

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

**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 Services Canada)**

Respondent

- and -

**CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION**

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
WRITTEN SUBMISSION RE RETENTION OF JURISDICTION, MAJOR CAPITAL,
REALLOCATION POLICY, FUNDING AGREEMENTS AND TIMELINES FOR
CONSULTATION COMMITTEE DELIBERATIONS**

February 4, 2019

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I. Retention of Jurisdiction by the Tribunal after March 31, 2019

1. In response to the Panel's request for positions on the retention of jurisdiction at the Case Management Conferences on October 31, 2018 and December 2017, 2018, the First Nations Child and Family Caring Society (the "**Caring Society**") seeks an order that the Canadian Human Rights Tribunal (the "**Tribunal**") retain jurisdiction over the complaint until March 31, 2020. This requested order reflects the Caring Society's stated position at these Case Management Conferences that the Tribunal's retention of jurisdiction is required to ensure that Canada will give full effect to the Tribunal's orders. Discussion is also ongoing at the Consultation Committee on Child Welfare ("**CCCW**") on a number of subjects.

2. Since the Tribunal's decision (2016 CHRT 2) Canada has repeatedly been found in non-compliance with the Tribunal's orders. The Tribunal's successive orders have been critical in moving Canada towards compliance. In the absence of Tribunal supervision, CCCW discussions are very unlikely to result in compliance with the Tribunal's orders. This is particularly concerning given Canada's repeated reliance on "discussions" versus "action" to respond to the Tribunal's orders, which has had the effect of perpetuating the discrimination for children and families.

3. In its January 26, 2016 decision determining that Canada's FNCFS Program and implementation of Jordan's Principle were discriminatory and contrary to the *Canadian Human Rights Act* ("**CHRA**"), the Panel indicated that it had "outstanding questions on the remedies being sought by the Complainants and Commission" and that it would "maintain jurisdiction over this matter pending the determination of those outstanding remedies".¹ The Panel has yet to make orders regarding all outstanding remedies, as the orders to date have principally dealt with immediate relief. Long-term reform has yet to be secured.

4. An extension of the Tribunal's jurisdiction until at least March 31, 2020 will allow the CCCW to continue its work on long-term relief both in relation to the FNCFS Program and Jordan's Principle. Specifically, Canada has yet to provide responses to: 1) the findings and recommendations contained in the Institute for Fiscal Studies and Democracy's ("**IFSD**") "current

¹ *First Nations Child and Family Caring Society et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 2, at para. 494 ("2016 CHRT 2"), Tab 3 of the Joint Record of Documents ("**ROD**").

state” report, dated December 15, 2018²; 2) the recommended follow-up work to the “current state” report to develop the new funding model ordered by the Tribunal; and 3) how the new funding approach will be implemented. Canada has been ordered to develop an alternative funding system in order to reform the FNCFS Program and the 1965 Agreement to reflect the Tribunal’s findings. This funding system must be in place before the Tribunal relinquishes jurisdiction over its orders; otherwise, these orders will not be effective.

5. The Caring Society continues to receive a significant number of complaints from First Nations, professionals, and family members regarding Canada’s failure to implement Jordan’s Principle per the Tribunal’s orders. At every turn, the Caring Society immediately advises Canada of the issues and occasionally this results in positive change for the family, but the number, nature and severity of the non-compliance issues has resulted in the Caring Society documenting these concerns for Canada in a report outlining systemic non-compliance patterns and suggesting solutions.³

6. Furthermore, Canada has yet to share the amount and terms and conditions of funding for Jordan’s Principle after March 31, 2019. Moreover, in October of 2018 and again in January 2019, the Caring Society submitted substantial revisions to Canada’s Standard Operating Procedures (SOP),⁴ which guide its implementation of Jordan’s Principle and are an evolving document.⁵ Canada has not yet furnished the Caring Society with a revised draft.⁶

² Affidavit of Lori Warner, affirmed January 29, 2019 (the “Warner Affidavit”), Institute of Fiscal Studies and Democracy “current state” report, dated December 15, 2018, at Exhibit “2”.

