

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 FAILURE TO PROVIDE FULL RESTITUTION TO
SMALL FIRST NATIONS AGENCIES FOR DOWNWARD SCALING FROM
JANUARY 26, 2016 to FEBRUARY 1, 2018**

April 14, 2019

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I. Overview

1. First Nations Child and Family Services Agencies (“FNCFS Agencies”) serving fewer than 800 First Nations children have been treated differently by Canada than other FNCFS Agencies since the Tribunal’s January 2016 ruling holding that the FNCFS Program discriminated against First Nations children and families on the basis of race and national and/or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“*CHRA*”).
2. Canada applied “downward adjustments” to the operations funding for small FNCFS Agencies serving fewer than 800 registered Indian children on reserve. The operations formula includes core costs such as salaries (such as funding for an Agency Director or for administrative staff) and operational expenses, such as funding for a board of directors, for rental fees or Information Technology (“IT”).
3. This downward scaling was a practice that the Tribunal noted in its January 2016 decision as having adverse impacts for First Nations children.¹ However, despite this finding, Canada largely persisted in this practice following the January 2016 decision, albeit with a minor adjustment in treatment for FNCFS Agencies serving fewer than 300 children in January 2016.
4. In February 2018, the Tribunal ordered Canada to cease this downward scaling practice going forward, and to reimburse the actual costs retroactive to January 26, 2016. Initially, Canada’s position was that it would only reimburse for expenditures actually made, as opposed to the actual costs identified in its funding model. Later, Canada agreed to reimburse salaries and benefits to comparable provincial levels. However, Canada is refusing to reimburse FNCFS Agencies for non-salary and benefits-related items affected by its discriminatory application of downward population thresholds, unless an expenditure was made by the FNCFS Agency.
5. Accordingly, the Caring Society seeks an order that the non-salary and benefits items in the fixed funding stream be reimbursed to the full funding level, in order to place FNCFS Agencies in the same position they would have been in but for Canada’s discriminatory application of the downward population adjustments in its funding formulae.

II. The Tribunal’s Findings and Orders Regarding Small First Nations Agencies

6. The Tribunal has made a number of findings and orders regarding small FNCFS Agencies:

¹ *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 458, Tab 3 of the Joint Record of Documents (Vol. 1).

a) 2016 CHRT 2

- i. Para 384: “[...] For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies, and for some, put them in jeopardy of closing.”
- ii. Para 386: “AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care – to remove them from their families.”
- iii. Para 389: “Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services [emphasis added].”
- iv. Para 458: “[...] Non-exhaustively, the main adverse impacts found by the Panel are: The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. [...] The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention [...] [emphasis added].”

b) 2016 CHRT 10:

- i. Para 23: “The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-

2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.”

c) 2016 CHRT 16:

- i. Para 24: “With regard to small FNCFS Agencies, INAC indicates that agencies with less than 800 children in care will still be subject to scaling with respect to their core funding (expenses for Board of Directors, employee salaries, benefits, training and travel, funding for agency evaluations, audits, insurance, legal fee and administrative overhead). However, this does not decrease the funding provided to an agency for protection or prevention services. According to INAC, future approaches to funding small agencies will be part of longer-term engagement with First Nations and provincial partners.”
- ii. Para 29: “[...] The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC’s old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them.”
- iii. Para 36: “The Panel reiterates its immediate relief orders that all items identified in paragraph 20 of 2016 CHRT 10, and not limited to the items that were underlined, must be remedied immediately, including the adverse effects related to: [...] Remote and/or small agencies [...]”.
- iv. Para 40: “For the assumptions in the funding formulas based on population levels, INAC is ordered to immediately stop formulaically reducing funding based on arbitrary population thresholds. Again, funding must be provided based on an assessment of the actual service level needs of FNCFS Agencies. As above, INAC will be required to report back to the Tribunal confirming that it has implemented this order and clearly demonstrate how it has done so.”
- v. Para 160(A)(5): “In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above).”

d) 2018 CHRT 4 (as amended on February 13, 2018 and September 7, 2018):

- i. Para 154: “The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC’s old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed,

the Panel identified the challenges faced by small and/or remote agencies and communities across Canada numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them [emphasis in original].”

