

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

**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 RESPONSE SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS
REGARDING CANADA'S NATIONAL PROGRAM MANUALS**

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INTRODUCTION

1. On February 20, 2020, this Panel requested that the Respondent, Attorney General of Canada (representing the Minister of Indigenous Services Canada), provide a copy of the most recent version of the Social Programs National Manual and any documented plan to reform inequalities in the First Nations Child and Family Services Program (FNCFS Program). The Panel also requested the most recent version of the Terms and Conditions referred to in Canada's submissions on major capital dated January 30, 2019 and a copy of the Capital Directive. The Panel also requested a copy of Indigenous Services Canada's plan to eliminate the lack of coordination in federal programs and services which is adversely impacting First Nations children.

2. On March 4, 2020 Canada provided the Panel with the following documents:
 - Social Programs National Manual 2017-2018
 - National Recipient Guide (2018/2019 version)
 - National Recipient Guide (January 2020 version)
 - 2018/2019 Ontario Region Recipient Guide for Band Representative Services
 - January 2020 draft Prevention Directive
 - Community Well-Being and Jurisdiction Initiatives Guidelines
 - First Nations Child & Family Services Program Terms and Conditions pre-December 13, 2018
 - First Nations Child & Family Services Program Terms and Conditions post-December 13, 2018
 - Draft Capital Directive Document

3. The Assembly of First Nations (AFN) acknowledges that Canada has made various improvements to its FNCFS Program since the Panel's January 2016 ruling. However, more long-term and lasting reforms are yet to be made by the Respondent. Reforms to date have mainly focused on the interim relief ordered by this Panel. The Respondent has been collaborating with the parties on the implementation of immediate reforms to ensure that it is complying with the Tribunal's orders. There remains multiple issues which require immediate redress by the Respondent, including the fact that funding for First Nations agencies is still based on annual

contribution agreements and that no concrete plans have been put into place to ensure long-term predictable, and sustainable funding. Furthermore, significant gaps exist with respect to the information that has been made available by the Respondent to date. These gaps and the lack of pertinent information is frustrating the parties' ability to commence the process of developing long-term reforms to the FNCFS Program.

4. The AFN agrees with the First Nations Child and Family Caring Society of Canada (Caring Society) position that the Respondent currently has no articulated plan for the implementation of long-term reforms. Instead, the Respondent is advancing a series of patch work initiatives designed solely to address pressing and immediate issues.

SUBMISSIONS

A. Social Programs National Manual

5. The Tribunal found that the 2012 Social Programs Manual was problematic and inconsistent with substantive equality. In particular, the Program Manual lacked direction regarding the delivery of prevention programs for First Nation families.¹ As a result of this Panel's February 1, 2018 ruling, the Respondent drafted revised manuals to provide guidance to agencies and First Nations in making claims for the actual costs they incurred in the delivery of these services.
6. The First Nations Child Welfare chapter has been removed from the Respondent's National Social Program Manual 2017-19.² The chapter has been replaced by new Program documents, namely the National Recipient Guide and the Ontario Region Recipient Guide for Band Representatives. There are a few draft directives currently under review that will provide additional direction to recipients. The draft directives

¹ *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada*, 2018 CHRT 4, at paras 166-199.

² Exhibit 1 of Affidavit of Lorri Warner affirmed March 4, 2020.

include: a Capital Directive; a draft Prevention Directive; and Guidelines for the Community Well-Being.

7. There are two versions of the Recipient Guides. It was necessary to revise the documents to address the evolving circumstances First Nation service providers encountered in submitting invoices, particularly in relation to prevention services. For instance, Annex B to the to February 1, 2018 Recipient Guide provides a list of eligible prevention services that First Nation agencies could invoice for. These include: Parenting education programs; respite care; mentoring services; cultural activities, etc.³ In contrast, the January 2020 Recipient Guide does not provide a list of prevention programs but rather three categories of eligible prevention programs: Primary prevention services (aimed at the community as a whole); secondary prevention (early intervention); and tertiary prevention (least disruptive services).⁴
8. Greater flexibility and an expanded eligibility criteria for prevention and other expenditures was required to ensure the FNCFS Program would remain responsive to First Nations concerns. In light of the fact that additional issues will continue to arise and the circumstances surrounding the funding of First Nations service providers will continue to evolve,, it is clear that these documents will have to be continually reviewed and updated. As such the AFN is of the view that the Recipient Guides should be “evergreen” documents.

B. Plan to reform inequalities in the Child Welfare Program

9. The focus of the AFN’s complaint now before this Panel relates to the provision of child welfare services. However, the situation faced by First Nations peoples on a daily basis in Canada remains one of the most pressing human rights issues. First Nations individuals continue to be significantly disadvantaged in terms of poverty, education,

³ Exhibit 2A of Affidavit of Lorri Warner affirmed March 4, 2020, at page 9.

