



2021 CHRT 41: Tribunal Orders on Capital Funding - Including Amended Orders Released January 18, 2022

Introduction

In February 2019, the First Nations Child & Family Caring Society (Caring Society) brought a [non-compliance motion](#) to the Canadian Human Rights Tribunal (CHRT) as part of the ongoing proceedings on remedy in *First Nations Child and Family Caring Society et al v. Attorney General of Canada*. On August 26th, 2021, the CHRT issued a letter decision. A letter decision is equivalent to an oral ruling made at the bench, which is binding with legal reasons to follow. On November 16, 2021, the CHRT issued the full reasons for the decision in order [2021 CHRT 41](#), and on January 18, 2022, the CHRT issued an amended ruling.

2021 CHRT 41 responds to the Caring Society's February 2019 motion, addressing Canada's failure to take sufficient measures to ensure substantively equal capital to support the delivery of child and family services and Jordan's Principle. The CHRT found that Indigenous Services Canada (ISC) has been applying a narrow interpretation of its orders:

The Panel recognizes that Canada is approving hundreds of thousands of cases and is pleased with those results. However, approvals are meaningless if the services cannot be delivered. . . . With respect, the need for sufficient office space to offer services is so intertwined with the actual provision of services and so self explanatory, the Panel did not envision the need for orders in that regard at the time. (para 297-298)

2021 CHRT 41 is meant to provide clarity on the intent of the Tribunal's original ruling on the merits in January 2016 ([2016 CHRT 2](#)). Compliance is essential, as there is a severe housing/building shortage in many First Nations communities. As a result, there is often no space to provide the "safe, appropriate, and confidential" prevention services that would keep more children safely at home with their families (2021 CHRT 41, para. 140).

The Parties in this case include the Attorney General of Canada (the Respondent); the Caring Society and the Assembly of First Nations (the Complainants); and the Chiefs of Ontario (COO), Amnesty International, and Nishnawbe Aski Nation (NAN) (Interested Parties).

Purpose of the Order

The order focuses on funding the purchase and construction of capital assets for First Nations child and family services and Jordan's Principle. The order also prohibits Canada from using the Financial Administration Act to fetter its implementation of Canadian Human Rights Act orders. Capital refers to the physical property required to operate programs and services, such as buildings, vehicles, and other infrastructure. The CHRT confirmed that funding for the purchase of buildings and additional capital assets that support the delivery of programs and prevention services must be provided under the First Nations Child and Family Services (FNCFS) Program.

FNCFS Capital Funding

In 2021 CHRT 41, the CHRT ordered Canada to fund all FNCFS Agencies, including small agencies and First Nations, for the full cost of purchasing capital assets "that support the delivery of FNCFS on-reserve including prevention services" (para. 260). The CHRT further ordered Canada to fund the actual cost of constructing capital assets that are "ready to proceed" (para. 279). Canada was also ordered to provide funding for capital projects that are still in the early planning stages and for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies in relation to the purchase and/or construction of capital assets required to deliver FNCFS services on-reserve.

Jordan's Principle Funding

The Tribunal also ordered Canada to fund all First Nations and First Nations-authorized service providers, for the purchase of capital assets that "support the delivery of Jordan's Principle services to children on-reserve" and to fund the actual cost of constructing capital assets that are "ready to proceed" (para. 305). Canada must also fund capital needs and feasibility studies for FNCFS Agencies and First Nations looking into the purchase and/or construction of capital assets to "support the delivery of Jordan's Principle on-reserve and in the Yukon and off-reserve where applicable under Jordan's Principle" (para. 305).

Band Representative Funding in Ontario

The CHRT also ordered Canada to fund the full cost for Band Representatives and any on-reserve prevention services. This clarification was requested specifically by Ontario First Nations, who the CHRT confirmed also have access to funding for feasibility studies and needs-assessments for the purchase and/or construction of capital assets that support the delivery of Band Representatives and prevention services on-reserve and off-reserve when applicable under the Federal Program in Ontario” (para. 480).

Addressing All Three Funding Areas

In terms of FNCFS capital funding, Jordan’s Principle funding, and Band Representative funding, Canada argued in their submissions that they could not provide capital for these services in all cases due to the need to consult with First Nations governments to ensure the appropriate use of land and funds. The CHRT rejected this argument and stated, “The Tribunal is not ordering Canada to build offices without consulting First Nations and going through the appropriate processes. The Tribunal is ordering Canada to fund those building purchases or construction once all processes have been completed and the First Nations approve it” (para. 149).