- ii. Para 195: “This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately. However, we also find Canada not in full-compliance of this Panel’s previous orders for [...] small agencies [...]. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children. The orders are included in the order section below.”
- iii. Para 247: “Given that Canada has made submissions it will address [small agencies] as part of its long term reform. The Panel finds Canada has unilaterally postponed addressing this to the long term even when ordered to immediately address it. While Canada complied to stop reducing the agencies’ funding for those who serve less than 251 children, the Panel finds Canada not in full compliance with its previous orders. This Panel ordered Canada to eliminate population thresholds and levels and, to immediately address adverse impacts for small agencies who encounter the greatest challenges especially, if they are isolated. (see at 2016 CHRT 10 at paras. 20 and 23).”
- iv. Para 251: “The Panel, pursuant to Section 53(2)(a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53(2)(a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs which operates on the same basis as INAC’s current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFS agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018** [emphasis in original].”
- v. Para 252: “The Panel, pursuant to Section 53(2)(a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies’ costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs small first nations agencies’ for reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above [emphasis in original].”

- vi. Para 420: “The Panel, pursuant to Section 53(2)(a) of the *CHRA*, orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53(2)(a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs, which operates on the same basis as INAC’s current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child; and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018** [emphasis added].”
- vii. Para 421: “The Panel, pursuant to Section 53(2)(a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies’ costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs small first nations agencies, to be reimbursed retroactive to January 26, 2016 ~~by April 2, 2018~~ within 15 business days after receipt of documentation of expenses for retroactive payments to Canada no later than **March 31, 2019**. This order complements the order above [**bold emphasis in original, underlining denotes amendment from April 1, 2019 submission**].”

7. The orders made in paragraphs 251 and 252 of 2018 CHRT 4 are reflected in the order summary in paragraphs 420 and 421 of 2018 CHRT 4. Unlike the order in para 251/420, which ordered Canada to fund “based on actual needs”, the order in para 252/421 referenced Canada providing funding “on actual costs”. As will be summarized below, Canada has refused to fully restore the funding lost by small FNCFS Agencies due to downward scaling based on there not having been an “actual expenditure” by the FNCFS Agency. However, Canada does not address the issue that agencies could not possibly spend money that was withheld due to Canada’s ongoing application of the discriminatory population thresholds. Moreover, the Tribunal’s order in para 252/ and the operative portion of the Tribunal’s order in para 421 does not reference actual expenditure, it references actual cost. The Tribunal’s reference to “cost” is consistent for Canada’s manner of providing funding to small FNCFS Agencies before February 1, 2018, which was based on pro-rated amounts from Canada’s costing model.

III. Canada's costing model for core funding for small FNCFS Agencies

8. The funding model that Canada put into evidence in its September 30, 2016 compliance report was a costing model that set out key cost metrics for core functions. Specifically, the costing model funded the following functions in a pro-rated manner for small FNCFS Agencies:

- a) Board of Directors;
- b) Director;
- c) HR Staff;
- d) Secretary/Receptionist;
- e) Financial support;
- f) Audit;
- g) Insurance;
- h) Legal;
- i) Benefits;
- j) Admin overhead (rent, IT, etc. – set at 15% of salaries and benefits);
- k) Ongoing training; and
- l) Travel for service staff.²

9. Canada applied downward funding adjustments for the above-noted items to FNCFS Agencies serving fewer than 800 children as follows:

- a) 700-799 children: 87.5% of full core funding
- b) 600-699 children: 75% of full core funding
- c) 500-599 children: 62.55 of full core funding
- d) 400-499 children: 50% of full core funding
- e) 300-399 children: 37.5% of full core funding

² Canada's September 30, 2016 Compliance Report at Annex C.

- f) 200-299 children: 25% of full core funding
 - g) 100-199 children: 12.5% of full core funding³
10. Following the Tribunal’s September 14, 2016 order, Canada set the “downward scaling” factor for all FNCFS agencies serving fewer than 300 children at 37.5%.⁴
11. According to the information provided in Canada’s September 30, 2016 compliance report, at least 36 FNCFS Agencies, serving a total of 16,174 children were impacted by this downward scaling (see Table A).
12. The Caring Society’s understanding is that the downward scaling noted above was applicable in the 2015/16, 2016/17, and 2017/18 fiscal years. The Tribunal’s orders regarding funding at actuals affected the final two months of the 2017/18 fiscal year, as well as the 2018/19 fiscal year and following.