³ See for example, cross-examination of Dr. Valerie Gideon, October 30, 2018 (the “30 Gideon Cross”), at p. 182 | lines 5-18, Tab 41 of the ROD; and cross-examination of Dr. Valerie Gideon, October 31, 2018 (the “31 Gideon Cross”), at p. 8 | lines 11-18; pp. 14 -15; p. 51 | lines 16-22, Tab 42 of the ROD; Tab 12 of the Caring Society Exhibits to the October 30-31, 2018 cross-examination of Dr. Valerie Gideon: Caring Society Concerns with Jordan’s Principle Compliance, Tab 5 of the February 4, 2019 Caring Society Motion Record (“Feb 4 CSMR”); 31 Gideon Cross at p. 69 line 7 to p. 71 line 21, Tab 42 of the ROD.

⁴ Affidavit of Andrea Auger, affirmed January 31, 2019 (the “Auger Affidavit”) at paras 3, 4 and 6, Tab 2 of the Feb 4 CSMR.

⁵ Tab 7 of the Caring Society Exhibits to the October 30-31, 2018 cross-examination of Dr. Valerie Gideon: October 5, 2018 Jordan’s Principle Standard Operating Procedures, Tab 5 of the Feb 4 CSMR; 30 Gideon Cross at p 155 line 22 to p 156 line 14, Tab 41 of the ROD.

⁶ Auger Affidavit at para. 7, Tab 2 of the Feb 4 CSMR.

7. In order to provide an assurance of progress to the Tribunal, the Caring Society proposes that the CCCW shall provide quarterly progress reports to the Tribunal on a quarterly basis regarding the progress of its deliberations, on the following dates:

1. Friday, June 14, 2019;
2. Friday, September 6, 2019;
3. Friday, December 6, 2019; and
4. Friday, February 28, 2020.

8. The Caring Society's view is that over this period, it should be possible for Canada to develop and test the alternative funding model ordered by the Tribunal, so that it is in place for the beginning of fiscal year 2020/21 (i.e. April 1, 2020). This assumes that Canada funds and supports the additional funding approach research identified in the IFSD report (which the Caring Society states is essential to ensuring the best outcomes for children and families and meeting the Tribunal's orders).

9. Regarding Jordan's Principle, this extension will provide time to resolve outstanding non-compliance concerns and enable a compliance review of Canada's post March 2019 approach to Jordan's Principle (April 1, 2019 to March 31, 2022). The Caring Society agrees that Canada has made progress on Jordan's Principle, however, there are significant outstanding concerns and uncertainties that require resolution. The requested extension will ensure that this work continues, keeping children at the forefront while safeguarding their rights pursuant to the Tribunal's orders and process.

10. The reporting dates noted above could also be associated with appearance dates for mediation/adjudication, case conferences and/or further adjudication.

II. Major Capital Costs Must be Funded

11. The Caring Society seeks the following orders regarding major capital funding:

1. Further to the Tribunal's February 1, 2018 orders, Canada shall fund the major capital costs of small FNCFS Agencies, and for administration and governance, prevention, intake/investigation, and legal services at their actual cost;
2. In consultation with the CCCW, Canada shall provide funding for FNCFS Agencies to conduct major capital needs and feasibility studies;
3. Where such feasibility studies identify a need for major capital, Canada shall fund the design, land purchase (if required) and fulfillment of permit and other administrative requirements to facilitate construction;
4. Where projects are ready to proceed, Canada shall fund the major capital needs of FNCFS Agencies at actual cost;
5. In order to carry out orders #3 and #4, Canada shall create a long-term capital envelope for FNCFS Agencies to address their major capital needs as they continue to arise, with the initial size of the envelope to be guided by the IFSD report.⁷
6. Canada shall write to all First Nations child and family service agencies within 30 days of the order advising them on how to access major capital funding; and
7. Canada shall post its policy on major capital for FNCFS agencies on its website.

12. The Caring Society is seeking the above orders to ensure that First Nations children and families accessing the FNCFS Program are able, without discrimination, to access essential prevention and other services that cannot be delivered without a major capital investment.

