Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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 and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA, NISHNAWBE-ASKI NATION and INNU NATION

Interested Parties

SUBMISSIONS OF INNU NATION ON THE MOTION DATED AUGUST 7, 2020 ON FUNDING BEYOND FEDERALLY-RECOGNIZED FNCFS AGENCIES

February 3, 2021

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I. INTRODUCTION

Overview

1. The complainant the First Nations Child and Family Caring Society of Canada (the "Caring Society"), brought a motion dated August 7, 2020 for a declaration that the respondent, the Attorney General of Canada ("Canada"), has failed to comply with the Tribunal's orders in several *Caring Society* decisions, and related orders (the "Motion").

2. More specifically, the Caring Society's Motion relates to the fact that Canada is **not** providing reimbursement for the actual costs determined to be in the best interests of the child, of prevention/least disruptive measures services (together, "prevention services" in these submissions), intake and investigation, legal fees, and building repairs for those First Nations children and families on-reserve and in the Yukon who receive services from provincial/territorial agencies or provincial/territorial service providers. In other words, the motion is about those First Nations children and families not served by a federally recognized First Nations Child and Family Services Agency ("FNCFS Agency").

3. In contrast, and further to 2018 CHRT 4 at paras. 410-411, Canada **is** reimbursing those services at actual costs where it recognizes the recipient as an FNCFS Agency.

4. In further contrast, Canada **is**, at least in Newfoundland & Labrador, the home province of Innu Nation, continuing to reimburse "maintenance" costs at actual cost.

5. For the children and families of the Innu Nation in Labrador, for instance, Canada has no current commitment to reimburse any entity – whether an Innu service provider, or the province – for prevention services at actual cost on the basis of need. It is funding an Innu service provider for prevention services, which is welcome, but the pot is limited, and there

is no assurance funding will meet needs. In contrast, the funding Canada provides the province to put Innu children into care (known as maintenance) remains unlimited.

6. The Caring Society's Motion states, and we agree, that Canada is continuing to discriminate against such children and their families.

7. We submit that such discrimination is an urgent issue requiring the Tribunal's immediate attention. Indeed, it is the precise type of issue the Tribunal has spoken to before in this proceeding in powerful terms. Unfortunately, Canada's interpretation and implementation of the Tribunal's rulings have left out a significant portion of children and families: those to whom services are not provided by an FNCFS Agency that Canada recognizes within its funding program.

8. We generally support the remedies sought by the Caring Society, though we suggest certain small adjustments. In addition, we seek a further remedy to address the way in which Canada has been determining who is an FNCFS Agency without appropriate criteria.

Innu Nation Background

9. Innu Nation is a political body representing the Innu people of Labrador ("Innu"), inclusive of the two First Nations in Labrador: Sheshatshiu Innu First Nation and Mushuau Innu First Nation. Its members reside mainly in the reserve communities of Sheshatshiu and Natuashish, in Labrador.[1]

10. Innu Nation's members fall into the funding gap for prevention services and other services identified in the Motion. Given the significant impacts of this funding gap and the outcome

[1] Affidavit of Germaine Benuen sworn October 30, 2020 ("Benuen Affidavit") at paras. 3-5.

of this Motion on the Innu of Labrador, Innu Nation sought and obtained leave to participate in the Motion.

II. FACTS

11. The Innu of Labrador lived independently on the land until very recently. In the 1950s-1960s, settlement upended the Innu way of life. Cascading impacts relating to the settlement of Innu into villages, together with Canada's failure to provide any direct services or direct funding to the Innu until the recent past, even at the inadequate levels provided to other First Nations, have worked together to severely damage and fracture Innu families. Because of the way in which Newfoundland entered Confederation in 1949 and the federal government's response, the Innu First Nations were not initially put under the *Indian Act*, and the federal government initially left most matters involving them to the province; they were later recognized as bands under the *Indian Act* in the early 2000s.[2]

12. There are currently approximately 165 Innu children and youth in care. While the number fluctuates and has declined slightly from a peak a few years ago prior to the introduction of prevention services, it is an enormous number, representing roughly a tenth of the Innu child and youth population.[3]

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[2] Benuen Affidavit at paras. 9-15.