IV. Discussions at the CCCW regarding small FNCFS Agency downward scaling

13. The Caring Society raised the need for reimbursement of past downward scaling in its June 7, 2018 consent order proposal, which was provided to the Tribunal in Affidavit #2 of Doreen Navarro.
14. The Caring Society asked whether small FNCFS Agencies would be fully reimbursed for the cost of downward scaling at the Consultation Committee on Child Welfare’s (“CCCW”) second meeting, on June 22, 2018. The Caring Society was advised that Indigenous Services Canada (“ISC”) would review the matter.⁵
15. At the August 2, 2018 CCCW meeting, the then Assistant Deputy Minister for the Education & Social Development Programs and Partnerships Branch, Paula Isaak, advised that reimbursement for small FNCFS Agencies was for costs already paid, and that no payment would be provided if expenses had not been incurred. Ms. Isaak indicated that a reimbursement for expenses not incurred was an issue that should be addressed as a matter of compensation. Ms.

³ Canada’s October 31, 2016 Compliance Report at pp 4-5.

⁴ Canada’s October 31, 2016 Compliance Report at p 5.

⁵ Record of Decision of the June 22, 2018 CCCW meeting at Item 7(a), Tab 2 of the Supplementary Record of Documents dated January 29, 2019.

Isaak committed to ISC examining available data regarding the downward adjustment and to collaborating with small FNCFS Agencies to better understand the impact of the downward adjustment.⁶

16. At the September 5, 2018 CCCW meeting, ISC advised that the total downward adjustment for small FNCFS Agencies from January 2016 to March 2018 was \$29.6 million. ISC also advised that as part of the retroactive reimbursement process it would accept claims for retroactive salary increases for small FNCFS Agency staff in accordance with provincial standards. However, ISC maintained that payment could not be made for non-salary core funding amounts where no expense was incurred.⁷

17. On October 16, 2018, a letter was sent to small FNCFS Agencies confirming that ISC would retroactively reimburse staff salaries and benefits. However, at the October 23, 2018 CCCW meeting, ISC confirmed that no further reimbursements would be made for expenses not incurred.⁸

V. Canada’s refusal to reimburse downward scaling for core funding where no expenditure was made is contrary to the Tribunal’s February 1, 2018 order

18. As noted above, the Tribunal’s February 1, 2018 order was to “provide funding on actual costs [to] small first nations agencies, [to] be reimbursed retroactive to January 26, 2016”.⁹ The stated goal of this order was “to ensure proper data collection and to be responsive to the real needs of [F]irst [N]ations children”.¹⁰

19. The position taken by Canada in Ms. Isaak’s June 21, 2018 affidavit implies that the *Financial Administration Act*, R.S.C. 1985, c. F-11 (“*FAA*”) precludes Canada from reimbursing expenses that have not be incurred.¹¹ The Caring Society understands Canada to be referring to

⁶ Record of Decision of the August 2, 2018 CCCW meeting at pp 6-7, Tab 4 of the Supplementary Record of Documents dated January 29, 2019.

⁷ Record of Decision of the September 5, 2018 CCCW meeting at p 10, Tab 5 of the Supplementary Record of Documents dated January 29, 2019.

⁸ Record of Decision of the October 22, 2018 CCCW meeting at p 12, Tab 6 of the Supplementary Record of Documents dated January 29, 2019.

⁹ *FNCFCSC et al v AGC*, 2018 CHRT 4 at para 252 and 421, Tab 15 of the Joint Record of Documents (Vol. 2).

¹⁰ *FNCFCSC et al v AGC*, 2018 CHRT 4 at para 421, Tab 15 of the Joint Record of Documents (Vol. 2).

¹¹ Affidavit of Paula Isaak sworn June 21, 2018 at paras 6(e) and 8(d), Tab 37 of the Joint Record of Documents (Vol. 5).

section 34 of the *FAA*, which prescribes requirements for departments to make payments in respect of works, goods and services.

20. However, the payment to small FNCFS Agencies are not payments for works, goods and services, instead they are payments made to satisfy an order under paragraph 53(2)(a) of the *CHRA*, “to redress the [discriminatory] practice.” In any event, the items subject to the downward scaling for core funding are all items for which ISC established costs in its budgetary processes, and should have been included in the annual appropriations for each of the fiscal years involved.

21. Furthermore, Canada does not calculate administrative overhead at actual cost. Instead, Canada calculates the administrative overhead amount as 15% of the small FNCFS Agency’s salaries and benefits. Given that Canada is willing to make repayments for these salaries and benefits to their actual cost as reflected in comparable provincial metrics, it is unclear why the corresponding 15% contribution in relation to administrative overhead in the funding model would not be made as well.

