

**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**

Interested Parties

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**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA  
WRITTEN SUBMISSION IN REPLY TO CANADA'S MAY 30, 2019 SUBMISSION  
REGARDING CAPITAL**

**June 6, 2019**

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***A. Further orders regarding major capital are within the scope of the complaint***

1. In its May 30, 2019 reply submission, Canada argues that the orders requested by the Caring Society with respect to major capital “go beyond the scope of the complaint”.<sup>1</sup> The Tribunal has already rejected this submission, which was made in the penultimate paragraph of Canada’s October 3, 2014 closing submissions:

An order providing a remedy respecting programs other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal. Accordingly, the Complainants[’] request for a remedy to provide funding for items such as capital costs must be denied as funding for capital costs falls outside of the FNCFS Program and provides further illustration of the fact that this complaint is not properly constituted under section 5 of the Act.<sup>2</sup>

2. The Tribunal’s rejection of this argument is evident in its orders, which have required Canada to address capital infrastructure.<sup>3</sup> Having not applied for judicial review of any of these orders, Canada cannot be permitted to recycle its failed final submission argument at the remedy stage.

3. Moreover, the matter of capital infrastructure has been repeatedly referred to by the Tribunal in its orders, as it was explicitly identified as an item of inadequate funding causing adverse impacts by “hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate service to First Nations children and families” (see para. 458 of 2016 CHRT 2), such that it was addressed in the Tribunal’s April 26, 2016 and September 14, 2016 **immediate relief** decisions. Indeed, on September 14, 2016, Canada was ordered to “take measures to address a number of items. As indicated in 2016 CHRT 10 and reiterated in this ruling, those items were to be addressed immediately. Again, those items include [...] capital infrastructure [...]”<sup>4</sup>

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<sup>1</sup> Canada’s May 30, 2019 submissions regarding major capital, at para 4.

<sup>2</sup> Canada’s October 3, 2014 closing submissions at para 251.

<sup>3</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 2 at paras 481 and 458; <sup>3</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 10 at paras 23 and 20; <sup>3</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 16 at para 158.

<sup>4</sup> *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 16 at para 158. See also *First Nations Child and Family Caring Society*

4. Accordingly, the Tribunal ought to reject Canada’s “outside of scope” argument made at paragraph 4 of its May 30, 2019 submission. The further orders sought by the Caring Society are to ensure the implementation of the Tribunal’s prior orders, for which Canada did not seek judicial review.

***B. There is no concrete plan to address major capital needs***

5. Paragraphs 8 and 9 of Canada’s May 30, 2019 submission confirm the *ad hoc* nature of the *status quo* for major capital requests within the FNCFS Program. Where capital requests are not tied to the Tribunal’s February 1, 2018 orders regarding funding at actuals,<sup>5</sup> capital requests may only be funded where FNCFS Agencies have surpluses, sufficient remoteness/ramp-up funding from Budget 2018, or where a capital project is approved through the Community Well-being and Jurisdiction Initiatives (“CWJI”) funding stream. Funding is also only possible to a threshold of \$2.5 million. The situation is even more dire with respect to Jordan’s Principle, where there continues to be no funding for major capital requests for Jordan’s Principle.<sup>6</sup>

6. Paragraphs 10-12 and 16-17 of Canada’s May 30, 2019 submission demonstrate that Canada has no concrete plan to address FNCFS Agencies’ major capital needs in the near-term. The submission is similarly silent regarding major capital needs for Jordan’s Principle.

7. Canada cites the need for further “discussions” on long-term capital needs and for leveraging expertise outside of the FNCFS Program.<sup>7</sup> This is the same vague response that has been given over and over again since the Caring Society raised the matter of major capital at the June 22, 2018 CCCW meeting.<sup>8</sup> In fact, this approach is consistent with Canada’s overall approach to capital needs within the FNCFS Program in the 19 years since the National Policy Review

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*of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 10 at para 23.

<sup>5</sup> May 14, 2019 cross-examination of Joanne Wilkinson at pp 76-79.

<sup>6</sup> May 7, 2019 cross-examination of Valerie Gideon at p 41.

<sup>7</sup> Canada’s May 30, 2019 submission at paragraphs 6 and 10.

<sup>8</sup> Supplementary Record of Documents, Tab 2, June 22, 2018 CCCW meeting minutes at 5(b) “[...] [Ms. Isaak] highlighted the need for more information on community infrastructure needs related to CFS”, and at Tab 4, August 2, 2018 meeting minutes at 6.1 “Ms. Isaak alluded to the challenges of grasping the full scope of the Agencies’ needs [...]”, and at Tab 5, September 5, 2018 CCCW meeting minutes at 7.1 “[Ms. Isaak] also urged the need that a capital needs assessment of all agencies be performed to have a better understanding and comprehensive picture of current and projected costs”, and at Tab 7, November 19, 2018 CCCW meeting minutes at 6.1 “With respect to major capital, following an exhaustive review of the IFSD data, ISC will be in a better position to determine above and beyond requirements in order to approve capital projects and perform the costing”.

recommended action.<sup>9</sup> Yet, the First Nations parties to this proceeding have not been calling for more “discussions” with Canada as a precursor to Canada funding major capital in the FNCFS program.