[3] Benuen Affidavit, para. 15. This is the number that the Province reported at the most recent trilateral meeting prior to Germaine Benuen swearing her affidavit. We note that Nathalie Nepton's affidavit sworn on November 20, 2020 ("Nepton Affidavit") provided the number of 82 Innu children in care, then in Exhibit NN-2, reported 235 First Nations children in care in the Province. Ms. Nepton's evidence on cross examination confirmed that the only other reserve community in the Province, Miawpukek, has a "very small number of children in care": Transcript of cross-examination of Nathalie Nepton, January 8, 2021 ("Nepton Transcript") at page 169, lines 11-16. In her response to undertakings delivered January 28, 2021 ("Nepton Undertakings") Ms. Nepton provided that the 82 number reflects ***registered*** children with band numbers. As outlined in Germaine Benuen's affidavit, Sheshatshiu Innu First Nation and Mushuau Innu First Nation were initially denied band status as a legacy of the way Newfoundland joined Confederation, and only became federally listed bands in 2002 (see Exhibits A and B). To this day, many

13. The Province of Newfoundland and Labrador delivers child protection services to the Innu, under its own provincial system and rules, and with provincial staff. It does so further to federal funding under a bilateral agreement between the Province and Canada. Provincial child protection started to be applied in Innu communities in 1978 and continues to the present.[4]

14. Recent copies of these bilateral agreements are included in the affidavit of Dr. Cindy Blackstock. They show that operations funding from Canada to Newfoundland & Labrador has increased in recent years, in fixed amounts. Maintenance funding, i.e. the funding used if a child is in care, is predicted at certain levels but adjusted based on actual costs. Nathalie Nepton of Indigenous Services Canada ("ISC") confirmed that provincial operation costs are negotiated annually, while maintenance costs, if a child is placed outside their home, "are reimbursed on actuals".[5]

15. The Province of Newfoundland & Labrador does not provide prevention services to the Innu. It takes the position that prevention services are outside its mandate. As a corollary to this position, the Province does not delegate any authority over prevention to any entity.[6]

Innu remain unregistered, though eligible for registration. We suggest that this likely explains the discrepancy between 165 and 82. In relation to the higher federal number of 235, our understanding – though we flag that this is not in evidence – is that the federal government counts all those it pays for, including kinship placements where a child is not considered legally "in care" under provincial law. Given that the Province delivers child protection, and regularly reports in care figures trilaterally which is where Ms. Benuen obtained them, in these submissions we continue to rely with confidence on the last provincially reported figure of 165 Innu children in care.

[4] Benuen Affidavit at para. 16; Nepton Affidavit at para. 27.

[5] Affidavit of Dr. Cindy Blackstock affirmed October 30, 2020 ("Blackstock Affidavit") at para. 25 and Exhibits 3A-D; Nepton Undertakings, #13.

[6] Benuen Affidavit at paras. 23-24 and 61; Nepton Affidavit at para. 27; Nepton Transcript at p. 153, lines 19-22.

16. Until 2017, no funding was provided to any entity in order to provide child welfare prevention services to the Innu of Labrador. The Innu simply did not have access to prevention services, allowing the number of Innu children and youth in care to grow.[7]

17. Despite many years of Innu advocacy for prevention services funding, it was only after the Tribunal's 2016 CHRT 2 decision that Canada began providing any funding to prevent Innu children from entering into or remaining in care. Since 2016-2017, Canada has provided funding to the Innu Round Table Secretariat ("IRT Secretariat"), an Innu organization, for the provision of prevention services to Innu children and youth.[8]

18. Yet that funding is limited. The funding stream used is called the Community Wellbeing and Jurisdiction Initiative ("CWJI"). As Ms. Nepton confirmed, the total amount in the national pot for CWJI is fixed, and was determined without a needs assessment.[9] This pot of funding is mainly divided up among the ISC regions. The manner of dividing it further among potential recipients depends on the region. In the Atlantic region, First Nations and their organizations can apply for access to the funds. Thus, ISC's response to an application for funding will depend not only on its assessment of the application's merits but also on whether any more funding is left in the regional pot.[10]

Two Tiers of Prevention Services

19. Since the Tribunal's ruling in 2018 CHRT 4, Canada has had two tiers of funding for prevention services. The upper tier is needs-based and reflective of the "actual costs" orders

[7] Benuen Affidavit at paras. 26 and 50.

[8] Benuen Affidavit at paras. 36-38.

[9] Nepton Transcript at page 65, lines 12-25 continued on page 66, lines 1-2; and page 138, lines 4-16.

