

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 Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and  
NISHNAWBE ASKI NATION

Interested Parties

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RESPONDENT'S SUBMISSIONS

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**ATTORNEY GENERAL OF  
CANADA**

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Counsel for the Respondent

## Overview

1. The First Nations Child and Family Caring Society and the Assembly of First Nations, filed a complaint against the federal government with the Canadian Human Rights Commission in February 2007. The parties argued that the funding support that the federal government provided for child welfare on reserve is lower than the support provincial governments provide to children off reserve.
2. In 2016, the Tribunal found that Canada's funding model led to discriminatory funding and management. Since the initial finding of discrimination, the Tribunal has issued additional orders clarifying their finding and identifying the systemic issue of inadequate funding for capital expenditures. Canada has been responsive in addressing this systemic issue:
  - The Tribunal ordered Canada to provide detailed information in a compliance report to demonstrate how it was addressing the issue of urgent capital infrastructure expenditures including building repairs required for compliance with various codes and regulations.<sup>1</sup> Canada has done this through various reporting affidavits filed in this matter.
  - The Tribunal also ordered Canada to start paying actual agency costs on an ongoing basis while the program is being reformed.<sup>2</sup> Canada is doing this.<sup>3</sup>

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<sup>1</sup> Record of Documents Tab 8: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT, para 49.

<sup>2</sup> Record of Documents Tab 15: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4, para 223.

<sup>3</sup> Record of Documents Tab 33: Affidavit of Paula Isaak sworn May 24, 2018, at paras. 8-10.

- Canada has been and continues to approve requests for building repairs.<sup>4</sup> As of January 11, 2019, Canada has approved \$9.4 million in claims for building repairs.
  - Canada has consulted with the parties through the Consultation Committee on Child Welfare; and
  - Based on those consultations, Canada has revised the authority for funding capital in the new First Nations Child and Family Services (“FNCFS”) Terms and Conditions (approved in December 2018), which is the legal vehicle for spending public money.<sup>5</sup>
3. There are no outstanding issues of compliance. Canada has complied with the Tribunal’s orders and there is no evidence of ongoing discrimination.

### **Submissions**

#### ***Jurisdiction***

4. Parliament has the exclusive authority to issue payments out of public funds. The *Financial Administration Act* (FAA) sets the legal framework for Canada’s financial management. Pursuant to section 26 of the FAA, payments require authority of Parliament. There is no authority for a government department or a program to unilaterally make a substantive policy change to a program that would impact the amount of funding required or the way in which government monies are spent.
5. When a Minister has determined a policy change to increase/change funding is required, the Minister must gain approval from Cabinet. After Cabinet approval is obtained, the Minister’s office must prepare a Treasury Board submission to receive funding

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<sup>4</sup> *Ibid*, at paras 8-10.

<sup>5</sup> Affidavit of Lorri Warner sworn January 29, 2019 at Tab 1.

authority. The Treasury Board submission must provide specific details regarding how the funding will be used and the justification for the funding change. The Treasury Board process also requires the development of “Terms and Conditions” to establish the authority under which public monies can be used and sets out strict parameters for how this money can be spent.

6. The department of Indigenous Services Canada (“ISC”) is responsible for ensuring that funds disbursed through the FNCFS Program are being used in accordance with their governing Terms and Conditions. This is part of the government’s general stewardship role for the accountability of public funds, which requires it to ensure that all funds provided are spent within the authority provided by Cabinet.
  
7. While the Tribunal has exercised its jurisdiction in this complaint to date, there are limits to that jurisdiction. There is a distinction between ordering remedies with an incidental impact on funding and dictating the specifics of a replacement policy. Absent statutory authority or a challenge on constitutional grounds, courts do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy.<sup>6</sup> The nature of this complaint is a discriminatory funding model with respect to First Nations child welfare. The immediate relief orders are addressing the discrimination while this program is being reformed. At this point, an order directing the allocation of funds for capital expenditures outside the program, goes beyond the scope of this complaint.
  