13. As the Tribunal found in its January 26, 2016 decision, the FNCFS Program's funding structure often creates funding deficiencies for items like capital infrastructure, among other items.⁸ The Tribunal found that one of the main adverse impacts of the FNCFS Program was the failure to provide for capital costs, among other items, "hinder[ing] the ability of FNCFS Agencies

⁷ See for example: *Conseil scolaire francophone de la Colombie-Britannique et al v British Columbia*, 2016 BCSC 1764 at paras 6756-6765, Tab 3 of the February 4, 2019 Caring Society Book of Authorities ("Feb 4 CSBA").

⁸ 2016 CHRT 2 at para 389, Tab 3 of the ROD.

to provide provincially/territorially mandated services, let alone culturally appropriate services to First Nations children and families”.⁹

14. While the Tribunal’s February 1, 2018 order on building repairs responds to one aspect of FNCFS Agencies’ capital needs (i.e. maintenance), it does not address the broader question of FNCFS Agency capital needs, as it excludes matters such as the addition of space to support new or expanded prevention programming. Despite the Panel’s encouragement in its September 14, 2016 order that “INAC should develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies”,¹⁰ there has been little progress.

15. As outlined in the statement regarding capital dated January 21, 2019 and attached to this submission in Appendix A, the parties have been discussing the matter of major capital within the FNCFS Program for many months. In addition to the deficiencies noted in the Tribunal’s January 26, 2016 decision, major capital pressures go hand-in-hand with the necessary expansion of services available pursuant to Jordan’s Principle (particularly through group requests), and increased intake, assessment and prevention services, Band Representative services, etc. Indeed, increased funding for new staff and new programs cannot be effective if there is not adequate space to house programs and staff in ways that facilitate effective culturally-based service delivery.¹¹ Contrary to Canada’s argument at paragraph 7 of its submission, the Caring Society is not seeking an order directing the allocation of funds for capital expenditures outside the FNCFS Program and Jordan’s Principle. Rather, the Caring Society is seeking an order providing for the ancillary major capital costs of increased programming that accompanies the Tribunal’s existing orders.

16. Following discussions at the CCCW, major capital has been added as an eligible expenditure pursuant to the FNCFS Program terms and conditions.¹² Canada has recognized infrastructure as part of its costing exercise for Jordan’s Principle.¹³ Similar circumstances apply to Band Representative Services. However, despite three years having passed since the Tribunal’s

⁹ 2016 CHRT 2 at para 458, Tab 3 of the ROD.

¹⁰ 2016 CHRT 16 at para 97, Tab 8 of the ROD.

¹¹ Cross-examination of Ms. Paula Isaak, October 30, 2018 (the “Isaak Cross”), at p. 86 | lines 5-10, Tab 41 of the ROD.

¹² January 21, 2019 Statement on Capital at para 27; Affidavit #4 of Doreen Navarro, affirmed January 28, 2019 (Navarro Affidavit #4) at Exhibit “P”; Warner Affidavit at Exhibit “1”.

¹³ Summary statement regarding capital at Tab 4 “ISC Jordan’s Principle Cost Estimate Development”, Tab 9 of the Feb 4 CSMR; 31 Gideon Cross at p. 66 line 13 to p. 69 line 16.

Decision (2016 CHRT 2) and the IFSD report having identified the quantum of the initial required investment for major capital,¹⁴ Canada has not tabled a concrete commitment to meet these needs or a plan to accomplish it, and has yet to indicate that it supports the Tribunal retaining jurisdiction until this major element of addressing the discrimination found within the FNCFS Program is resolved.

17. As the Panel held at paragraph 303 of its February 1, 2018 ruling regarding immediate relief:

The Panel wants to make it clear that discussions with no comprehensive plan or specific deadlines attached to it can go on for a very long time and seeing these types of arguments is a source of concern. Also, as already discussed in the *Decision*, a piecemeal approach is to be discouraged.¹⁵

18. At paragraph 13 of its submission, Canada asserts the need to work closely with the CCCW, the National Advisory Committee, FNCFS Agencies, “front-line service providers,” communities, leaders, organizations, provincial governments and the Yukon government as precluding action on major capital. This is an approach that Canada has used before, and does not address the Panel’s encouragement in its February 1, 2018 ruling to provide evidence where outside parties provide some obstacle to making progress in implementing the Tribunal’s orders.¹⁶ In the particular context of the FNCFS Program’s capital needs, the immediate need figure generated by IFSD was the result of a survey process that involved a representative sample comprised of nearly three quarters of FNCFS Agencies across the country.¹⁷ Contrary to the Panel’s encouragements, Canada has provided no evidence of why this highly reliable data source is insufficient.