[10] On the allocation of CWJI generally, see the Nepton Affidavit paras. 18-26 and Nepton Transcript.

outlined in the CHRT ruling. This tier is only available to organizations recognized by Canada as FNCFS Agencies. The lower tier is fixed and limited, and not needs-based. This is mainly the CWJI funding outlined above (in Newfoundland & Labrador, it is CWJI).

20. The existence of and basic facts about these distinct tiers do not appear to be in dispute. Actual cost funding on the basis of children's needs for prevention services is only being made available to FNCFS Agencies.

21. Ms. Nepton confirmed there are approximately 138 First Nations that do not have an FCNFS Agency.[11] We note this is about a fifth of First Nations in Canada.

What is an FNCFS Agency?

22. Canada makes its own rules about who it recognizes as an FNCFS Agency, for purposes of federal funding. Its written policies do not speak to the issue extensively. Section 4 of ISC's current FNCFS Program Terms and Conditions describe "Eligible Recipients". The chart is somewhat confusing, because while it identifies several types of legal entities that *could* be recognized by Canada as an FNCFS Agency, it does not say *what* is necessary for the entity to receive such recognition. Those internal criteria are like a missing filter between the categories on the left and the first column, eligibility for FNCFS Agency funding.[12]

23. Canada has been clear in its evidence and practice that only those entities it recognizes as FNCFS Agencies are eligible for federal FNCFS Agency funding, and only FNCFS Agency funding includes actual cost reimbursement of prevention services. But its criteria

[11] Nepton Affidavit at para. 12.

[12] Nepton Affidavit, Exhibit NN-1.

for recognition of an FNCFS Agency are not clearly stated. Below the chart, the Terms and Conditions say that "FNCFS agencies or societies would include agencies in the process of obtaining delegation, and those that are recognized by provinces in the delivery of child and family services."[13]

24. The Innu organization providing prevention services, IRT Secretariat, worked with ISC for about a year to try to find a way to be recognized by Canada as an FCNFS Agency so that it could ensure its prevention services would be funded on the basis of actual need. However ISC insisted that to be eligible, IRT Secretariat had to be:

(a) "delegated or designated" by the Province (delegation is referred to in the Terms and Conditions, but is not clearly stated as a mandatory criteria; the Terms and Conditions also appear to allow for the entity to be simply "recognized by province in the delivery of child and family services"), and

(b) it had to deliver protection services in addition to prevention (this is nowhere stated in the Terms and Conditions).[14]

25. These conditions are impossible for the Innu to meet, either at all, or in a realistic time frame. More specifically:

(a) It is not possible for the Province of Newfoundland and Labrador to delegate or designate anyone for prevention, given its position that is has no legislative mandate over such services.

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[13] Nepton Affidavit, Exhibit NN-1.

[14] Benuen Affidavit at para. 59.

IRT Secretariat is delegated to deliver prevention services by the two Innu First Nations, but ISC's rejection of the IRT Secretariat's agency-based funding application makes clear that this is not the kind of delegation it is looking for. [15] Only Provincial delegation will do.

(b) Meanwhile, the project of taking on protection services, in addition to prevention, is beyond the scope of what IRT Secretariat is currently prepared to do at this time. Having just been first funded for prevention in 2017, it is focused on developing those services first.[16] Moreover, ISC has confirmed that provincial law in Newfoundland & Labrador still lacks a complete foundation for any delegation of protection services. An update to Newfoundland & Labrador's child welfare legislation was made regarding delegation of protection services in 2019, but the Province has not enacted regulations to implement that provision.[17]

26. Despite the two criteria above to be considered an FNCFS Agency, that were stipulated to the Innu by ISC, Canada appears to offer an exception to both requirements, which – like the details of these two requirements themselves – seems to be unpublished. The Miawpukek First Nation and the Mi'kmaq Confederacy of Prince Edward Island are considered by Canada to be eligible FNCFS Agencies, as Ms. Nepton's evidence

[15] Exhibit H of the Benuen Affidavit shows the response by ISC to IRT Secretariat's actual costs application, which states: "The Department has now finalized its review and the amount of … is considered ineligible given that the CHRT Order and the current First Nation Child and Family Services (FNCFS) program authorities extend the reimbursement of actuals costs only to delegated First Nations agencies." See also Exhibits G, I and J to the Benuen Affidavit.

[16] Benuen Affidavit at para. 50. Note too that the possibility of creating any delegated agencies for protection was not an option under Newfoundland and Labrador's legislation prior to June 2019. There are no agencies in Newfoundland and Labrador.