8. Given the above, reconciling the implementation of a government funding mechanism and policy with Tribunal orders that specifically dictate funding would be problematic. For example the direction to fund ‘actual costs’ which are uncertain and ongoing costs, does not align well with a government funding model relying on certainty: requests and justification for specific amounts to fund specific programming. In specifically directing

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<sup>6</sup> *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. at paras 5, 15, and 28.

the remedy, there is a risk the remedy will not function efficiently within the governmental regime, thereby resulting in disfunction and delay.

***Facts***

9. Canada has a legal obligation under the *Charter* and the *Canadian Human Rights Act* (CHRA) to ensure any federally funded services are provided in a non-discriminatory manner. Canada is committed to developing a new funding mechanism in consultation with the parties as is evidenced by the progress achieved through discussions and consultation during the Consultation Committee meetings and email correspondence with partners. For example:

- On June 22, 2018, during the Consultation Committee Paula Isaak, former Assistant Deputy Minister of the Education and Social Development Programs and Partnerships, advised she would provide the next version of the draft Terms and Conditions by June 29, 2018. Ms. Isaak further confirmed she would continue discussions and analysis with the Community Infrastructure Branch of ISC and she highlighted the requirement for more information on community infrastructure needs related to Child and Family Services.<sup>7</sup>
- For the August 2, 2018, Consultation Committee meeting an updated draft of the Terms and Conditions was circulated as was a discussion paper to assist in better understanding the capital needs with the intention of creating a process for addressing them.<sup>8</sup>

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<sup>7</sup> Supplemental Record – Tab 2: CCCW Record of Decision – June 22, 2018.

<sup>8</sup> Supplemental Record – Tab 4: CCCW Record of Decision – August 2, 2018.

- On September 5, 2018, at the Consultation Committee, it was determined a gap existed in the infrastructure authorities, which could be addressed by amending the Terms and Conditions.<sup>9</sup>
- On October 23, 2018, at the Consultation Committee, it was reported that as of October 5th, more than \$2.6M had been paid towards building repairs, representing just under 6% of total claims.<sup>10</sup>
- On November 19, 2018, at the Consultation Committee it was reported that FNCFS agencies had received just over \$3.43M for building repairs and possible supplementary funds as additional capital reimbursements could potentially be embedded in prevention and small agency claims. Further reporting advised the broader capital directive being developed would be shared with the parties prior to being finalized.<sup>11</sup>
- On November 19, 2018, at the Consultation Committee ISC also reported it would be in a better position to determine capital requirements after reviewing the final IFSD report.<sup>12</sup>
- The Institute of Fiscal Studies and Democracy (“IFSD”) Report was made available to the parties on December 18, 2018.<sup>13</sup>
- On January 17, 2019, Joanne Wilkinson Assistant Deputy Minister of the Education and Social Development Programs and Partnerships, advised the

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<sup>9</sup> Supplemental Record – Tab 5: CCCW Record of Decision – September 5, 2018.

<sup>10</sup> Supplemental Record – Tab 6: CCCW Record of Decision – October 23, 2018.

<sup>11</sup> Supplemental Record – Tab 7: CCCW Record of Decision – November 19, 2018.

<sup>12</sup> Supplemental Record – Tab 7: CCCW Record of Decision – November 19, 2018.

<sup>13</sup> Affidavit of Lorri Warner sworn January 29, 2019, at Tab 2.

parties that Canada was considering the IFSD report, including the recommendations related to Capital.