By December 16, 2021, Canada was required to advise FNCFS Agencies and First Nations, in writing, how to access the funding. Canada was also ordered to make this information available on the ISC website.

The CHRT also provided clarification about the use of the Financial Administration Act (FAA) due to concerns that this law has been interpreted, by Canada, “in a way that hinders the Panel’s quasi-judicial statutory role” (para. 337). The order means that the CHRT’s rulings and the FAA should be used together, not against each other. If there is a conflict between a CHRT order and the FAA, the orders of the CHRT come first. This clarification prohibits Canada from denying services or refusing to implement orders based on their interpretation of the FAA. The CHRT stated, “There is great need for a shift in mindset on how things are done. This is what reform means. If trends and forecasts are informed by the past discriminatory practices the adverse impacts and harms will not be addressed” (para. 347).

Amendments to Original Order

During negotiations between parties to come to an agreement-in-principle on compensation and capital funding (November-December 2021), the Parties requested amendments to 2021 CHRT 41 to resolve

disputes arising from the letter decision and the order, including a judicial review filed by Canada in Federal Court. The following amended orders apply to projects that are ready to proceed (i.e., they have completed feasibility and design work and received the required First Nations approvals).

Canada must fund the full cost for the purchase or construction of capital assets required for the delivery of FNCFS on-reserve, including in Ontario and in Yukon. Canada must also, in consultation with the Parties, fund capital needs and feasibility studies conducted by FNCFS Agencies and First Nations who wish to purchase or construct capital assets to support the delivery of FNCFS on- and off-reserve, including in Ontario and in Yukon.

Canada must provide funding for the full cost of the purchase or construction of capital assets that provide “safe, accessible, confidential and culturally- and age-appropriate” spaces for the delivery of Jordan’s Principle services (para. 544). This applies to Jordan’s Principle services delivered to First Nations children on-reserve, and in the Northwest Territories and in Yukon, for First Nations or First Nations-authorized service providers. Canada, in consultation with the Parties, must also provide funding for capital needs and feasibility studies for these projects.

In consultation with the COO and the NAN, Canada must fund the full cost of the purchase or construction of capital assets that support the delivery of First Nations Band Representative and prevention services for First Nations children, youth, and families on-reserve for First Nations in Ontario. Canada is also required to fund First Nations in Ontario to conduct feasibility studies and needs assessments for capital assets to supply these services for on-reserve and off-reserve Agencies.

For all above scenarios, Canada must notify First Nations in writing by February 2, 2022 about how to access the capital asset funding and must post this information online by February 17, 2022.

Within 30 business days of receiving a request for funding of a FNCFS Agency or First Nation project that is ready to proceed, Canada must decide on full funding. If full funding is delayed, denied, or deemed ineligible, Canada has up to 30 business days to advise the Agency or First Nation in writing of its reasons. If Canada requires more than 30 business days to decide, Canada must, in writing, clearly describe the rationale for its decision and provide a reasonable time for the Agency or First Nation to correct any deficiency in their plan. Canada and the Parties must develop a guide on the approvals process and design and

implement a joint review mechanism by March 4, 2022.

The above orders apply until such time as a First Nation reaches an agreement with Canada respecting self-governance of its own child welfare services, Canada reaches a Nation-specific agreement with a First Nation, or long-term reform of FNCFS is completed in a manner that is no longer based on discriminatory funding formulas or programs, including discriminatory funding for the purchase or construction of major capital assets.

[Click here](#) for more information on the Agreement in Principle on long-term reform of the First Nations Child and Family Services Program and Jordan's Principle.

Summary

Altogether, the ruling reiterates the requirement for greater funding for capital so that FNCFS agencies can deliver programs and services, including Jordan's Principle services, in safe, family-friendly environments that serve the best interests of First Nations children and the community. In addition, the ruling reinforces the provision of funding for Band Representatives and preventative services on reserve and addresses the conflict between CHRT orders and other government legislation.

Read the full text of the amended order here:

https://fncaringsociety.com/sites/default/files/2021_chrt_41_amendment.pdf.

For more information on the CHRT case, please visit fnwitness.ca.

For more on Jordan's Principle or any of the other focus areas of the Caring Society, please visit our website at fncaringsociety.com.