19. On October 30, 2018, Ms. Paula Isaak was cross-examined before the Tribunal. She had left her position as the Assistant Deputy Minister for Economic, Education and Social Development Programs and Policies for Indigenous Services Canada on October 9, 2018 and, therefore, her information was current up until that date.

¹⁴ Navarro Affidavit #4 at Exhibit “O”, slide 11, Tab 1 of the Feb 4 CSMR; Warner Affidavit at Exhibit “2” (Institute of Fiscal Studies and Democracy December 15, 2018 report) at pp. 3 and 70-75.

¹⁵ 2018 CHRT 4 at para 303, Tab 15 of the ROD.

¹⁶ 2018 CHRT 4 at para. 443, Tab 15 of the ROD.

¹⁷ Warner Affidavit at Exhibit “2” at pp. 20-27 and at Appendix I – Expert Opinion: Data Reliability and Methodological Review.

20. Ms. Isaak acknowledged that major capital funding is of particular concern to the parties and requires attention. According to Ms. Isaak, Canada's failure to move on this issue was a result of a lack of information regarding agency major capital requirements rather than an attempt by Canada to thwart the needs of agencies:

[...] So, I don't think the conversation's over on capital. So, I think there is more conversation about exactly those questions that may be undertaken.

My comments at the Consultation Committee were around understanding – we needed to get a full understanding of what the needs were for major capital. Across the country we were mapping – starting the process to map what the actual situation was [for] the agencies. So, whether they were owned or leased or rented. Across the country it varies.

I believe I'd also mentioned there are community capital plans that would come into the equation around building of buildings in communities. So, there would need to be some understanding of that vis-à-vis the agencies. IFSD was also doing work around needs, including capital needs. So, some preliminary information had been made available by them, as we were awaiting – and I believe that's coming up soon – a report from IFSD, which would hopefully provide some helpful information.

So, understanding the full landscape of the capital needs was something that I had indicated would be important for the department to be able to make a submission around capital.¹⁸

21. IFSD circulated its report to the CCCW on December 15, 2018 with a final desktop published version following on January 14, 2019. IFSD presented its findings to the CCCW on January 17, 2019.¹⁹ The information Canada needs to meet major capital needs for FNCFS Agencies is in its hands. Contrary to Canada's argument at page 8 of its submission, the Caring Society is not seeking an order from the Tribunal that would dictate a specific funding amount. Instead, the Caring Society is seeking an order that Canada act on the expert advice that it has received as a product of the needs assessment that was ordered by the Tribunal in order to meet FNCFS Agencies' immediate major capital needs.

22. IFSD has identified a need for a one-time investment of between \$116 million to \$175 million for FNCFS Agency headquarters facilities. There is no need to wait for the full

¹⁸ Isaak Cross at p. 56 line 10 to p. 57 line 8. See also p. 87 | lines 8-24 and p. 88 | lines 17-22, at Tab 41 of the ROD

¹⁹ Navarro Affidavit #4 at para 16, Tab 1 of the Feb 4 CSMR.

implementation of the new funding model for FNCFS Agencies to meet these needs., It is important to acknowledge that major capital expenditures have not been funded since the FNCFS Program was launched in 1991, as they were excluded from both Directive 20-1²⁰ and the EPFA,²¹ and have not been funded under the 1965 Agreement since 1975.²² This means that some FNCFS Agencies have been waiting for over 28 years to have their major capital needs met by Canada. Canada has already had ample time to respond to this pressing need.