- On January 18, 2019, Ms. Wilkinson provided the parties with the FNCFS Program new Terms and Conditions approved in December 2018. “Purchase or construction of capital assets that support the delivery of FNCFS services” is now included as an eligible expenditure for the FNCFS agencies and the distinction between minor and major capital was removed.<sup>14</sup> In addition, the Terms and Conditions also include infrastructure purchase, maintenance and renovations as eligible expenditures under the Community Well-Being and Jurisdiction initiative.<sup>15</sup>

### ***Compliance***

10. In its January 2016 decision (2016 CHRT 2), the Tribunal found the funding formula led to inadequate funding for capital costs. In subsequent decisions, the Tribunal has addressed the issue of capital costs and noted long-term reform would benefit from discussions and consultation. Since its initial finding of discrimination the Tribunal has ordered Canada to demonstrate that urgent needs were being addressed in the interim, and pay actual agency costs on an ongoing basis. Canada has been responsive and is in full compliance with these interim orders addressing the systemic issue of capital spending.<sup>16</sup>

11. In 2017 CHRT 14, at paragraph 31, the Tribunal noted the importance of collaboration in reforming the program:

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<sup>14</sup> Affidavit of Lorri Warner sworn on January 29, 2019, at Tab 1.

<sup>15</sup> Affidavit of Lorri Warner sworn January 29, 2019, Tab 2 at page 1: *Introduction of a new funding stream within FNCFS for Community Well-being and Jurisdiction Initiatives (CWJI) is designed to enable projects of up to five years in duration to expand the availability of prevention and well-being initiatives that are responsive to community needs, and to support First Nations in developing and implementing jurisdictional models.*

<sup>16</sup> Record of Documents Tab 33: Affidavit of Paula Isaak sworn May 24, 2018, at paras. 8-10.

[31]...the Panel’s purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* [of January 26, 2016] are temporarily addressed while INAC’s First Nations child welfare programming is being reformed.”<sup>17</sup> The Panel then went on to quote the Federal Court statement in *Grover v. Canada* that, “[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal.”<sup>18</sup>

12. The process of reforming the FNCFS program is ongoing. There is no quick fix. Reforms cannot be made unilaterally, they require consultation. It is clear from its earlier decisions that the Tribunal has recognized that collaboration and consultation prior to reforming the FNCFS program are crucial to its ultimate success. It is submitted that this deference is still appropriate.
  
13. Furthermore, Canada is working closely with key partners, including the Consultation Committee, National Advisory Committee on First Nations Child and Family Services Program Reform, First Nations Child and Family Services agencies, front-line service providers, communities, leaders, organizations, provincial governments and the Yukon government, to reform the FNCFS program. All of these partners have important voices and perspectives that are necessary for ensuring that the reformed FNCFS program serves the needs of First Nations children. Unilateral action in addressing these important issues would be contrary to the federal government's commitment to renew the relationship between Canada and Indigenous peoples.

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<sup>17</sup> Record of Documents Tab 13: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14, para 31.

<sup>18</sup> *Ibid.*, para 32.



14. Canada has been responsive to the guidance of the Tribunal and has implemented interim processes and procedures to deal with the systemic issue of inadequate capital funding. Canada is in full compliance and is collaborating to ensure the reformed FNCFS program will be responsive to and meet the needs of the First Nations children.

#### **Conclusion**

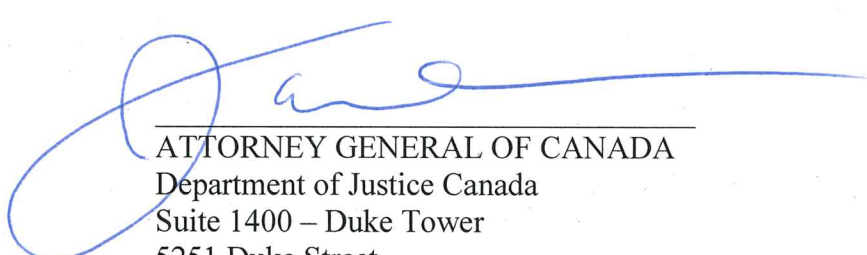
15. The motion for non-compliance should be dismissed. Canada has complied with the Tribunal's orders regarding capital expenditures and is collaborating with the parties to reform the FNCFS program.

#### **Order Sought**

16. The Respondent requests the Tribunal dismiss this non-compliance motion on the basis Canada has complied with the orders regarding capital expenditures to date.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at Halifax, Nova Scotia this 29<sup>th</sup> day of January, 2019.



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## List of Authorities

### Jurisprudence

*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R.