⁴ Exhibit 2B of Affidavit of Lorri Warner affirmed March 4, 2020, at page 6.

employment, health care, and access to basic services such as housing, water and food security. In addition, First Nations women and girls experience systemic discrimination by public safety officials making them more susceptible to violence. This is reflected in the inordinately high rate of missing and murdered First Nations women and girls within Canada . Many of these factors are outside of child welfare policy, however, they can be directly traced to the removal of First Nation children from their homes and communities.

10. The Respondent notes that Canada’s plan to address the inequalities in the First Nations Child and Family Services Program is multi-faceted.⁵ Canada states that it has “implemented a Consultation Protocol and significantly consulted with key partners; dramatically increased funding to the Program; and supported three separate studies aimed at reforming the Program.”⁶
11. The Respondent notes that it has increased funding for the FNCFS Program from \$680.9 million (2015-2016) to approximately \$1.2 billion in 2018-2019⁷. This increase in funding is demonstrative of the decades of discriminatory practices and underfunding First Nations communities and agencies were subjected to. Nevertheless, the AFN appreciates these recent enhancements to the program and submits that additional resources are required to provide substantive equality for First Nation families and to reunite the large amounts of First Nations children currently in care to their families.
12. With respect to the Respondent’s submissions on the introduction of Community Well-Being and Jurisdiction Initiatives (“CWJI”) funding, the AFN takes no issues with respect to the accuracy of the funding allocated under the program. However, the AFN submits that CWJI funding was minimal at the outset and currently cannot

⁵ Canadas Submissions at para 9.

⁶ *Supra* note 4 at para 9.

⁷ *Supra*, Note 4 at para 12.

support all the needs of First Nation communities throughout Canada. This Panel must therefore critically consider the Respondent's assertion that CJWI funding will enable First Nations to assert greater control over the well-being of their children and families.

13. The AFN sits on the National Advisory Committee on Child and Family Services (NAC) which has expressed its concern with Canada continuing to rely on a fixed-budget approach as outlined in the federal budget of 2018. The NAC has also raised concerns that Canada's approach to funding is not outcome based and further, is not based on any evidence. Furthermore, the AFN is also concerned that the CJWI funding is intended to be the source of funding for First Nations to exercise their inherent jurisdictions and laws which was recognized in Bill C-92, *An Act respecting First Nations, Métis and Inuit children, youth and families*. The AFN submits that CJWI funding is insufficient to enable First Nations to implement the full spectrum of necessary child protection mechanisms, from the development of First Nations law making to the implementation of a separate adjudicative process.
14. As mentioned above, there remains various gaps with respect to the information available to the parties' and as a result, the parties remain unable to commence discussions on the essential long-term reforms which must be made to the FNCFS program. In an effort to address these gaps, the AFN approached the Institute of Fiscal Studies and Democracy ("IFSD"), a University of Ottawa affiliate, to obtain reliable data, and conduct an analysis and reporting methodology on the needs of First Nations agencies. The Respondent provided the AFN with \$2 million in April 2018 to contract the IFSD to undertake this analysis.
15. The IFSD conducted FNCFS agency case studies and surveys. The IFSD noted the most significant cost driver of FNCFS agencies was the number of children in care, which correlates tightly to agency total budgets. Additional observations and findings from the IFSD Agency survey include:

- Agency characteristics transcend provincial boundaries and funding formulas. An agency serving remote communities in Ontario shares characteristics similar to those serving remote communities in British Columbia.
- Budgets, while most agencies do not run deficits, emphasized the need for investment in capital and people. Agency budgets are most tightly correlated with children in care (unsurprising, given the structure of the current system).
- Employees: Most agencies (62%) cannot remunerate their employees at provincial salary levels. Agencies noted the regular over-extension of staff beyond their defined duties.
- Capital and information technology (IT): Nearly 60% of agencies indicated a need for capital repair and investment. Agency IT funded on average at 1.6%, is severely underfunded when compared to the industry standard of approximately 5-6%.
- Governance and Data Capacity: While some agencies use internal data to improve their planning, programming and decision-making, significant data gaps exist in aligning inputs and outputs to better understand short-, medium-, and long-term outcomes for children and families that interact with the FNCFS system.

16. Following the completion of the IFSD's first report regarding FNCFS Agency needs, the AFN was of the view that further work was required before a new funding model could be developed and implemented, consistent with this Panel's rulings. On March 6, 2019, the AFN submitted a funding proposal to Canada to enable the IFSD to conduct further work.⁸ The AFN received a \$1.7 million funding commitment in 2019 to enable the IFSD to complete a full allocation and expenditure analysis of the FNCFS Program, assess any impacts of Tribunal-related spending on FNCFS agency results and develop options for a new funding methodology. The work of IFSD has been delayed as the Respondent has been slow in providing the necessary data.⁹ Part of the issue relating to the delay in the IFSD's report is the fact the Respondent cannot presently account for where all the funding is applied.