23. Finally, Canada’s assertion at paragraph 16 of its submissions that it has “complied with the orders regarding capital expenditures to date” obfuscates the purpose of the Consultation Protocol ordered by the Panel and fails to appreciate the intent of the orders made in 2016 CHRT 2 and following. The Panel’s general approach in its February 1, 2018 order was to provide guidelines for Canada to move forward in consultation with the parties in order to address FNCFS Agencies’ and children and families’ specific needs. Canada citing the lack of a specific order requiring the expenditure of funds for major capital projects as confirmation of its compliance fails to heed the Panel’s repeated instruction not to read its orders in isolation from its reasoning.²³ The Panel identified manifest deficiencies in major capital funding in the FNCFS Program, which has been confirmed by IFSD in its FNCFS agency needs assessment. Proactive steps, and not simply policy changes, are required to close the gap.

III. The December 21, 2018 policy regarding reallocations within the ISC budget

24. With respect to the ongoing practice of reallocation, the Caring Society seeks the following four orders:

1. In consultation with the CCCW, Canada will amend the “adverse impact” screen regarding temporary reallocations to ensure it meets the Tribunal’s orders and post the final result on the home page of the ISC website within 30 days of the order.
2. The “adverse impact” screen established by the policy for temporary reallocations from programs listed in the policy should also apply to permanent reallocations out of non-listed programs.

²⁰ 2016 CHRT 2 at paras 157, 162, 177, and 275, Tab 3 of the ROD.

²¹ 2016 CHRT 2 at paras 289 and 344, Tab 3 of the ROD.

²² 2016 CHRT 2 at para 245, Tab 3 of the ROD.

²³ 2017 CHRT 14 at para 133, Tab 13 of the ROD, and 2018 CHRT 4 at para 63, Tab 15 of the ROD.

3. Funds that are temporarily reallocated from a program listed in the policy shall be returned to the program in question within 30 days.
4. Officials determining whether a reallocation (whether labelled as “permanent” or “temporary/cash management”) will have an adverse impact on First Nations children and families shall have training to familiarize them with the factors leading to the over-representation of First Nations children in care.

25. On February 1, 2018, the Tribunal ordered Canada “to stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the *Decision*”.²⁴

26. On December 21, 2018, Canada adopted its policy on reallocation. Prior to its adoption, Canada shared a draft with the CCCW on October 15, 2018.²⁵ The Caring Society provided its comments on November 1, 2018, with these ranging from copy editing to substantial concerns such as a lack of timeframes for the return of the “cash managed” or reallocated funds to their original source.²⁶ Canada provided the final version of its policy on January 8, 2019, for information, along with a response to the Caring Society’s comments.²⁷ Ms. Wilkinson confirmed on January 16, 2019 that the reallocation policy was considered final.²⁸

27. While Canada integrated a number of the Caring Society’s suggestions into the version of the policy that it finalized on December 21, 2018, the Caring Society notes that the suggestions not agreed to by Canada are significant (i.e. failing to put timeframes for repayment of “cash managed” or reallocated funds to the allocation from which they were sourced). It was, therefore, surprising that Canada unilaterally finalized the document and closed the consultation. Specifically, the Caring Society has the following five concerns:

1. It is unclear what programs are excluded from the policy (i.e. from which programs may reallocations be made on a temporary or permanent basis without further consideration). The Caring Society is not aware of the whole suite of ISC programs, such that knowing the programs from which reallocation is prohibited is only a partial answer.

²⁴ 2018 CHRT 4 at para 422, Tab 15 of the ROD.

²⁵ Navarro Affidavit #4 at Exhibit “H”, Tab 1 of the Feb 4 CSMR.

²⁶ Navarro Affidavit #4 at Exhibit “I”, Tab 1 of the Feb 4 CSMR.

²⁷ Navarro Affidavit #4 at Exhibit “J”, Tab 1 of the Feb 4 CSMR.

²⁸ Navarro Affidavit #4 at Exhibit “K”, Tab 1 of the Feb 4 CSMR.