[17] Nepton Undertakings, #11.

outlined.[18] Neither is an "agency" in the strict sense; they are a First Nation and First Nations' political entity, respectively. Neither is provincially delegated; in fact, Ms. Nepton's evidence is that such delegation is impossible in both the relevant provinces of Newfoundland & Labrador and Prince Edward Island. And neither delivers protection services. Like IRT Secretariat, they deliver prevention services, and as with the Innu situation, it is the province in both cases that continues to provide child protection services.[19]

27. What those First Nations do differently from the Labrador Innu is flow through the federal funding for protection. So, instead of Canada having a separate bilateral agreement with the province for protection in respect of those First Nations, Canada flows that money to the First Nations entity, which then flows it in turn to the Province by contract. In essence, this model leaves program delivery identical to what the Innu are doing, but downloads a financial contracting function from the province to the First Nations entity.[20]

28. Presumably, accepting this financial contracting function is not too a heavy burden for these First Nations who have "a very small number of children in care".[21] With respect to Miawpukek for instance, only one provincial social worker is assigned.[22] Innu Nation takes no issue with Miawpukek First Nation and Mi'kmaq Confederacy of PEI being recognized as FCNFS Agencies, and supports their right to make their own choices. But Innu circumstances are quite different. Given the scale of the Innu protection caseload, which is

[18] Nepton Affidavit at paras. 29 and 31.

[19] Nepton Undertakings, #11 and #12.

[20] Nepton Affidavit at para. 29 and 31; Nepton Undertakings, #11 and #12.

[21] Nepton Transcript, page 169, lines 11-16.

[22] Nepton Affidavit at para. 29.

at an entirely different order of magnitude, accepting that financial contracting role for protection services would be an immense burden and extremely time consuming for the Innu. It would consume significant Innu and provincial government time to negotiate such an arrangement, without a discernable practical benefit to children. Ms. Nepton agreed that "there's a difference there in complexity".[23] IRT Secretariat has not agreed to pursue that approach.[24]

Consequences of Not Being Recognized as an FNCFS Agency

29. As it stands, Canada does not recognize IRT Secretariat as an FNCFS Agency for federal funding purposes. It has therefore relegated IRT Secretariat to the lower tier of prevention services funding.[25]

30. IRT Secretariat is the only entity providing prevention services in the Innu communities. Yet no entity – not the province, nor IRT Secretariat, nor anyone else – is eligible for actual cost reimbursement for prevention services in respect of Innu.[26]

31. Canada has not taken any issue with the quality of IRT Secretariat's prevention services. As several documents appended to Ms. Benuen's affidavit show, IRT Secretariat has taken steps to plan and deliver prevention services responsibly and with attention to both Innu culture and mainstream social work expertise.[27]

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[23] Nepton Transcript, page 169 at lines 11-25, continued on page 170 at lines 1-4.

[24] Benuen Affidavit at Exhibit G, in the email on the first page, and in the appeal submissions pages 9-10.

[25] Benuen Affidavit at paras. 42-47.

[26] Nepton Transcript at page 176 at lines 8-16, and for further context, start from Page 174 at line 14 continued to page 176; Benuen Affidavit at para. 76.

[27] Benuen Affidavit, Exhibits C (*Innu Prevention Approach* report by the Child Welfare League of Canada (2016)) and Exhibit G (at Appendix 2 of the funding proposal: *A Guide to the Innu Care*

32. Canada's refusal to provide "actual costs" funding for prevention services to benefit Innu children and families has had various negative impacts:

(a) Restricted funding and uncertainty about availability of funds from year to year has meant a limited ability to expand the IRT Secretariat's prevention services. Expansion of services requires planning. Without reliable needs-based funding, planning and hence service growth to meet needs is restricted. This affects the number of removals of Innu children that could otherwise be prevented, and the number of Innu children who could be successfully returned home with support.[28]

(b) Restricted funding meant that when, in 2019, IRT Secretariat sought funding for its Indigenous Representative program (similar to band representatives in Ontario), it was informed that funding for that program would come out of IRT Secretariat's prevention services funding.[29]

(c) IRT Secretariat's efforts to gain access to "actual costs" funding for prevention have cost IRT Secretariat significant time and effort. While this year's funding was increased in fall 2020 and now meets needs for this year, IRT Secretariat does not know whether funding will meet or approach needs next year, or what kind of effort will have to be marshalled in order to try to achieve that objective.[30]

Approach (2017).

