Chief Peter Johnston, affirmed on October 30, 2020.

³³ *Ibid* at para 18.

³⁴ *Ibid* at paras 19 and 24.

³⁵ Affidavit of Dr. Cindy Blackstock, affirmed on October 30, 2020 at para 19.

during her cross examination.³⁶

31. Provinces and territories are not completely bound by the FNCFS Programs terms and conditions.³⁷ The activities and services provinces and territories can bill for reimbursement are outlined in their bilateral agreements.
32. While the agreements have not been updated to reflect the Tribunal's orders, Canada has made some additional funding available to Non-First Nation Agencies for prevention through the Community Well-Being and Jurisdiction Initiatives ("CWJI") fund.
33. In Budget 2018, Canada established CWJI as a new funding stream to provide prevention-like services. Beginning in 2018-2019 First Nations communities were eligible to apply for funding from a national pot of \$105 million for various programs designed to meet the needs of their community. The amount of funding is set to increase incrementally to \$140 million in the 2022-2023 fiscal year.³⁸ At present, CWJI is set to expire on March 31, 2023.
34. While the CWJI provides a valuable enhancement to prevention programs and services, the program alone is insufficient to fully meet the needs of First Nations communities. Ms. Nepton acknowledged that CWJI, as a funding stream, is not needs-based and is confirmed to be a "fixed pot".³⁹

2. Is ISC obligated to comply?

35. The AFN remains concerned with ISC's continued failure to fully comply with this Panel's Orders and provide prevention-based funding to all First Nations children and families on-reserve. Prevention programs and services based on the needs of First Nations children and families is required to address and correct the historical disadvantages associated with

³⁶ Transcript of the Cross-Examination of Nathalie Nepton, pg 31 (Lines 4-9).

³⁷ Transcript of the Cross-Examination of Nathalie Nepton, pg 32 (Lines 6-11).

³⁸ Affidavit of Nathalie Nepton affirmed on November 20, 2020, at para 21.

³⁹ Transcript of the Cross-Examination of Nathalie Nepton, pg 11 (Lines 7-13). pg. 65, lines 22-25, and pg. 66, lines 1-2.

the legacy of colonization that First Nations children and families on-reserve face. Curtailing access to prevention programs while fully funding apprehensions continues to provide agencies with a perverse incentive that promotes the removal of First Nations children from their on-reserve families and homes.

36. Canada has taken measurable steps to reform its FNCFS Program and ensure prevention services are being provided by both First Nations and CFS agencies and the AFN is happy to concede that there have been some measurable positive shifts in relevant federal policies. However, more needs to be done to ensure that the discrimination in the program ceases. The lack of prevention services provided under the provincial and territorial agreements is one such gap that must be eliminated. The AFN submits that children and families who are being provided services by Non-First Nation agencies should not be adversely and differentially treated based on their service provider.
37. Access to the same types of prevention programs that other First Nations children and families currently enjoy would provide more equality and will begin to address the real needs of First Nations children and families, which can certainly vary from child-to-child or family-to-family.
38. ISC has considerable authority and discretion over the FNCFS Program and has the capacity to provide prevention programs for First Nations covered by a provincial/territorial agreement at the same level that it is provided to other First Nations across Canada. Canada has demonstrated its discretion when it unilaterally created the CWJI funding stream for prevention-like programs.

3. Bill C-92

39. The AFN is cognizant of the potential role Bill C-92 may have for the future of child welfare in the future. It is important to note that Bill C-92 is an expression by the House of Commons, the Senate and the Crown that First Nations have the inherent right to exercise

law making on child protection and family law. The AFN would encourage this Panel to exercise constraint in addressing Bill C-92, as it is up to First Nations to decide how they will exercise their jurisdictions and possible arrangements, if any, with other levels of government. First Nations should not be prejudiced in any manner in how they may choose to draw down and exercise their jurisdiction.

PART V – NATURE OF THE ORDER SOUGHT

40. The Assembly of First Nations generally supports the remedies requested by the Caring Society, and requests the following additional Orders:

- i. Canada take steps to request revisions to its agreements with the Provinces and Yukon to ensure services provided to First Nations families are consistent with the rulings of this Panels.
- ii. An Order that, within 30 days of the Order, Canada shall develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families living on-reserve and in the Yukon who are served by provincial or territorial agencies and/or service providers on the same basis as ISC's current funding practices for funding child welfare maintenance costs and for FNFCFS Agencies pursuant to paragraphs 410-413 of 2018 CHRT 4, that is, 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;

- iii. 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 for First Nations children and families living on-reserve and in the Yukon, on the same terms as referenced in paragraph b, above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 3, 2021



ASSEMBLY OF FIRST NATIONS
Stuart Wuttke
Adam Williamson

55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
T: (613) 241-6789
F: (613) 241-5808
swuttke@afn.ca
awilliamson@afn.ca
Co-Counsel for the Complainants, Assembly
of First Nations

PART VI – TABLE OF AUTHORITIES

Primary Sources
<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2016 CHRT 2.
<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2016 CHRT 10.
<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2016 CHRT 16.
<i>First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)</i> , 2018 CHRT 4.