2. The policy allows reallocations to be made from the Infrastructure program. Infrastructure needs underlie many of the risk factors facing First Nations children and families living on reserve, such that reallocations out of such programs could reasonably result in negative consequences for them, including but not limited to a reduction in services that could reasonably be expected to increase the likelihood of the child's removal (i.e. an adverse impact). This possibility was acknowledged by Ms. Isaak during her cross-examination.²⁹
3. The policy fails to put sufficiently clear parameters around "temporary" reallocations. This does not respond to the Auditor General's 2008 finding that reallocation to meet unforeseen needs can cause the needs that would have been addressed with the funds subject to reallocation to deteriorate, particularly in light of Ms. Isaak's acknowledgment in her cross-examination that such "temporary" reallocations could spread across more than one fiscal year.³⁰
4. The policy does not indicate how decisions will be made by ISC personnel regarding what constitutes an adverse impact for First Nations children and families.³¹

28. It is worth noting that Ms. Isaak presented a hopeful and optimistic picture of the importance of ongoing dialogue with the parties and the impact that such a dialogue was to presumably have on the issue of reallocation, as well as for major capital (noted above) and FNCFS Agency funding agreements (noted below).³²

29. However, given that Canada has yet to indicate any support for an extension of the Tribunal's jurisdiction beyond March 31, 2019 and has failed to provide a time-limited plan to achieve meaningful compliance whilst ensuring the effects of the ongoing discrimination are mitigated, guidance from the Tribunal by way of orders is required. The Caring Society is concerned that Canada's calls for "discussion" will simply serve to put the Tribunal's orders to eliminate discrimination within the FNCFS Program into abeyance by rejecting compliance-related solutions proposed by the Parties, whilst providing no alternatives.

²⁹ Isaak Cross at p. 25 | line 24 and p. 26 | line 1, at Tab 41 of the ROD.

³⁰ Isaak Cross at p. 29 | lines 23-25; p. 30 | lines 1-10; p. 36 | lines 15-21, Tab 41 of the ROD.

³¹ See for example: Isaak Cross at p. 37 | lines 5-22, Tab 41 of the ROD.

³² Isaak Cross at p. 56 line 7 to p. 57 line 12; p. 60 line 16 to p. 61 line 5; p. 34 line 24 to p. 35 line 12; p. 37 lines 5-22, Tab 41 of the ROD.

IV. The Funding Agreements Remain Insufficient

30. The Caring Society seeks the following order:

1. Funding Agreements with FNCFS Agencies and Ontario First Nations (band representatives) that are implementing the Tribunal's orders regarding funding for First Nations child and family services shall include a "non-derogation clause" providing that the terms of the funding agreement do not limit any of the recipient's rights to take legal recourse against Canada if the Tribunal's orders are not followed.

31. On September 14, 2016 the Tribunal made the following order regarding Canada's funding agreements under the FNCFS Program:

In the Panel's view, the request to update policies, procedures and agreements is captured by its general order to reform the FNCFS Program and *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*.³³

32. On September 11, 2018, Canada provided the CCCW with the text of its template FNCFS Agency funding agreement, as well as the revisions proposed to implement the Tribunal's February 1, 2018 orders regarding funding at actuals, whether as amendments to existing agreements or as modifications to the template agreement where new agreements were required.³⁴ The Caring Society provided its comments on September 25, 2018.³⁵ Canada provided the final version of its funding agreement text on December 3, 2018, for information only, along with a response to the Caring Society's comments.³⁶

33. While Canada integrated a number of the Caring Society's comments into its funding agreement, the Caring Society has concerns with sections 6 (termination) and 28 (dispute resolution) of the funding agreement.

34. Section 6 of the funding agreement entitles Canada to terminate the funding agreement if Parliament opts not to allocate funds that would fund the agreement, if Treasury Board changes or

³³ 2016 CHRT 16 at para 137, Tab 8 of the ROD.

³⁴ Navarro Affidavit #4 at Exhibit "L", Tab 1 of the Feb 4 CSMR.

³⁵ Navarro Affidavit #4 at Exhibit "M", Tab 1 of the Feb 4 CSMR.

