

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2017 CHRT 7

Date: March 29, 2017

File No.: T1340/7008

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

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

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I. Nishnawbe Aski Nation's motion for immediate relief orders

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 2 (“the *Decision*”), this Panel found that First Nations children and families living on reserve and in the Yukon are denied equal child and family services and/or differentiated adversely in the provision of child and family services contrary to the *Canadian Human Rights Act* (“the *Act*”). More specifically, that Indigenous Affairs and Northern Affairs Canada’s (“INAC”) design, management and control of the First Nations Child and Family Services Program (“the FNCFS Program”), along with its corresponding funding formulas and other related provincial/territorial agreements, results in denials of services and creates numerous adverse impacts for many First Nations children and families living on reserve. Among other things, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards.

[2] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that First Nations children and families suffer the adverse impacts in the provision of child and family services enumerated in the *Decision*. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Indigenous peoples, in particular as a result of the Residential Schools system.

[3] INAC was ordered to reform the FNCFS Program and *Memorandum of Agreement Respecting Welfare Programs for Indians* (“the *1965 Agreement*”) to reflect the findings in the *Decision*. It was also ordered to cease applying its narrow definition of Jordan’s Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle.

[4] The Nishnawbe Aski Nation (“NAN”) seeks various immediate relief orders arising out of the *Decision* and two subsequent rulings (see 2016 CHRT 10 and 2016 CHRT 16).

[5] In sum, NAN seeks orders with respect to the provision of mental health services to First Nations in Ontario, the development of a remoteness quotient to be applied to funding for NAN child welfare agencies, and other agency-specific relief.

[6] The First Nations Child and Family Caring Society of Canada, the Assembly of First Nations, the Chiefs of Ontario and the Commission also filed separate motions seeking orders of immediate relief. Along with the motions of the other parties, NAN's motion was heard from March 22-24, 2017 in Ottawa.

[7] During the hearing, the Panel was encouraged to learn that NAN and INAC, were able to reach a resolution on certain aspects of NAN's motion. The following ruling incorporates those resolutions into an order of this Panel. The other orders requested by NAN that are not covered in this ruling shall be dealt with in a separate ruling.

A. Adjournment of request for "Choose Life" order

[8] In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[9] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlaw, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused.

[10] Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5).

[11] The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances.

[12] In its *Decision*, the Panel made findings about the gaps in mental health services for First Nations children and youth. In particular, the Panel identified jurisdictional issues between INAC and Health Canada in the provision of these services that created adverse impacts and denials of services for First Nations children and families. With specific regard to Ontario, mental health services are not covered by the *1965 Agreement* despite the fact that they are legislated in Ontario's *Child and Family Services Act* (see paras. 217-223, 239-242, 246, 364-373 and 391-392, and para. 458 of the *Decision*).

[13] In a subsequent order following the *Decision* and dealing specifically with the *1965 Agreement*, INAC was ordered to provide a rationale, data and other relevant information to assist this Panel in understanding how Budget 2016 investments are responsive to the needs of First Nations children and how it addresses, in the short term, the findings in the *Decision* with respect to mental health services (see 2016 CHRT 16, at para. 73).

[14] In response, INAC indicated it was reviewing the provision of additional services under the *1965 Agreement*, such as mental health services, as part of a longer-term engagement and reform process involving national and regional discussions.

[15] Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch, provided affidavit evidence and was cross-examined on the Wapekeka tragedy. She had no response as to why the Wapekeka proposal was left unanswered. However, according to Ms. Buckland, the gap in mental health services, created by the *1965 Agreement*, "could rightly be considered a Jordan's Principle case."

[16] It is in this context that the NAN seeks a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide.

[17] On March 22, 2017, Health Canada committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative (Jordan's Principle) funding (see Annex "A"). As such, NAN has asked this Panel to adjourn *sine die* its motion for a "Choose Life" order. NAN proposed to report back to the Panel with respect to the Choose Life Working Group by September 6, 2017.