⁸ Affidavit of Dr. Cindy Blackstock, Affirmed on April 8, 2020 at para 13.

⁹ Ibid, at para 13.

17. The AFN acknowledges Canada's submissions regarding the enactment of Bill C-92, *An Act respecting First Nations, Inuit and Metis children, youth and families*. The passage of national legislation on child and family services in June of 2019 was an important milestone. For the first time in Canadian history the inherent right of First Nations to exercise jurisdiction in relation to child and family matters was recognized and affirmed by an act of Parliament. The federal legislation was a response to many factors, including the final report of the Truth and Reconciliation Commission (TRC), and Calls to Action #1-4 which called for comparable legislation. First Nations governments and organizations set a priority following the TRC on co-developing legislation that would support Indigenous governments inherent jurisdiction, administration and dispute resolution authority in relation to child and family services. The legislation was "recognition" legislation and did not involve Canada "giving" something to First Nations that First Nations did not already have, as the legislation was simply an affirmation of constitutionally recognized pre-existing inherent Aboriginal and Treaty rights.

18. *An Act respecting First Nations, Inuit and Metis children, youth and families*, establishes national standards for the provision of child and family services to Indigenous children. Many elements of the legislation are an improvement over the existing regime, including its emphasis on substantive equality, preventive care, a hierarchy of placement, and the need for the continuity of culture and language. However, the AFN notes the legislation does not adequately address the need for reliable, stable and predictable funding. This Panel has stressed the need for Canada to provide adequate resources for Indigenous child and family services.

19. The AFN submits that the legislation does address change, but it does not reference the need to comply with orders of the Tribunal and the role of systemic change in child and family services based on human rights. The AFN requested that Canada include a reference to the the Tribunal's decision in the preamble and during the co-development process. This request was rejected.

20. The preamble to the legislation specifically references the TRC in the sixth preambular paragraph.
- i. Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children.
21. The Reference Group referred to by Canada performed the role identified but the statement made by Canada is not completely accurate. The Group requested broader and stronger legislation with institutions and mechanisms to support its implementation because of the vulnerable persons impacted and the human rights failures of past policies.
22. The purpose of the Reference group was to develop a policy paper reflecting the consensus position of the National Indigenous Organizations on the necessary structure or content for legislation, including the mechanisms and tools required to respond to a humanitarian crisis reflected in the overrepresentation of Indigenous children and youth in care. The policy positions of the Reference Group and national Indigenous Organizations were not accepted by Canada in whole and there remained significant gaps between what Canada advanced in the drafting of legislation and what the AFN proposed with the Reference Group. For instance, the AFN called upon Canada to have:
- i. explicit funding provisions,
 - ii. a Child Advocate or National Indigenous Children's Commissioner role, and
 - iii. support an independent National Indigenous Child Welfare Organization to support First Nations and others to address the human rights issues for Indigenous children and families.

23. These three items were not addressed by the legislation, despite the fact that these specific items directly responded to this Panel's Orders and reflected the concern of First Nations, Metis and Inuit with the structural problems associated with facilitating change in Canada's provision of child and family services, along with ensuring proper accountability and advocacy. First Nations were told Canada would work with them outside of the development of the legislation on these matters. Such work has not happened to date.

24. The co-development of legislation was more of a collaboration than co-development, and the approach to implementation has been missing proper structure with First Nations. The National Chief has written three times to three successive ministers on a "distinctions" based approach to implementation, focusing on a First Nations pathway to achieve change. A protocol to guide this approach that has not yet been put in place despite the advocacy of First Nations organizations such as AFN over the past seven months. The letters and responses are available within the AFN as they have been circulated to its Chief's Committee on Child and Family Services and Self-Determination.

25. With respect to the implementation of the legislation, uncertainty currently exists with respect to the following key matters:
 - a. Source of funding for capacity—whether it is under legacy programs that were inadequate—and the piecemeal amounts.
 - b. No coordinated implementation mechanism with First Nations, reflecting the principles of UNDRIP and consent, or collaboration
 - c. No clarity on funding to support necessary child and family services and to support better "outcomes" despite the fact that legislation specifically denotes that the purpose of funding is to support long term positive outcomes for children, youth and families.

- d. No clear identification of the outcomes that will be targeted or the strategy that will be used to achieve improvement in outcomes.

