

**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 Indian and Northern Affairs)**

Respondent

And

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

Interested Parties

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**Canada's Reply to NAN's submissions on capital for Band Representative Services**

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**OVERVIEW**

1. The Nishnawbe Aski Nation's [NAN's] submissions on the reimbursement of major capital expenses for Band Representative Services rest on three erroneous premises: that the Tribunal has ordered the payment of such expenses; that Indigenous Service Canada [ISC] has been inconsistent in its handling of requests for reimbursement of such expenses; and that ISC has been insensitive to the challenges of First Nations situated in remote areas in the payment of such expenses.

2. In fact, Canada has gone beyond what the Tribunal has ordered, and has consistently worked with the parties to attempt to address the Tribunal's orders and First Nations' capital needs beyond these orders.

### **Statement of Facts**

#### a) Reliance on Previous Submissions

3. Canada relies on its previous submissions in respect of Band Representative Services filed April 10, 2019, its submissions in respect of major capital filed May 30, 2019, and its reply submissions of April 24, 2020.
4. For greater clarity, those submissions refer to evidence that demonstrates that Canada responded to the February 1, 2018 order by working with potential claimants, including establishing recipient guides for making past or future claims, to make the process comprehensible to all;<sup>1</sup> showing flexibility on deadlines for the submission of claims;<sup>2</sup> doing considerable work with the parties to identify and address their capital needs.<sup>3</sup>
5. More importantly, the previous submissions also address the fact that the capital needs of First Nations communities can be addressed through existing programs.<sup>4</sup> Capital needs of communities cannot be addressed in isolation; they require consultation with the First Nation, because major infrastructure projects have spin-off effects on other infrastructure such as water and sewer services.<sup>5</sup> Canada is committed to a collaborative approach that involves identifying needs and responding to them. The evidence is clear that Canada has pursued a collaborative approach.

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<sup>1</sup> AGC Submissions of April 10, 2019, paras. 11-19, and evidence referred to therein.

<sup>2</sup> AGC Submissions of April 10, 2019, paras. 11-19, and evidence referred to therein.

<sup>3</sup> AGC Submissions of May 30, 2019, paras. 10-19, and evidence referred to therein.

<sup>4</sup> AGC Submissions of May 30, 2019, paras. 10-19, and evidence referred to therein.

<sup>5</sup> AGC Submissions of May 30, 2019, paras. 10-19, and evidence referred to therein; AGC Submissions of April 24, 2020, paras. 24-26, and evidence referred to therein.

b) The Alleged Inconsistency in Canada's Approach

6. The affidavit of Nathalie Nepton demonstrates that ISC has been transparent with the interested parties and the First Nations themselves about how the orders would be applied. Guides were developed in conjunction with the parties, which clearly described eligible expenses. There has been an ongoing dialogue about how to satisfy greater capital needs.<sup>6</sup> From the issuance of the Tribunal's orders through the development of guides for reimbursement to discussions about capital needs, the parties have been aware of ISC's positions.

c) Canada's Respect for the Remoteness Principle

7. Canada is paying the actual costs of providing Band Representative Services for all communities as required by the Tribunal's orders. NAN was advised that this permits claims for the expansion of office spaces, family support meeting spaces, safe confidential spaces for access visits, and the lease or purchase of vehicles required for Band Representative Services program delivery that is non-medical.<sup>7</sup>

8. Because ISC is paying actual costs, remoteness does not affect the decision to pay, so no compliance issue arises. Nevertheless, ISC has consistently respected this principle. The affidavit of Nathalie Nepton provides examples of areas in which remote costs that have been reimbursed.<sup>8</sup>

### Statement of Law

9. Canada believes that it is complying with the Tribunal's order, so it is important to remember what the Tribunal actually ordered. As the Tribunal has stated, it is important not simply to look at what was ordered, but the reasons why it was ordered.<sup>9</sup> Taking this contextual approach reveals that Canada has complied with the order.

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<sup>6</sup> Affidavit of Nathalie Nepton dated October 14, 2020, paras. 9-13, 14-18.

<sup>7</sup> Affidavit of Nathalie Nepton dated October 14, 2020, para. 12.

<sup>8</sup> Affidavit of Nathalie Nepton dated October 14, 2020, para. 13.

<sup>9</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 Canada)*, 2015 CHRT 1, at para. 24; 2018 CHRT 4, at para. 407.

10. The relevant orders made by the Tribunal appear at paras. 411 and 427<sup>10</sup> of 2018 CHRT 4:

[411] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of prevention/least disruptive measures, **building repairs**, intake and investigations and legal fees. 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 for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare to be reimbursed retroactive to January 26, 2016 **by April 2, 2018**. This order complements the order above. [**emphasis added**]

[427] The Panel, pursuant to [Section 53](#) 2 (a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, at the actual cost of providing those services retroactively to January 26, 2016 by **February 15, 2018** and until such time as studies have been completed or until a further order of the Panel.

11. The context for the order under para. 411 (which deals with agencies) was the reasoning at paras. 212-213 under the heading “Building Repairs”:

**Building repairs**

[212] Canada has advised that the Program authorities include minor capital expenditures. Minor capital expenses may include maintenance and repairs/upgrades/renovations to facilities to include compliance with building codes. If funds are required, Canada will work with agencies on a case-by-case basis to address this issue.

[213] The Panel considers it is unclear if this practice is now implemented or if it will only be implemented in the future. It is also unclear when the funding will be made available to agencies that identify the need for building repairs. Therefore, the Panel finds it is justified to make a further order to this item of immediate relief. The order is included in the order section below.