[18] The Panel grants NAN's request to adjourn its motion for a "Choose Life" order and is really encouraged by the Choose Life Working Group initiative. In writing, by September 6, 2017, NAN shall report back to the Panel with respect to the Choose Life Working Group and indicate whether or not it continues to seek an adjournment of its request for a "Choose Life" order.

B. Agreement on the development and implementation of a remoteness quotient

[19] Since joining these proceedings as an interested party in May 2016, NAN has sought to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario. It has advocated that a new remoteness quotient be developed to ensure funding to remote northern communities reflects the high costs of living and the extraordinary costs of providing services in those communities.

[20] Indeed, this was recognized by the Panel in its *Decision* where it found the ability of remote FNCFS Agencies to recruit and retain staff, and to deliver services was adversely impacted by the FNCFS Program. The Panel ordered INAC to immediately address how it determines funding for remote FNCFS Agencies. Current funding does not account for such things as travel to provide or access services, the higher cost of living and service delivery in remote communities, the compounded effect of reducing core funding for remote agencies that may also be smaller agencies (see paras. 213-233 and 291 of the *Decision*). In its subsequent ruling in 2016 CHRT 16, the Panel ordered INAC to provide detailed information to clearly demonstrate how it is determining funding for remote

FNCFS Agencies that allows them to meet the actual needs of the communities they serve (see 2016 CHRT 16, at para. 81).

[21] INAC and NAN have now agreed to terms on the development and implementation of a remoteness quotient for the three FNCFS Agencies that serve NAN communities. INAC will fund the development of this quotient. The specific Terms of Reference of their agreement are attached as Annex “A” of this ruling. The Panel adopts those terms as set out in the order below and pursuant to section 53(2)(a) of the *Act*.

[22] Again, the Panel is pleased by this agreement between INAC and NAN. The other parties are also supportive of this agreement, but await the final development and implementation of the remoteness quotient in NAN communities before taking a position on its application across the country. As such, the Tribunal will reserve its jurisdiction to return to the issue of the remoteness quotient to modify or clarify its order in the future. As with the “Choose Life” order, NAN proposed to report back to the Panel with respect to the development and implementation of the remoteness quotient by September 6, 2017.

[23] The Panel also notes that its acceptance of INAC and NAN’s agreement does not affect the other immediate relief measures requested by the parties. As mentioned above, the motions and measures requested by the other parties, along with the other measures requested by NAN that are not addressed in this ruling, shall be dealt with in a separate ruling. Finally, the Panel’s acceptance of INAC and NAN’s agreement should not be construed to modify or change any immediate relief measures already ordered by the Panel.

II. Order

[24] Having heard from the parties and upon considering their written submissions on NAN's motion for immediate relief and the subsequent resolutions reached with INAC, the Tribunal orders as follows:

1. NAN's motion for a "Choose Life" order is adjourned sine die. NAN shall report back to the Panel with respect to the Choose Life Working Group by September 6, 2017 and indicate whether or not it continues to seek an adjournment of its request for a "Choose Life" order;
2. INAC and NAN will work to develop and implement an immediate relief funding formula for the three FNCFC Agencies that serve NAN communities, in accordance with the Terms of Reference attached to this order as Annex "B";
3. INAC will provide to NAN, within 30 days of this order, funding of \$77,931.02, inclusive of HST, for Phase 1 as set out in the expert proposal provided by NAN to INAC in accordance with the Terms of Reference;
4. INAC will provide NAN with the available empirical data agreed upon by NAN and INAC for Phase 1 by April 15, 2017;
5. The results of Phase 1 will be made available by NAN to INAC by July 15, 2017;
6. In accordance with paragraph 4 of the Terms of Reference, INAC will commit to a further update to the Barnes Report using data from the 2016 Census and any other relevant available data that NAN and INAC agree upon; and
7. By September 6, 2017, INAC and NAN will provide an update to the Tribunal concerning the progress of data collection and analysis in relation to the Terms of Reference and every six months thereafter as long as the Panel remains seized of this order.