C. Terms and Conditions

26. The Respondent has made changes to the FNCFS Program's Terms and Conditions. However, the AFN disputes the Respondent's assertion that revisions to the Terms and Conditions based on consultation with the Parties. While the Respondent has shared a copy of the revised Terms and Conditions with the Parties and the revisions were discussed at the Consultation Committee on Child Welfare, not all revisions sought by the Parties were incorporated into the document.¹⁰
27. The Terms and Conditions require a thorough review. The AFN made numerous requests for changes to the draft text and these were not all included. In fact, the Respondent advised the AFN that it would have another opportunity to make changes in the future and that it needed to agree to the current iteration of the Terms and Conditions so that ISC could get money out the door. One key revision sought by the AFN was the ability to fund First Nation jurisdiction through the program.
28. The NAC has also raised concerns with the Terms and Conditions. First, funding is tied to delivering services pursuant to provincial child welfare legislation. Secondly, the program will not fund First Nations CFS agencies for activities arising from laws passed by First Nation government pursuant to *An Act respecting First Nations, Inuit and Metis children, youth and families*.¹¹ Finally, the Terms and Conditions outcomes are not based on evidence.

¹⁰ Exhibit 8 to the Affidavit of Lorri Warner, affirmed March 4, 2020 (Oct 23, 2018 minutes at p. 10-11) and June 17, 2019 Minutes at p. 2-3).

¹¹ Exhibit 8 to the Affidavit of Lorri Warner, affirmed March 4, 2020 at (April 2, 2019 Minutes at p. 4).

29. While the Respondent initially indicated that the AFN would have an opportunity to further revise the Terms and Conditions, ISC recently noted that the Treasury Board of Canada's approval is required to bring forward further changes to the FNCFS Program's outcomes.

D. Draft Prevention Directive

30. The AFN remains optimistic that a prevention services directive will be finalized in the future. The AFN is of the view that access to prevention programs will have a significant impact in reducing the large numbers of First Nations children in state care. Such programs will also repair damage to families resulting from the Indian Residential Schools, Indian Day Schools and the 60's scoop.

31. At present, the Prevention Directive appears to apply only to FNCFS Agencies. It is not clear if the directive will also apply to those provincial agencies offering services to First Nations communities. The AFN shares the concern raised by the Caring Society that the prevention directive will adversely impact those First Nations children who receive services directly from provincial or territorial governments, namely: Yukon First Nations, 85 First Nations in British Columbia, a handful in Alberta, Quebec, and Newfoundland and Labrador.

32. Finally, the Prevention Directive incorporates the flawed outcomes as set out in the Terms and Conditions. As noted above, these outcomes are not based on evidence.

E. Capital Directive

33. The Respondent has engaged the Parties to update the capital expenditure provisions in the Terms and Conditions. The Respondent is aware that greater flexibility is required to enable First Nation agencies to address needed repairs to offices and other capital expenditure requirements. On October 30, 2018, ISC advised the parties

that the \$1.5 million cap referenced in the Terms and Conditions for capital projects would be increased to \$2.5 million to account for inflation and other pressures.¹²

34. While the increase was well received, the Parties have noted that this cap is still too small to address office requirements and it is still not possible to fund the building of new offices.

F. ISC's plan to eliminate the lack of coordination in Federal Programs and services adversely impacting First Nations children

35. This Panel found that federal programs lacked coordination in the delivery of services related to child welfare and Jordan's Principle. The lack of coordination adversely impacted First Nations children and families. The Respondent submits that the dissolution of the Department of Indian Affairs and Northern Development, the creation of the ISC and Crown-Indigenous Relations and the passage of *An Act respecting First Nations, Inuit and Metis children, youth and families* has largely addressed the coordination issue.¹³

36. The AFN submits that the Respondent's structural reforms have positively impacted the coordination with respect to the delivery of child welfare services. However, many First Nations children and their families continue to live in poverty, lack adequate housing, do not have access to safe drinking water and various federal programs such as education, housing, social services and public safety are all underfunded. First Nations often cite lack of funding as the main reason for inadequate programs and services on reserve, including special education services, disability-related services, and social and health supports. In addition, First Nations individuals face systemic racism in the criminal justice system, accessing health

¹² Exhibit 8 to the Affidavit of Lorri Warner, affirmed March 4, 2020 at p. 10.

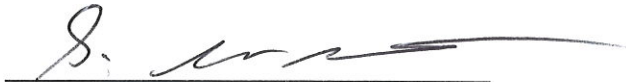
¹³ AGC Submissions at para 28.

services, and seeking employment. Social problems continue to plague First Nations youth and is reflected in this demographic's disproportionately high rates of suicide.

37. The AFN submits that the Respondent's efforts to date will have minimal impacts in addressing these related issues. While beyond the scope of child welfare complaint, a whole of government approach is necessary to facilitate broader outcomes and improve the quality of life for First Nations peoples.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 9, 2020



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