12. The Tribunal also referred to its previous findings on Band Representatives, who perform an important advocacy function:

[327] The Court also added on the Band representatives’ role at para. 89 and citing the *Decision: These representatives play a vital role in ensuring that child welfare staff and the courts have a full appreciation of the child’s cultural heritage*,

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<sup>10</sup> The same order also appears at para. 336.

*traditions and needs before making decisions about the child. They work to ensure that the child receives culturally appropriate services and placements. Furthermore, they often support the plan advanced by a parent and assist that parent in advancing the plan by highlighting how it will foster the child's ties to their Aboriginal community (First Nations Child and Family Caring Society, para. 229).*

[333] As already said in the *Decision*, *the discordance between the objectives and the actual implementation of the program is also exemplified by the lack of funding in Ontario, for Band Representatives under the 1965 Agreement. Not only does the Band Representative **address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together** and is directly provided for in Ontario's Child and Family Services Act.*

13. The Tribunal's orders cannot and should not be read as an order that Canada fund any and all costs that are tangentially related to the provision of Band Representative Services, nor can the orders be reasonably interpreted as attempting to ensure the satisfaction of all of a community's many capital needs. Nor should the order to fund Band Representative Services at their actual costs be interpreted without regard to the order that agencies be reimbursed for "building repairs," not all capital needs.
14. The Tribunal's orders must be read purposively. They are intended to ensure that Band Representatives are able to carry out their statutory functions.<sup>11</sup> The evidence is that ISC has generously interpreted those orders.<sup>12</sup>
15. The evidence before the Court, even NAN's own evidence, shows that Canada has observed both the letter and spirit of the order, and in fact gone beyond what the order requires. In paragraph 7 of its submissions, NAN cites questions posed to Assistant Deputy Minister Wilkinson. The questioner asked whether building renovations and new buildings may be considered. Ms. Wilkinson noted that such costs may not be eligible, but that they may nevertheless be considered, on a case-by-case basis.
16. Similarly, the letter from Catherine Thai cited at para. 9 of NAN's submissions confirmed that ISC was prepared to interpret the term "building repairs" generously: it would consider

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<sup>11</sup> See the Ontario *Child, Youth and Family Services Act*, S.O. 2017 c. 14, at ss. 73, 186 and 197, for example.

<sup>12</sup> Affidavit of Nathalie Nepton dated October 14, 2020, para. 13.

requests for expansion of office space, family support meeting spaces or safe confidential spaces for access visits, and the lease or purchase of vehicles required for Band Representative Services program delivery that is non-medical. The letter went on to state that ISC had turned down more ambitious requests for reimbursement, such as requests for the building of recreation centres; cultural centres; Early Years buildings; soccer fields; baseball diamonds; playground structures; basketball courts; ice rinks; and winter and summer road maintenance projects.

17. There has been no inconsistency in the way ISC has approached the orders, or the way that ISC has communicated to the parties about the orders. Moreover, the line drawn by ISC is both reasonable and rational. As the affidavit of Nathalie Nepton points out, the figure of \$1.5 million is more than four times the average claim made for reimbursement.<sup>13</sup> As such, it provides considerable flexibility for First Nations in addressing their needs in relation to Band Representative Services.
18. It is also critical to understand that ISC deals with First Nations not simply on the basis of what this Tribunal's orders require, but what the community needs. ISC has taken a community-centred approach, where it discusses capital needs for the community as a whole, including how the capital needs may address the needs for Band Representatives.<sup>14</sup> The capital needs issue cannot be approached as if Band Representative Service needs are distinct from the needs of communities as a whole.
19. The submissions of NAN in respect of remoteness are irrelevant in the context of this motion. Canada is required to pay actual costs; any increase in costs due to remoteness are paid. The difference of opinion here is not about remoteness, but about the scope of the Tribunal's orders. Nevertheless, the evidence is clear that ISC has been sensitive to remoteness issues in paying Band Representative Services costs.<sup>15</sup>

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<sup>13</sup> Affidavit of Nathalie Nepton dated October 14, 2020, para. 17.

<sup>14</sup> AGC Submissions of May 30, 2019, paras. 10-19, and evidence referred to therein; AGC Submissions of April 24, 2020, paras. 24-26, and evidence referred to therein.

<sup>15</sup> Affidavit of Nathalie Nepton dated October 14, 2020, para. 13.

20. The evidence is thus clear that ISC has liberally interpreted this Tribunal's order. It has continued to work with First Nations and communities to address their capital needs outside the parameters of the Tribunal's order. Canada continues to be in full compliance with these orders, and going beyond them to help First Nations to address their capital needs.
21. Finally, it should be noted that the affidavit filed by NAN is irregular. While it may be acceptable to have an articling student attach non-contentious material to an affidavit (as at para. 3), where matters of original evidence are involved, as at paras. 5-12, the affiant should be the person providing the information; otherwise rights of cross-examination are defeated. If first-person affidavits were difficult or impossible to obtain, NAN should have sought to tender such evidence by agreement. No agreement was sought. While in the circumstances the evidence proffered is only offered on remoteness issues that are, as argued above, irrelevant, the Attorney General should not be taken as accepting this practice generally.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at the City of Ottawa in the Province of Ontario, this 14<sup>th</sup> day of October, 2020.



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**LIST OF AUTHORITIES****Legislation**

*Child, Youth and Family Services Act*, SO 2017 c 14, at ss [73](#), [186](#) and [197](#)

**Jurisprudence**

*First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 1

*First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4