[28] Benuen Affidavit at paras., 40, 84-86.

[29] Benuen Affidavit at paras. 44-45. In order to avoid this situation, IRT Secretariat sought funding for the Indigenous Representative program through Jordan's Principle.

[30] Benuen Affidavit at paras. 80-83.

III. ISSUES

33. The issue in this Motion is whether, for those First Nations children and families living on the reserves of First Nations unaffiliated with a federally-recognized FNCFS Agency, Canada has failed to comply with the Tribunal's orders in this proceeding, and if so what remedy should result.

IV. LAW & ARGUMENT

1. The Tribunal has already found that capping prevention funding while maintenance funding is uncapped is a discriminatory funding model.

34. The Tribunal has repeatedly held that Canada's practice of providing uncapped funding for protection services and capped funding for prevention services is discriminatory and must be remedied.

35. In 2016 CHRT 2, the Tribunal found that Canada's existing funding models, which provided *unrestricted* funding to take children out of a home (known as "maintenance", or in this factum, "protection"), but provided *restricted* funding for prevention services (or failed to provide such funding at all, as in the case of Directive 20-1, which was applied in Newfoundland & Labrador), were discriminatory. The Tribunal found that such an approach created perverse incentives to bring First Nations children and youth into care unnecessarily.[31]

[31] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2 ["2016 CHRT 2"] at paras. 349, 384, 386, 458, 481.

36. The Tribunal specifically pointed to the discrepancy between ISC's maintenance and prevention funding approaches as being discriminatory. The Tribunal saw that this discrepancy creates an incentive to put children into care, which is a serious adverse impact. This was not the only reason for the Tribunal's ultimate finding of discrimination, but it was clearly an important one. For example:

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. … Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. …
>
> …
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> [386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, **along with the fixed streams of funding for operations and prevention**. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated **the main shortcoming** of the FNCFS Program: the incentive to take children into care - to remove them from their families.[32]

37. The Tribunal ordered Canada to cease its discrimination.[33] While Canada has made changes to its prevention services funding for the entities that it recognizes as FNCFS Agencies, we respectfully submit that Canada's funding approach beyond FNCFS

[32] 2016 CHRT 2 at paras. 384 and 386 [emphasis added]. See also para. 458.

[33] 2016 CHRT 2 at para. 481. See also 2016 CHRT 10 at paras. 20, 23; 2016 CHRT 16 at para. 36.

Agencies continues to discriminate against First Nations children and families, in violation of this primary order from 2016 CHRT 2.

38. We respect that long-term reform remains in the works. But there can also be no doubt that the Tribunal has already identified this funding discrepancy as a matter requiring immediate relief. The paragraphs cited above from 2016 CHRT 2 were repeated in the Tribunal's first ruling on immediate relief in 2016 CHRT 10 at para. 20, with added emphasis.[34] At para. 23, the Tribunal "**order[ed] INAC to immediately** take measures to address the items underlined above from the findings in the *Decision*."[35]

39. In our view, the ongoing funding discrepancy at issue in this motion falls within the discriminatory conduct described in the passages above – conduct which the Tribunal (five years ago now) directed Canada to address immediately.

40. Later in 2016, the Tribunal issued a further ruling on immediate relief in 2016 CHRT 16. It acknowledged that continuing discussions were taking place, but "reiterate[d] its immediate relief orders that all items identified in paragraph 20 of 2016 CHRT 10, and not limited to the items that were underlined, must be remedied immediately".[36] It noted for greater certainty that "[a]gain, those items include … least disruptive measures".[37] The Tribunal once again highlighted the unfair contrast between full maintenance reimbursement and limited prevention funding as a core issue:

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[34] 2016 CHRT 10 at para. 20.

[35] 2016 CHRT 10 at para. 23 [emphasis added].

[36] 2016 CHRT 16 at para. 36.

[37] 2016 CHRT 16 at para. 158.

> Most importantly, inadequate funding for operation and prevention costs provides an incentive to bring children into care because eligible maintenance expenditures to maintain a child in care are reimbursable at cost (see the *Decision* at paras. 384-389 and 458).[38]

41. We respectfully submit that, in respect of its funding of prevention services to First Nations children and families not served by a federally-recognized FNCFS Agency, Canada is in breach of the order in paras. 36 and 158 of 2016 CHRT 16, which reiterates the order from para. 20 of 2016 CHRT 10.