22. The Caring Society’s position is that in order to be in full compliance with the terms and purpose of the Tribunal’s February 1, 2018 orders, small FNCFS Agencies must be brought up to the full amount for core funding from January 26, 2016 to February 1, 2018. Each of the items on the core funding list is required by every agency regardless of size.

23. The Caring Society submits that the amendment made to paragraph 421 of 2018 CHRT 4 on September 7, 2018 did not change the tenor of the order made in paragraph 252. The language added on September 7, 2018 (“within 15 business days after receipt of documentation of expenses”) is standard language that was used in Schedule A to amend the orders in paragraphs 306 and 426 (regarding mental health), to amend the orders in paragraphs 336 and 427 (regarding band representatives), and which was reproduced in Schedule B to amend the orders in paragraphs 411 (regarding prevention/least disruptive measures, building repairs, intake and investigations and legal fees), and 417 (child service purchase amount). Unlike Schedule A, Schedule B does not amend the orders made in the body of 2018 CHRT 4. The Caring Society submits that amendments made as a matter of administrative convenience to Canada cannot change the substance of the Tribunal’s findings and conclusions related to Canada’s continuation of a

discriminatory practice in the face of multiple orders from the Tribunal to stop that practice, such as with respect to downward scaling of small FNCFS Agencies' core operational costs.

24. It was reasonable for small FNCFS Agencies to avoid deficits, such that they would not have spent money they did not have. Therefore, it is unreasonable for Canada to shield itself from fulfilling the Tribunal's orders by saying that FNCFS Agencies did not spend money that Canada, itself, withheld from them. The small FNCFS Agencies should all be placed in the position they would have been in had Canada immediately complied with the Tribunal's order, starting on January 26, 2016.

VI. Order Sought

25. The Caring Society seeks the following orders:

- a) Canada shall reimburse small FNCFS Agencies (serving fewer than 800 registered Indian children) for any funding reduction related to Canada's application of downward adjustments based on population thresholds in its operations formula for core funding, retroactive to January 26, 2016, where those amounts have not yet been reimbursed pursuant to the Tribunal's February 1, 2018 Order (2018 CHRT 4); and
- b) Canada shall contact all small FNCFS Agencies within six weeks of the date of the Order to advise them of the Order.

All of which is respectfully submitted this ~~1st~~ 4th day of April, 2019.



David P. Taylor
Sarah Clarke

Counsel for the Caring Society

TABLE A

FNCFS Agency	Children Served
<i>British Columbia</i>	
Ayas Men Men	689
Spallumcheen Child and Family Services	116
Gitxan	703
Kucwentwecw Society Family and Children Services	400
Nlha'7kapmx Child and Family Services	362
Scw'Ex'Mx Child and Family Services	371
Secwepemc Child and Family Services	600
Nil/Tu,O	746
Ktunaxa?Kinbasket Tribal Council	189
Heiltsuk Kaxla Child and Family Services	307
Nezul Be Hunuyeh Child and Family Services	307
Namgis	234
Haida	352
Desniqi Services Society	658
<i>Alberta</i>	
Athabasca Tribal Council	611
Piikani Nation	627
Tsuu T'ina Nation Child and Family Services	727
<i>Saskatchewan</i>	
Ahtahkakoop Child and Family Services	703
BTC Human Services Corp	681
Qu'Appelle Child and Family Services	721
Wahkotowin	702
<i>Manitoba</i>	
Intertribal Child and Family Services	753
<i>Quebec</i>	
Gesgapegiag Child and Family Services	250
Grand Conseil Wabanaki Child and Family Services	102
Nation Huronne-Wendat Child and Family Services	382
Kitigan Zibi Amishnabeg Child and Family Services	388
Montagnais du Lac St. Jean Child and Family Services	617
Regroupement Mamit Innuat Child and Family Services	694
Conseil Montagnais de Shefferville Child and Family Services	280
Ristigouche Child and Family Services	573
Natashquan Child and Family Services	347
CJ Laurentides	253
CPEJ Outaouais	221
Conseil Montagnais Essipit Child and Family Services	54
<i>Prince Edward Island</i>	
MCPEI Child and Family Services	214
<i>Newfoundland and Labrador</i>	
Miawpukek Mi'kamawey Mawi'omi	240