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 Services Canada)

Respondent

- and –

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

-and-

MI'GMAQ CHILD AND FAMILY SERVICES OF NEW BRUNSWICK INC.

Moving Party

REPLY OF MI'GMAQ CHILD AND FAMILY SERVICES OF NEW BRUNSWICK INC. to the responses of the Chiefs of Ontario, Nishnawbe Aski Nation, and the Attorney General of Canada

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PART I – OVERVIEW

1. Pursuant to the Tribunal's direction of April 24, 2025, this is the reply of Mi'gmaq Child and Family Services of New Brunswick Inc. ("MCFS") to the responses of the Chiefs of Ontario ("COO"), Nishnawbe Aski Nation ("NAN"), and the Attorney General of Canada ("Canada") (together, the "Opposing Parties") to MCFS's motion for interested party status with respect to the joint motion filed by COO and NAN on March 7, 2025 (the "OFA Motion").

PART II – REPLY SUBMISSIONS

A. MCFS's concerns are not speculative

2. The Opposing Parties argue, principally, that any concerns regarding the draft Ontario Final Agreement's ("OFA") impact on long-term reform outside of Ontario are speculative and premature. They argue that the OFA has no applicability – and thus no impact – outside of Ontario and, as such, the proposed interested parties, including MCFS, do not have a direct interest in the outcome of the OFA Motion. Any concerns are, in their view, the result of an incorrect assumption on behalf of the prospective interested parties that the OFA Motion will have an effect outside of Ontario.[1]

3. In particular, COO argues that the proposed interested parties have misapprehended and overstated the significance of Canada's March 17, 2025 letter, and specifically, Canada's statement therein that "the outcome of the joint motion is likely to inform the path forward in these proceedings, including the use of the dialogic approach and the completion of the long-term remedial phase outside of Ontario."[2]

4. While COO states that Canada's statement in its March 17, 2025 letter is not an entrenchment of the approach for national reform, COO offers no evidence to support its bold assertion that the outcome of the OFA Motion will not have an impact on the prospective interested parties' interests or inform national long-term reform. To the contrary, COO appears to contradict its own position by acknowledging, for example, that "the Tribunal's reasons on the OFA Motion will be "the most relevant case law" for the Tribunal's approval of any other regional or national agreement.[3]

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[1] Consolidated Responding Factum of the Interested Party, Chiefs of Ontario [COO Factum], para 30.
[2] Letter from Department of Justice Canada to the Canadian Human Rights Tribunal dated March 17, 2025 [March 17, 2025 Letter], online: https://fncaringsociety.com/sites/default/files/2025-03/March%2017%2C%202025%20Letter%20to%20CHRT.pdf
[3] COO Factum, para 34, citing 2024 CHRT 95 at para 28.

5. COO also discusses "concerns about speculative impacts […] which have not (and may never) come to fruition."[4] In doing so, COO appears to acknowledge that there is, in fact, a real possibility that the concerns raised by the proposed interested parties, including MCFS, may indeed come to fruition.

6. Moreover, and in any event, COO and NAN are not the appropriate parties to be making such conclusive statements about Canada's intentions with respect to national long-term reform. If it is indeed true that the OFA, if approved, will in no way be used as a template or otherwise inform national or other regional negotiations, then a statement confirming same needs to be made by Canada on the record. However, Canada makes no such statement. To the contrary, at no point in Canada's submission does Canada expressly state that the OFA, if approved, will not be used by Canada as a template or to otherwise inform national long-term reform.

7. Indeed, the Opposing Parties offer no evidence to support their assertion that the OFA will not inform national long-term reform, nor do they offer any evidence that the concerns raised by the prospective interested parties are merely "speculative". In contrast, there are many factors which strongly suggest that the OFA and the Tribunal's decision on the OFA Motion will impact long-term reform elsewhere in Canada, including in New Brunswick. Those factors include Canada's own conduct and statements and the text of the OFA itself. For example:

    a. The OFA was negotiated shortly after the rejection of the draft Final Settlement Agreement ("FSA") by First Nations-in-Assembly. The text of the draft OFA is substantively similar to the failed draft FSA, and it adopts many of the same mechanisms, including the "Reformed FNCFS Funding Approach." Moreover, Canada has stated that the only reason they agreed to negotiate an Ontario-specific agreement is because COO and NAN supported the rejected draft FSA, and that the new OFA would be based on the terms of the draft FSA that was rejected by Chiefs in October 2024.[5]

    b. Canada now says that its mandate does not permit negotiation of a national-level agreement, nor is it prepared to negotiate long-term reform of the FNCFS Program based on the Resolutions passed by First Nations-in-Assembly in 2024.[6] Instead, Canada's primary focus is on advancing the OFA. Canada requested that the Tribunal place the Caring Society's consultation motion – which seeks an order directing Canada to engage in consultation on national-level reform – in abeyance in favour of the OFA Motion.

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[4] COO Factum, at para 3.
[5] Letter from Canada to the Caring Society dated January 14, 2025.
[6] Letter from Canada to the Caring Society dated February 17, 2025.

c. The OFA contains amended FNCFS Terms and Conditions that will apply outside of Ontario. Specifically, Appendix 8: First Nations Child and Family Services Terms and Conditions, which provides: "This document presents the amendments to the FNCFS Terms and Conditions that will be made to support the implementation of the [OFA]. The inclusion of Appendix A: Reformed FNCFS Program in Ontario as well as the underlined and highlighted amendments in the national Terms and Conditions will be implemented on the Effective Date of the […]" OFA.[7]

d. The OFA contains further terms that may extend applicability outside of Ontario. In particular,

   i. Article 3 provides that "[u]nless the context necessitates a different interpretation, all terms of this Final Agreement are to be interpreted as applying only in Ontario […]." COO's interpretation of when "the context may necessitate a different interpretation" is just that – COO's interpretation. It is not grounded in or supported by any express provision of the OFA itself. It is, in fact, the exact kind of speculative assumption that COO cautions against in its own submissions.

   ii. Article 320 provides that ISC can revise certain appendices in consultation with the parties, including Appendix 8: First Nations Child and Family Services Terms and Conditions. As mentioned above, Appendix 8 contains two sets of amended FNCFS Terms and Conditions: one that applies to the Reformed FNCFS Program *within* Ontario, and one that applies to the FNCFS Program *outside* of Ontario. Put simply, approval of the OFA means approval of the entire agreement, including its appendices. Appendix 8 includes Terms and Conditions which apply to the FNCFS Program on a national scale, and which can be revised by ISC, in consultation with COO and NAN.

8. MCFS is of the view that Canada is simply delaying further negotiations on national long-term reform until after the OFA Motion, in hopes the OFA is approved so that Canada can then seek to use the OFA as the standard for a national or other regional agreements. This speaks directly to Canada only being willing to negotiate on long-term reform outside of Ontario if other regions are willing to accept the previously rejected draft FSA, similar to COO and NAN.

9. Indeed, it appears that Canada is pushing its historical divide and conquer tactic by refusing to negotiate national long-term reform, and instead, giving signals to those outside of Ontario that if they want reform, they will have to do something similar to COO and NAN.

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[7] Emphasis added.

10. Moreover, if the OFA is not intended to have any bearing on the FNCFS Program outside of Ontario, then the OFA Motion should not be seeking approval of an agreement that includes nationally applicable FNCFS terms and conditions that have not been negotiated with the parties at the national negotiation table, and which First Nations have not been consulted on.

B. MCFS's proposed submissions will not duplicate existing perspectives

11. Contrary to the statements of the Opposing Parties, MCFS's participation in the OFA Motion will not duplicate the perspectives and submissions of the other proposed interested parties, nor will it duplicate the perspectives of the existing parties to the proceeding. As set out in its previous submissions, MCFS is uniquely positioned as a relatively new agency, whose Mi'gmaq member communities are primarily small populated First Nations, with some of the highest population of individuals registered under section 6(2) of the *Indian Act* in the country. This is a unique perspective that none of the other prospective interested parties propose to speak to.

12. In addition, MCFS is not asking to merely provide a regional perspective, as suggested by the Opposing Parties. Rather, MCFS wishes to speak to aspects of the OFA (which were in the flawed and rejected draft FSA) that, if implemented nationally, would likely result in MCFS ceasing to exist.