42. Two years later in 2018 CHRT 4, the Tribunal explored prevention/least disruptive measures in even greater detail. It said again that a funding model in which funding for such services is capped, while maintenance funding to put children in care is reimbursable at actual cost, incentivizes the removal of children from their families, and is:

> … a broken system that is harming children and removing them from their communities instead of allowing them to remain safely in their homes with the benefit of sufficient culturally appropriate prevention services.[39]

43. The Tribunal stated that this is a form of discrimination that cannot wait for change. It must be addressed urgently as a matter of immediate relief:

> There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination.[40]

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[38] 2016 CHRT 16 at para. 18.

[39] 2018 CHRT 4 at para. 115.

[40] 2018 CHRT 4 at para. 121.

44. Despite these clear findings of discrimination by the Tribunal and clear orders to cease this discrimination, Canada has neglected to address this issue for the fifth of First Nations that are not served by a federally-recognized FNCFS Agency.

45. For the Labrador Innu specifically, the funding model used prior to 2017 was Directive 20-1, which structured the bilateral federal-provincial funding agreement.[41] In 2017, limited prevention funding started being offered to the Innu alongside that federal-provincial agreement. But the prevention funding has remained limited, while maintenance funding provided to the province remains unlimited.[42]

46. In essence, post-2017, Canada has moved the Labrador Innu into something much like the EPFA considered by this Tribunal in its 2016 decision. It is not using that name, but the principles are similar. Some prevention funding exists but remains capped, and maintenance is uncapped. The Tribunal has made it clear that such a funding model is not acceptable – and yet, it persists for the Innu of Labrador and many other First Nations.

2. The order in 2018 CHRT 4 that prevention services be funded at "actual costs" is not limited to FNCFS Agencies. Canada is interpreting that order too narrowly.

47. In 2018 CHRT 4, the Tribunal ordered that Canada address the urgent need to end its discriminatory funding practices and ordered specifically that it fund First Nations prevention and certain other services at their "actual costs", on the basis of need:

[41] Blackstock Affidavit at para. 23.

[42] Nepton Undertakings, #13; Benuen Affidavit at para. 84.

> 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 INAC 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**, based on actual needs which operates on the same basis as INAC'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...[43]

48. The Tribunal's 2018 Order says that needs-based prevention funding must be provided to "First Nations children families on-reserve and in the Yukon".[44] On the face of the wording of this order, it is not limited to those families that are served by entities recognized by Canada as FNCFS Agencies. It is an order for all First Nations children and families on-reserve and in the Yukon.

49. Canada has interpreted this order as requiring it only to reimburse FNCFS Agencies – a limitation not found in the order. The order requires Canada to fully reimburse actual costs "for these services". Per the wording of the order, these service are: "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". There is nothing limiting the recipients of such funding to FNCFS Agencies.

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[43] 2018 CHRT 4 at para. 410 [emphasis added]. See also para. 411.

[44] 2018 CHRT 4 at paras. 410-411.

50. FNCFS Agencies are mentioned at the end of this order. They are positioned as appropriate arbiters of the need for prevention/least disruptive measures services, not as the sole recipients eligible for that funding. It the agencies who "determine" what services are "in the best interest of the child".

51. This does raise a legitimate question about how need should be fairly determined for First Nations not served by an FNCFS Agency. In our respectful submission, it would be helpful for the Tribunal to provide a clarification of its order in 2018 CHRT 4 to address such situations. As noted, this is a circumstance affecting a minority of First Nations, but a substantial minority (about a fifth). We do not believe it was the Tribunal's intention to exclude the children and families not served by FNCFS Agencies.

52. And yet, while the Tribunal may not have explicitly outlined in its order how to implement actual costs funding in situations where there is no FNCFS Agency, Canada could and should have determined some reasonable mechanism to do so. The Tribunal had reminded Canada in that same decision to interpret its orders purposively, having regard to the reasons as a whole. It told Canada to ensure that it implemented the orders "in an effective and meaningful way" that actually eliminated discrimination:

> The orders made in this ruling are to be read in concurrence with the findings above, along with the findings and orders in the Decision and previous rulings [listed]. Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.[45]

[45] 2018 CHRT 4 at para. 407.

