



2021 CHRT 41: Orders on Capital



Introduction

On August 26th, 2021, the Canadian Human Rights Tribunal (CHRT or Tribunal) issued a letter decision in the *First Nations Child and Family Caring Society et al v. Attorney General of Canada* case. A letter decision is equivalent to an oral ruling made at the bench, which is binding with legal reasons to follow. On November 16, 2021, the CHRT issued the full reasons for the decision in order 2021 CHRT 41. This order flows from the original order on the merits (2016 CHRT 2). Canada failed to take sufficient measures to ensure substantively equal capital to support the delivery of child and family services and Jordan's Principle resulting in the Caring Society bringing a non-compliance motion in February 2019 regarding. The Tribunal stated, "Upon review of the evidence, it is obvious that clear efforts are being made by ISC to comply with the Tribunal's orders as ISC interprets them" (2021 CHRT 41, para. 53). According to the Tribunal, Indigenous Services Canada (ISC) has been applying narrow interpretations of its orders. This order is meant to provide clarity on the intent of those orders for compliance and implementation purposes. It is essential as there is a severe housing/building shortage in many First Nations communities. As a result, there is often no space to provide the "safe, appropriate, and confidential" prevention services that would keep more children safely at home with their families (2021 CHRT 41, para. 140).

The Respondent is the Attorney General of Canada. The complainants are, the Caring Society, the Assembly of First Nations. The Canadian Human Rights Commission also has standing and the Chiefs of Ontario, and Amnesty International and Nishnawbe Aski Nation have interested party status in these proceedings.

Purpose of the Order

The order focused on funding the purchase and construction of capital assets for First Nations child and family services and Jordan's Principle. The order also prohibits Canada from using the Financial Administration Act to fetter its implementation of Canadian Human Rights Act orders. Capital refers to the physical property required to operate programs and services, such as buildings, vehicles, and other infrastructure. The CHRT confirmed that funding for the purchase of buildings and additional capital assets that support the delivery of programs and prevention services must be provided under the First Nations Child and Family Services (FNCFS) Program:

"The Panel recognizes that Canada is approving hundreds of thousands of cases and is pleased with those results. However, approvals are meaningless if the services cannot be delivered...With respect, the need for sufficient office space to offer services is so intertwined with the actual provision of services and so self explanatory, the Panel did not envision the need for orders in that regard at the time." para 297-298

FNCFS Capital Funding:

As such, the Tribunal ordered Canada to fund all FNCFS agencies, including small agencies and First Nations, for the actual costs of purchasing capital assets. The Tribunal further ordered Canada to fund the actual cost of constructing capital assets that are "ready to proceed." Canada was also ordered to provide funding for capital projects that are still in the early planning stages and FNCFS Agencies and First Nations interested in capital asset purchase and construction.

Jordan's Principle Funding:

The Tribunal also ordered Canada to fund all FNCFS agencies, including small agencies and First Nations, for the purchase of capital assets that "support the delivery of Jordan's Principle services to children on-reserve" and to fund the actual cost of constructing capital assets that are "ready to proceed." Canada must also fund capital needs and feasibility studies for projects that are still in the early planning stages and FNCFS Agencies and First Nations interested in capital asset purchase and construction under Jordan's Principle.

Band Representative Funding in Ontario:

The Tribunal also made orders regarding Band Representatives. It ordered Canada to fund the actual costs for Band representatives and any on-reserve prevention services. This clarification was requested specifically by Ontario First Nations, who the Tribunal confirmed also have access to funding for feasibility studies and needs assessments for the purchase and construction of capital assets that support the delivery of Band Representatives and prevention services.

Addressing all three funding areas:

On these three topics, Canada argued in their submissions that they could not provide capital for these services in all cases due to the need to consult with First Nations governments to ensure the appropriate use of land and funds. The Tribunal rejected this argument and stated, "The Tribunal is not ordering Canada to build offices without consulting First Nations and going through the appropriate processes. The Tribunal is ordering Canada to fund those building purchases or construction once all processes have been completed and the First Nations approve it" (2021 CHRT 41 para. 149).

For each of the above orders, Canada was ordered to advise FNCFS agencies and First Nations "within 30 days of receipt of this order" on accessing funding. Canada was also ordered to make this information available on the ISC website.

The CHRT also provided clarification around the use of the *Financial Administration Act (FAA)* due to concerns that this law has been “interpreted in a way that hinders the Panel’s quasi-judicial statutory role.” The order means that the Tribunal’s rulings and the *FAA* should be used together, not against each other. If there is a conflict between a CHRT order and the *FAA*, the orders of the Tribunal are paramount, which means they come first. This clarification prohibits Canada from denying services or refusing to implement orders based on their interpretation of the *FAA*. The Tribunal stated, “There is great need for a shift in mindset on how things are done. This is what reform means. If trends and forecasts are informed by the past discriminatory practices the adverse impacts and harms will not be addressed.” (2021 CHRT 41, para. 347).

Summary

Altogether, the ruling reiterates the requirement for greater funding for on and off-reserve capital so that FNCFS agencies can deliver programs and services, including Jordan’s Principle services, in safe, family-friendly environments that serve the best interests of First Nations children and the community. In addition, the ruling reinforces the provision of funding for Band Representatives and preventative services on reserve and addresses the conflict between Tribunal orders and other government legislation.

In September of 2021, Canada announced its intention to seek judicial review (similar to an appeal) this order when the full reasons would be released. This judicial review has now been filed. The Caring Society hopes that Canada will drop its judicial review and implement the order without further delay.

For more information on the CHRT case, please visit fnwitness.ca.

For more on Jordan’s Principle or any of the other focus areas of the Caring Society, please visit our website at fncaringsociety.com.

You can read the full text of the order on the I am a Witness Timeline here: <https://fncaringsociety.com/publications/2021-chrt-41>.