13. Moreover, contrary to COO's submission, the unprecedented number of prospectives interested parties in this OFA Motion speaks not to a "coordinated" approach to derail the OFA Motion but rather, to the critical importance of the OFA Motion and the fact that its implications are not confined to Ontario.

C. Clarification as to the scope of MCFS's proposed participation

14. With respect to the Opposing Parties' argument that MCFS' participation would cause prejudicial delay, MCFS respectfully disagrees. To be very clear, MCFS does not seek to oppose the OFA for the purposes of Ontario. If granted interested party status, MCFS does not seek to expand the scope of the OFA Motion and takes no position on the applicability of the OFA in Ontario. MCFS' submissions will focus solely on the risks of the OFA Motion impacting long-term reform of the FNCFS Program in New Brunswick.

15. MCFS is committed to working with the parties and the Tribunal to facilitate the timely and efficient consideration of the OFA Motion to ensure that its participation does not expand the scope of the proceedings, cause delay, or otherwise prejudice any party.

16. Moreover, any concern raised by Canada regarding delay should be considered in context – namely, in light of Canada's repeated attempts to delay this proceeding generally, and in particular, its current refusal to engage in national long-term reform negotiations outside of Ontario. Canada's refusal to negotiate has unnecessarily delayed the reforms that are necessary to stop the harms Canada is causing to First Nations children and families across the country.

17. It is due to Canada's failure to act that MCFS is now applying for interested party status at this stage of the proceedings. MCFS did not apply at an early stage of the proceedings because it trusted Canada to fulfill the terms of the AIP and consultation protocol, and trusted Canada to return to the national negotiation table in good faith following the rejection of the draft FSA, in accordance with its legal and constitutional obligations.

D. MCFS's interests and perspectives are not represented by any other party

18. Without MCFS's participation, the interests of MCFS and its Mi'gmaq member communities ("Member Communities") will not be represented. Despite the Opposing Parties' contention to the contrary, MCFS's unique interests and regional specificities cannot be adequately represented by any of the of the other parties, including the AFN and the Caring Society.

19. While the Caring Society may represent the interests of agencies, neither the Caring Society nor the other parties to the proceeding represent the interests and perspectives of MCFS's Member Communities.

20. While the Opposing Parties rely on the assumption that the AFN reasonably represents the interests and perspectives of its member First Nations, the reality is that AFN has not meaningfully engaged MCFS Member Communities with respect to the draft FSA, or on long-term reform generally.

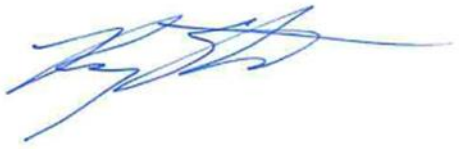
21. For example, following the release of the draft FSA, Chiefs of MCFS Member Communities attended the regional engagements hosted by the AFN to ask several questions and raise concerns about the agreement. Many of the questions posed were never addressed. AFN also prepared a regional engagement report summarizing AFN's engagement sessions on the draft FSA. This report did not provide an accurate portrayal of the engagements in New Brunswick, and did not include the concerns and comments of MCFS Member Communities.

22. Given that the Tribunal is not informed of the unique concerns and perspective of MCFS Member Communities by the parties to the underlying proceeding, Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") is particularly apt, which states that Indigenous Peoples have a "right to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance

with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions" [emphasis added].[8] Further, First Nations-in-Assembly passed Resolution 90/24 which, among other things, fully supports "any request, from any other regions, to seek interested party status in this Canadian Human Rights Tribunal case".[9]

23. For the reasons note above and as set out in MCFS's previous submission, MCFS has been directed by the leadership of its six Member Communities to bring forward its unique perspective to ensure the best interests of Mi'gmaq children in MCFS Member Communities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF MAY, 2025.



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[8] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/29.
[9] AFN Resolution 90/2024, Safeguarding First Nations Child and Holding Canada Accountable for its Canadian Human Rights Tribunal Legal Obligations, online: https://afn.bynder.com/m/3c8a25105069ece0/original/December-2024-SCA-Resolutions-Package.pdf