[25] The Panel retains jurisdiction over the above orders should it need to modify or clarify them in the future.

III. Concluding remarks

[26] At the outset of the March 22-24, 2017 hearing, the Panel Chairperson stated the following:

I have a few words to bring hope, since people can perish without vision and hope. Truth always needs to be said, even when it's hard. It is a component of justice. This does not mean we cannot bring hope; we have to foster hope.

Hope is the heartbeat of a nation. It gives people the strength to overcome obstacles that seem insurmountable. It brings people together to work towards a common goal and drives them forward even in the midst of adversity. I would like to say to everyone that you are all precious and that there is always hope.

[27] The Panel believes the agreements achieved between NAN and INAC to be carriers of hope.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
March 29, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: March 29, 2017

Date and Place of Hearing: March 22-24, 2017 at Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan N. Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

“Annex A”



Wednesday, March 22, 2017

Grand Chief Alvin Fiddler
Nishnawbe Aski Nation
200-100 Back Street
Thunder Bay, Ontario P7J 1L2

Dear Grand Chief Fiddler:

I am writing to confirm Health Canada's commitment to establish a Choose Life Working Group with Nishnawbe Aski Nation (NAN) aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative (CFI) funding that will address the needs of First Nations children at risk of suicide.

Health Canada commits to completing this work by April 10th as laid out in the draft Implementation Plan attached in Annex A.

The Choose Life application process will be grounded in criteria proposed by NAN in the proposal template submitted to Health Canada on March 21, 2017. It will serve as a pilot that could be broadened to other communities depending on feedback received from First Nations.

The Choose Life Working Group is not meant to displace the work of the Joint Action Table. It is intended to provide an interim measure for communities who have identified and assessed unmet needs of First Nations children in mental health that have resulted due to the lack of availability of services and supports requested in the community, or where a dispute over coverage of the requested services and supports is in question between federal departments or the provincial government.

Health Canada will also ensure that the Choose Life application process is consistent with the national Jordan's Principle approval process so that it enhances and does not create a more onerous approach for NAN communities, families and children to access Child First Initiative funding.

Canada

“Annex A”

Thank you for your consideration and openness to working through these issues.

Welalin,

A handwritten signature in black ink, appearing to read "V. Gideon". The signature is fluid and cursive, with a large initial "V" and a long, sweeping tail.

Valerie Gideon
Assistant Deputy Minister
Regional Operations

- c. Sol Mamakwa, NAN
- Travis Boissoneau, NAN
- Julian Falconer, Falconers LLP
- Paula Isaak, INAC
- Margaret Buist, INAC

“Annex B”

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 and
NISHNAWBE ASKI NATION**

Interested Parties

**ORDER RE NAN MOTION
RESPECTING A REMOTENESS QUOTIENT**

THIS MOTION, brought by the Interested Party, Nishnawbe Aski Nation ("NAN"), for an Order seeking immediate relief in respect of this Tribunal's decision dated January 26, 2016, was heard in Ottawa, Ontario.

UPON reading the materials filed in the herein proceedings, including the Terms of Reference attached to this Order as Schedule "A" ("the Terms of Reference") which were executed in

response to the Tribunal's January 26, 2016 decision and its accompanying September 14, 2016 ruling ordering that INAC report on how it is addressing the remoteness issue in Ontario;

AND UPON receiving the consent of NAN and INAC to this Order, and

AND UPON hearing the parties' oral submissions:

1. **THIS TRIBUNAL ORDERS** that INAC and NAN will work to develop and implement an immediate relief funding formula for the three First Nation Child and Family Services agencies that serve NAN communities, in accordance with the Terms of Reference attached to this Order as Schedule "A";
2. **THIS TRIBUNAL FURTHER ORDERS** that INAC provide to NAN, within 30 days of this Order, funding of \$77,931.02, inclusive of HST, for Phase 1 as set out in the expert proposal provided by NAN to INAC in accordance with the Terms of Reference;
3. **THIS TRIBUNAL FURTHER ORDERS** that INAC will provide NAN with the available empirical data agreed upon by NAN and INAC for Phase 1 by April 15, 2017;
4. **THIS TRIBUNAL FURTHER ORDERS** that the results of Phase 1 will be made available by NAN to INAC by July 15, 2017;
5. **THIS TRIBUNAL FURTHER ORDERS** that, in accordance with paragraph 4 of the Terms of Reference, INAC will commit to a further update to the Barnes Report using data from the 2016 Census and any other relevant available data that NAN and INAC agree upon; and
6. **THIS TRIBUNAL FURTHER ORDERS** that INAC and NAN provide updates to the Tribunal concerning the progress of data collection and analysis in relation to the Terms of Reference every six months from the date of this Order as long as the Tribunal remains seized of this matter.

ORDER signed this ____ day of _____, 2017 _____

“Annex B”

Terms of Reference for Remoteness Quotient Table

*Canadian Human Rights Tribunal: "The [First Nations Child and Family Service] FNCFS Program, corresponding funding and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services that are meant to be in accordance with provincial territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods."*¹

1. Context

Nishnawbe Aski Nation ("**NAN**") and the Government of Canada ("**Canada**") jointly acknowledge the decision of the Canadian Human Rights Tribunal ("CHRT") in *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada et al*, 2016 CHRT 2 ("*Caring Society*").

NAN and Canada jointly recognize the "legacy of stereotyping and prejudice through colonialism, displacement and residential schools."²

NAN and Canada jointly recognize that a "standardized, one-size-fits-all approach to determining funding for remote agencies affects their overall ability to provide services and results in adverse impacts for many First Nations children and families."³

NAN and Canada jointly recognize the unique challenges and "added time and expense"⁴ of delivering child welfare services to remote access communities in the North.

NAN and Canada jointly recognize that the effects of remoteness on Indigenous child welfare agencies in Northern Ontario are exacerbated by "extraordinary infrastructure deficits"⁵ and "distinct differences"⁶ between Indigenous and non-Indigenous child welfare agencies. NAN and Canada jointly recognize that "INAC does not currently provide funding for remoteness in [Ontario], as the Department did not have sufficient data and information on which to base calculations for funding."⁷

¹ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 383.

² *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 402

³ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 16 at para 81

⁴ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at paras 231-233.

⁵ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 244.

⁶ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 234.

⁷ INAC compliance report, October 31, 2016.

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NAN and Canada jointly recognize the "denials of service and adverse effects"⁸ caused for First Nation families by the absence of an equitable and sustainable funding model for culturally appropriate Indigenous child welfare services and the need for First Nations and the federal and provincial governments to work together to develop such a model.

2. Guiding Principles

The guiding principles at the foundation of the partnership between NAN and Canada include:

- The importance of collaboration and transparency to ensure open and informed lines of communication;
- The primacy of the best interest of the child;
- The need for an equitable and evidence-based child welfare funding model that is responsive to geographic remoteness, community needs and infrastructure, and cultural traditions; and
- The need for a sound empirical basis for funding calculations.

3. Mandate

This Table is intended to allow NAN and Canada to collaborate in the spirit of reconciliation on solutions to the deficiencies in remoteness funding for Indigenous child welfare that were found by the CHRT. The objective is to develop a remoteness quotient that can be used for funding First Nation child welfare agencies that serve various remote communities. NAN and Canada will develop a process for obtaining expert advice on this remoteness quotient. NAN and Canada will develop mutually agreeable remedies related to a remoteness quotient for joint presentation to the CHRT for implementation in the remedy phase of the Caring Society proceedings in accordance with the herein terms of reference and the attached Schedule A being correspondence from NAN to Canada of January 19, 2017.

NAN and Canada will discuss the needs of NAN communities relating to remoteness in the context of the CHRT's order that Canada "cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings" of its decision.⁹ The agenda for these discussions will be informed by the expertise of child welfare providers, First Nation leadership, and appropriate government representatives.