53. To us, it seems apparent, both having regard to the reasons in 2018 CHRT 4 as a whole, and on the face of the order in paras. 410-411, that the order was intended for the benefit of *all* First Nations children and families on reserve and in the Yukon. In our submission, that order already captures those children and families who reside within a First Nation not affiliated with an FNCFS Agency. All that is needed from the Tribunal is to confirm that point and perhaps provide some clarity on the mechanics of who determines what services are "in the best interest of the child" where there is no FNCFS Agency.

3. Guidance is needed as to who is an FNCFS Agency

54. Whether or not the Tribunal accepts Canada's position that "actual cost" prevention funding need only be provided to FNCFS Agencies, we respectfully request that the Tribunal provide guidance to Canada regarding what type of entity qualifies as a FNCFS Agency, and that such direction address the regional challenges associated with Canada's current criteria.

55. The Tribunal used the phrase "FNCFC agencies" in the orders in paras. 410-411 of 2018 CHRT 4, likely meaning First Nations Child and Family Caring Agencies. However, the Tribunal did not define this phrase, or set criteria on who is eligible. We have not located material in the Tribunal's *Caring Society* decisions placing any kind of restrictive interpretation on what constitutes an "FNCFC Agency."

56. At this point, a lot is riding on that determination. This is particularly true if only FNCFS Agencies are eligible for actual cost funding. But even if that is not the case, it remains significant, for instance if FNCFS Agencies are recognized as being in the best position to determine needs in the best interests of a child.

57. Canada has made its own decisions about who it considers to be an FNCFS Agency eligible for funding under that category. (In these submissions, we are using the acronym FNCFS [First Nations Child and Family Services] Agency, as does Canada.) Yet as outlined above in the Facts section of these submissions, Canada's criteria are (i) not easily identifiable and (ii) are not consistent. That alone is unacceptable.

58. Furthermore, in our submission, the criteria Canada is using are (iii) insufficiently flexible to account for regional circumstances and First Nation choices, (iv) create barriers that do not serve the best interests of children, and (v) fail to take into account current law.

Insufficiently flexible to regional circumstances and First Nation choices

59. The Tribunal has stated that:

> The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies **and communities** are best placed to indicate what those services should look like…
>
> …
>
> It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives**.** It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the Decision at paras. 341-347).[46]

60. We submit that Canada's determination of who is an eligible FNCFS Agency should show reasonable deference to the service choices made by First Nations. They know their communities, and their needs, best. The Tribunal has recognized that "INAC has previously acknowledged that it does not have expertise in the provision of child and family services

[46] 2018 CHRT 4 at paras. 163-166 [emphasis added].

to First Nations".[47] Canada is a funder, but it has never delivered any aspect of child and family services. It needs to show some respect for the informed choices that First Nations make themselves on how to best serve their own people.

61. Showing more deference and flexibility in this regard would also allow for adaptation to regional realities. For instance, Newfoundland and Labrador has chosen not to deliver or regulate prevention services. That choice is outside the control of Innu Nation. The Innu have chosen to fill the gap in prevention without, yet, trying to take over provincial protection services. It is just a fact, then, that protection and prevention services are split up between two providers in this province; but to date this is a fact that Canada's funding model cannot seem to accommodate.

Creating barriers that do not serve the best interests of children

62. Canada's insistence that an FNCFS Agency must take on protection in some way, in order to be eligible for *prevention* funding at actual cost, is not logical.

63. As noted above, Canada told IRT Secretariat that it had to deliver protection services, as well as prevention services, in order to be eligible for any form of actual cost funding. Canada later said that if IRT Secretariat acted as a flow-through for protection funding, creating its own service agreement with the Province, as do Miawpukek First Nation and the Mi'kmaq Confederacy of PEI, it would accept that instead.

64. These restrictions pose practical barriers for IRT Secretariat, as described above. In order to receive prevention funding based on need, IRT Secretariat either has to take on

[47] 2016 CHRT 16 at para. 10.

protection services before it feels ready or willing to do so, or has to negotiate a complex service agreement with the province so it can become the province's funder.

65. We fail to see the logic – in the best interests of children – for such requirements.

66. Perhaps there may be a logic that serves an unknown administrative purpose within the federal government. But we submit that such an administrative purpose cannot justify ongoing discrimination. We submit that considerations to determine eligible FNCFS Agencies should be founded on the best interests of children.

Failing to take into account current law

67. In 2019, Parliament passed *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, and it came into effect on January 1, 2020.