8. While some of ISC’s program authorities have been amended since the August 1, 2018 discussion paper,<sup>10</sup> Canada has not taken sufficient measures to address FNCFS Agency major capital needs. To the contrary, as outlined above, the measures taken to this point have been of an *ad hoc* nature, benefiting FNCFS Agencies with surplus funds or relationships to a community with CWJI funding and a plan to spend those funds on FNCFS Agency capital needs.

***C. The orders requested by the Caring Society are broadly worded, in keeping with the Tribunal’s prior immediate relief orders, and respect First Nations decision-making***

9. The orders proposed by the Caring Society are broadly worded. They speak to funding for FNCFS Agencies for feasibility studies, for preparatory work for projects, and for the projects themselves. They do not state who is to be consulted in conducting feasibility work, what sources of funding are to be used to carry out projects, or how projects are to be administered. As such, contrary to Canada’s arguments at paragraphs 5, 10-17, 19, 24 and 32 of its May 30, 2019 submission, nothing in the orders sought by the Caring Society requires existing programs or First Nations decision-making to be bypassed.

10. It is unclear why Canada’s submissions assume that feasibility studies would not take First Nations community priorities and needs into account, or why they allege that the capital envelope requested by the Caring Society would operate outside of the Community Infrastructure Branch. In particular, the Caring Society does not agree with Canada’s assertion at paragraph 24 of its submission that the Caring Society is asking the Tribunal to impose its own estimation of community needs. To the contrary, the Caring Society is asking for orders that would establish a

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<sup>9</sup> Summary statement regarding major capital at para 3, see Tab 9 of the Caring Society Motion Record dated February 4, 2019. See also *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2016 CHRT 2 at para 157.

<sup>10</sup> Tab 1 to the Summary statement regarding major capital, see Tab 9 of the Caring Society Motion Record dated February 4, 2019.

framework for communities to identify their needs and for projects to meet those needs to be brought to fruition.

11. The orders sought by the Caring Society would ensure that movement is possible with respect to major capital in the near-term. FNCFS Agencies who have projects that are “shovel ready” would have a source of funds to move forward. Those that require further feasibility work, whether at the project level or with respect to community planning, would have access to a source of funds to do this work as well as an overarching planning process to guide the project forward.

12. At paragraphs 6 and 22-29, Canada argues that the Tribunal cannot make an order requiring implementation of the IFSD report. The Caring Society is not, at this point, seeking an order requiring the implementation of the IFSD report. Rather, the Caring Society’s February 4, 2019 submissions use the IFSD report as a reference point. Canada states on a number of occasions that it lacks information regarding FNCFS Agencies’ capital needs. At this juncture, the IFSD report is the most up-to-date reflection of those needs, such that it is only logical that it would be used as a guide for the initial amount to be set aside in a capital envelope. Contrary to Canada’s argument at paragraph 23 of its submission, the Caring Society is not seeking that the IFSD report be the exclusive source of information used by Canada to set this initial size of the capital envelope.

13. It is important to note that the Caring Society has not requested that a specific amount of funds be set aside in a capital envelope; rather, the Caring Society is asking the Tribunal to order Canada to create an envelope, and as part of that order to require Canada to take the IFSD report into account when setting the initial size and structure of the envelope.

14. The Caring Society is concerned that, without specific orders, progress on meeting FNCFS Agencies’ major capital needs (which have not been addressed within the FNCFS Program since 1991 and which reflect an area for immediate relief) will continue to be mired in “discussions” and “requests for information”. More importantly it imperils the effectiveness of the Tribunal’s orders related to the provision of prevention services to communities as absent suitable buildings to house prevention services, these services will be difficult if not impossible to provide. Given Canada’s slow progress on implementing immediate relief measures after the January 26, 2016 decision, progress on major capital ought to be made alongside progress on long-term reform, and not be required for long-term reform to be fully implemented.

15. With respect to Jordan's Principle, Canada has provided no evidence indicating that there is any plan to address major capital needs within Indigenous Services Canada's current mandate from Cabinet (April 1, 2019 to March 31, 2022). As such, further orders are required in order to ensure that a lack of authority to address major capital needs, particularly in relation to group requests, does not result in the persistence of service gaps for First Nations children.

**All of which is respectfully submitted this 6th day of June, 2019.**



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