NAN and Canada do not speak for any of the other parties to the Caring Society proceedings, but recognize that the work of the Table may inform remedies that will affect other organizations.

4. Scope

⁸ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 392.

⁹ *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 481.

“Annex B”

NAN and Canada will engage in collaborative discussions with respect to the child welfare funding deficiencies identified by the CHRT regarding remoteness as they impact NAN. Any additional child welfare issues that are jointly identified by NAN and Canada and agreed to may be addressed.

Specific topics that are within the scope of the Table include:

- Collection and analysis of empirical data from all relevant sources to inform remoteness funding for Indigenous child welfare;
- An immediate update to the Bames Report using data from the 2006 census and 2011 national household survey;
- A further update to the Bames Report using data from the 2016 census;
- The design and implementation of a direct survey of First Nations in northern Ontario with respect to community needs and infrastructure as it relates to child welfare;
- Development and implementation of a new funding formula to address geographical remoteness;
- The unique history, culture, and socioeconomic circumstances of NAN communities;
- The unique challenges faced by Indigenous child welfare agencies in the North, including infrastructure and human resources deficits;
- Implementation of evidence-driven measures to ensure stable and equitable remoteness funding for Indigenous child welfare in the short, medium, and long term;
- Ongoing monitoring and evaluation of remoteness funding models to measure effectiveness; and
- Any other issues related to remoteness funding, the findings of the CHRT, and as agreed upon by NAN and Canada.

5. Membership

The Parties to the Table are NAN and Canada, as represented by the delegates chosen by each Party. Where appropriate, NAN and/or Canada may consult with other parties outside of this Table, on a confidential and without prejudice basis, regarding issues discussed at the Table.

6. Procedure

Term: These terms of reference remain in effect until March 31, 2017 unless otherwise agreed upon by NAN and Canada.

Meetings: The Table shall aim to meet at least once per week. Meeting locations shall alternate to meet the needs of both Parties to the extent possible.

Levels of Negotiation: The Table shall meet either as a Political Table or a Technical Table. Political Table meetings shall include appropriate representatives of both Parties who are prepared to discuss all issues on the agenda and possess general decision-

“Annex B”

making authority. Technical Table meetings shall include delegates with child welfare, economic, legal, or other appropriate expertise who are prepared to collaboratively develop the substantive materials for discussion by the Political Table. Certain delegates from both Parties may attend both Political and Technical Table meetings to ensure consistent and productive dialogue.

Quorum: Full attendance is encouraged but meetings may proceed as long as both Parties are represented.

Agenda: The Parties will rotate the responsibility of preparing an agenda for each meeting, in consultation with the other Party. The agenda and all other materials are to be circulated as soon as possible before each meeting, and in any event at least 24 hours in advance.

Minutes: Meeting minutes and action items are to be shared following each meeting.

Resourcing: Canada shall provide for the reasonable and adequate resourcing of Table meetings and supporting technical work.

Member Responsibilities:

- Attend and actively participate at meetings;
- Work within the terms of reference;
- Raise and respond to relevant issues in discussion;
- Consider the needs of both Parties, work towards common goals, and negotiate collaboratively in good faith;
- Share relevant information to facilitate evidence-driven discussion;
- Undertake necessary preparatory or follow-up action;
- Seek approvals within their organization as appropriate and necessary;
- Explore all options to obtain consensus and resolve opposing viewpoints;
- Maintain confidentiality of discussions.

Further to the member responsibilities set out above, members are permitted to reference the existence of the Table but the substance of all discussions and these terms of reference will be confidential unless both NAN and Canada agree otherwise. These terms of reference and the proceedings of the Table are not to be used for any purpose except as expressly stated herein.

Dated this 10th day of March, 2017



Alvin Fiddler
Grand Chief, Nishnawbe Aski Nation



The Honourable Carolyn Bennett
Minister, Indigenous and Northern
Affairs Canada