³⁶ Navarro Affidavit #4 at Exhibit "N", Tab 1 of the Feb 4 CSMR.

ends the program, if the Minister changes or ends the program, or if Parliament changes funding levels. This is particularly concerning to the Caring Society as an FNCFS Agency that has signed a funding agreement containing this clause could be taken to have agreed to the possibility of Canada withdrawing funding. This would be contrary to the Tribunal's order in 2016 CHRT 16 at para 160(A)(1) that Canada "not decrease or further restrict funding for First Nations child and family services," as well as the Tribunal's orders in 2018 CHRT 4 to fund in a number of areas at actual costs.

35. Section 28 of the funding agreement governs dispute resolution, and provides that a dispute resolution process will not be used regarding the amount of funding provided under the agreement. This provision would preclude a FNCFS Agency from taking issue with Canada's contravention of the orders regarding funding for First Nations child and family services noted above.

36. It is clear that parties cannot "contract out" of human rights legislation.³⁷ Accordingly, Canada's funding agreements should not purport to do so by allowing Canada to determine when it is compliant with the Tribunal's orders regarding First Nations child and family services funding absent any meaningful recourse from the funding recipient.

37. Notwithstanding that the Tribunal's orders would almost certainly prevail over the wording of the funding agreement in any litigated setting, particularly with respect to funding the agencies (as acknowledged by Ms. Isaak),³⁸ this set of circumstances places the burden and the onus on the agencies to seek redress against Canada should Canada exercise "rights" under the agreements that are non-compliant with the Orders. Such an arrangement is not in keeping with the Tribunal's order, nor the spirit of the Tribunal's ongoing directions to Canada, and must be remedied.

³⁷ *Ontario Human Rights Commission v Borough of Etobicoke*, [1982] 1 S.C.R. 202 at pp 213-214, Tab 6 of the Feb 4 CSBA.

³⁸ Isaak Cross at p. 59 | line 2, Tab 41 of the ROD.

V. Setting timelines for the completion of work presently underway at the Consultation Committee on Child Welfare

38. There are several initiatives underway at the CCCW, over and above the implementation of a new funding model for the FNCFS Program, that will not be completed by March 31, 2019, including:

1. Developing an independent and procedurally fair appeals process for denials of Jordan's Principle requests;
2. Developing an independent and procedurally fair appeals process for denials of requests by FNCFS Agencies;
3. Developing and implementing training for ISC employees whose work will impact First Nations children to prevent recurrence of discrimination;
4. Performance evaluation for ISC employees in a manner to prevent the recurrence of discrimination;
5. An accountability framework for Canada's implementation of the Tribunal's orders regarding Jordan's Principle; and
6. Developing, implementing and funding a baseline study regarding the baseline needs of First Nations children, based on the Adverse Childhood Experiences model.

39. Each of these measures responds to orders that the Caring Society and the AFN have sought. In some cases, such as with regard to training and appeals related to Jordan's Principle requests, the Panel has not made orders given that Canada was open to discussion on the matter.³⁹ Canada has agreed to work with the Caring Society and the AFN at the CCCW to implement these measures, and progress is being made on some of these matters. However, this progress risks being illusory if the Tribunal's jurisdiction ends without an enforceable plan to achieve relief on these measures, as the Caring Society and the AFN will have lost the opportunity to obtain legally

³⁹ 2016 CHRT 16 at para 141 (re training), Tab 8 of the ROD; 2017 CHRT 14 at paras 100-103 (re appeals), Tab 13 of the ROD.

enforceable long-term relief in these areas. The Tribunal’s order that Canada consult with the parties cannot have been intended to shield Canada from enforceable action, nor should Canada be able to use its slow implementation of the CHRT decision (as evidenced by the four non-compliance orders that followed the Tribunal’s January 26, 2016 decision) as a way to “run out the clock” of the Tribunal’s jurisdiction to avoid legal accountability for areas of non-compliance

40. Accordingly, if the Tribunal decides not to retain jurisdiction beyond March 31, 2019 and until Canada is in full compliance with the orders made, the Caring Society seeks specific orders, with time frames by which Canada is to implement each order so that the Parties can seek relief from the Federal Court of Canada if necessary.

All of which is respectfully submitted this 4th day of February, 2019.



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