68. It recognizes the jurisdiction of Indigenous governments in child and family services.[48]

69. The Act recognizes that passage of legislation can be an exercise of such jurisdiction. It contains a certain process, which is optional, for a First Nation or other Indigenous government to follow if it wishes to ensure that its legislation will override provincial law in the case of a conflict. If that process is followed, the Indigenous legislation "also has … the force of law as federal law".[49]

70. But the Act does not restrict the exercise of Indigenous jurisdiction to legislative action. Jurisdiction in any subject matter also involves executive action. Indeed, prior to this Act,

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[48] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 ("Federal Act"), at s. 18.

[49] Federal Act at s. 21(1).

all of Canada's actions in the area of child and family services were non-legislative. Most still are. Provinces typically use a mixture of executive actions (such as policy creation) and legislative ones in their management of child and family services.

71. Some Indigenous governments may choose to act, on certain matters, through non-legislative means. They will not have the "force of law as federal law" in doing so, but they may not need it.

72. In spring 2019, Sheshatshiu Innu First Nation and Mushuau Innu First Nation officially designated the IRT Secretariat as their agency for prevention services, by resolutions.

73. As acknowledged by Ms. Nepton, the Province of Newfoundland and Labrador does not regulate prevention services in its legislation. Nor does the federal Act restrict who may become a "service provider". There is therefore no conflict between the Innu government's designation under their inherent jurisdiction and any applicable legislation.

74. It is a shame that Canada would not recognize the Innu First Nations' own designation as a valid way to designate an agency for prevention purposes. Despite the passage of the Act and its affirmation of inherent Indigenous jurisdiction, and despite provincial designation being impossible, Canada refused to "see" a legal act of Innu jurisdiction for what it was.

75. We submit that Canada's determination of what or who is an FNCFS Agency needs to take into account its own legislative recognition of Indigenous governments' jurisdiction in section 18 of the *Act respecting First Nations, Métis and Inuit children, youth and families*, as well as other applicable legislation. Child and family services is now, more clearly than ever, a shared field of jurisdiction. All governments need to pay attention to that reality, and need to be alive to valid exercises of Indigenous jurisdiction.

V. RELIEF REQUESTED

76. Innu Nation respectfully requests that the Tribunal grant the following relief:

(a) An order:

a. Confirming that all First Nations children and families on reserve and in the Yukon are captured by the orders in paras. 410-411 of 2018 CHRT 4, not just those served by FCNFS Agencies (or "FNCFC agencies" in the wording of the order);

b. Clarifying that, with respect to those First Nations children and families on reserve and in the Yukon not served by FCNFS Agencies, the determination of actual needs in the best interests of the child and the selection of the appropriate recipient(s) of the funds shall be made in consultation with the First Nation(s) involved, and taking into account First Nations' service delivery choices; and

c. Confirming that Canada is required to provide reimbursement retroactive to January 26, 2016 for all prevention/least disruptive measures services for First Nations children and families on reserve and in the Yukon not served by FCNFS Agencies.

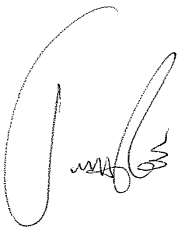
(b) In the alternative to the order described in para. 77(a) above, we support the orders sought by the Caring Society at paras. 2-4 of their Notice of Motion. In addition to the order referring to Canada engaging in "consultation with the First Nation(s) involved" we submit that the order should also require Canada to "take into account First Nations' service delivery choices".

If the Tribunal should find that its order at 2018 CHRT 4 paras. 410-411 was intended only to apply to those children and families served by a federally-recognized FNCFS Agency, then a parallel order is required to ensure compliance with the types of immediate relief that the Tribunal already ordered in 2016 CHRT 10 and 2016 CHRT 16, which remain unaddressed as regards to those children and families not served by an FNCFS Agency recognized by Canada.

(c) An order that Canada shall consult with the parties to this Motion to update its criteria for federal recognition of FNCFS Agencies for funding purposes, within 90 days. The criteria must be clear, available in writing, be reasonably consistent, be responsive to regional circumstances and to First Nation choices, take into account the *Act respecting First Nations, Inuit and Métis children, youth and families* and other applicable laws, and must not create barriers that do not serve the best interests of children.

(d) We also support the Caring Society's request for a declaration or finding of non-compliance, as described in para. 1 of their Notice of Motion.

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



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