

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 and Northern Affairs Canada)**

Respondent

- and -

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

Interested Parties

**CHIEFS OF ONTARIO AMENDED APRIL 14, 2020 WRITTEN REPLY SUBMISSIONS
RE: DOCUMENTS AND SUBMISSIONS PROVIDED BY CANADA ON MARCH 4,
2020 IN RESPONSE TO THE TRIBUNAL'S FEBRUARY 20, 2020 INFORMATION
REQUEST**

Maggie Wente and Sinéad Dearman

Olthuis Kleer Townshend LLP
250 University Avenue 8th Floor
Toronto, ON
M5H 3E5
Tel.: 416-981-9330
Fax: 416-981-9350
mwente@oktlaw.com
sdearman@oktlaw.com

Counsel for the Interested Party Chiefs of Ontario

1. These written submissions are Chiefs of Ontario's ("COO") reply to the written submissions and affidavit of the Respondent, the Attorney General of Canada ("Canada"), dated March 4th, 2020, in which Canada provided documents requested by the Panel and related submissions.
2. These submissions also provide the Panel with updated information on access to capital funding for Band Representative programs for Ontario First Nations. This issue was raised by COO in March 2019, when COO sought orders from the Tribunal for funding for capital for Band Representatives on par with capital funding for First Nations agencies.
3. Instead of repeating the submissions of the Caring Society dated April 9, 2020, COO supports and relies on those submissions.

I. LONG TERM REFORM

4. COO shares the Caring Society's concern that the path for long-term reform is far from clear. Despite completion of the Ontario Special Study and its recent submission to the Tribunal on February 28, 2020, Canada has not agreed to adopt any of the recommendations of the Ontario Special Study.
5. On cross examination of Canada's representative Ms. Wilkinson in May 2019, when asked about what would happen if Canada did not agree with the Ontario Special Study recommendations and whether there was a "Plan B", Ms. Wilkinson did not identify the path ahead:

Ms. Wente: Q. All right. And if there's -- I guess --okay. The very simplest way I can ask this question is what is Plan B? So, what if you don't like what the Special Study's recommendations are? Not you personally, Ms. Wilkinson, your employer.

Ms. Wilkinson: A. A. Sorry, just give me a moment. I'm not quite sure -- I want to make

sure I'm understanding your question well. So, again, I don't want to pre-judge what the findings will be. **If there are areas where we don't have the authority to go necessarily then we would need to look at whether there is an appetite within the federal system to move forward on some of those pieces. And if not to continue the discussions in terms of what an alternative path looks like.**

Ms. Wente. Q: Continue the discussions with the First Nations in Ontario?

Ms. Wilkinson. A. With partners.¹

[Emphasis added]

6. Therefore, if Canada will not adopt the recommendations of the Ontario Special Study, First Nations in Ontario have before them no other plan for long-term reform. All that Canada's representative had to say about "Plan B" is that there would be more discussions about an "alternative path" with "partners".
7. COO submits that this leaves First Nations in Ontario no further ahead than they were in 2016 when the Tribunal's decision on the merits decision was released, as Canada has not accepted the recommendations of the Ontario Special Study and has not indicated what the future looks like in light of that fact.

II. COMMUNITY WELL-BEING AND JURISDICTIONAL INITIATIVES

8. COO echoes the Caring Society's concern about the "fixed pot" approach to additional funding. As the Tribunal and all parties note, the fixed pot approach to Community Well-Being and Jurisdictional Initiatives funding (as well as increased

¹ Excerpted from the transcript of the Cross Examination of Joanne Wilkinson, dated May 14, 2019, at p. 179, Line 23 – p. 180. COO refers the Tribunal to the entire transcript for the full discussion of long-term reform, to be considered in light of the submission of the Ontario Special Study.

prevention funding, which is directed to First Nations in Ontario) is insufficient to meet substantive equality needs and causes division among First Nations. These issues are being canvassed in the Nishnawbe Aski Nation's Remoteness Quotient series of motions currently before the Tribunal.

III. CAPITAL AND BAND REPRESENTATIVE SERVICES

9. Since COO's March 2019 submissions on funding for capital for Band Representative programs Canada's position has crystallized. Initially it was unclear whether or to what extent Canada would fund capital for Band Representatives pursuant to 2018 CHRT 4. Over the past year, it has become clear that the answer is "no". COO and Canada have jointly filed a documentary record which demonstrates this shift. The documents filed on consent of Canada with these submissions consists of:

- (a) Consultation Committee on Child Welfare Draft Record of Decision, dated January 14, 2020 (see p. 4).
 - Included for reference to COO's attempts to resolve the issue of capital for Band Representatives through the CCCW.
- (b) Consultation Committee on Child Welfare Record of Decision, dated June 17, 2020 (see p. 2).
 - References Canada's commitment to clarify how capital needs for Band Representatives will be addressed, no further guidance was in fact provided.
- (c) Wabaseemoong Independent Nations Interim Appeal re Denial for Payment of Actual Costs, dated February 11, 2020.
 - This is an example of a First Nation seeking access to funding for capital for its Band Representative program. The claim was denied.
- (d) Letter from Asubpeeschoseewagong Netum Anishinabek to Indigenous Services Canada Ontario Region, dated February 5, 2020, and response from Catherine Thai of ISC Ontario Region, dated March 27, 2020.

- This is an example of a First Nation seeking access to funding for capital for its Band Representative program. The claim was denied.
- (e) Exhibit 7A to the Affidavit of Lorri Warner, sworn March 4, 2020 (*First Nations Child and Family Services Program Directive: Agencies Funding Stream – Capital Expenditures*).
- This Capital Directive is included as it demonstrates the process for access to funding for capital for First Nations agencies; Band Representative Services programs are not included in this Directive.
- (f) *Ontario Region Guide (Draft) for Reimbursement of 2019-2020 First Nations Child and Family Services (FNCFS) Band Representative Services Actual Costs Resulting from the Canadian Human Rights Tribunal Orders*.
- This funding guide shows that capital for Band Representative programs is not included as an eligible expense and is to be dealt with in the FNCFS Terms and Conditions, but it is not in fact dealt with in the FNCFS Terms and Conditions.
10. COO has attempted to resolve access to capital funding for Band Representative programs with Canada outside of litigation without success. We require the Tribunal to rule on whether necessary capital needs constitute an “actual cost” within paragraph 427 of 2018 CHRT 4:

“The Panel, pursuant to Section 53 2 (a) and (b) of the CHRA, orders Canada to fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 by February 15, 2018 or within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.”

11. In its January 26, 2016 decision the Tribunal found that the First Nations Child and Family Services Program’s funding structure often creates funding deficiencies for items like capital infrastructure for agencies:

“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. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program."²

As the Tribunal held, the FNCFS funding structure results in the inability of First Nations agencies to comply with provincial child welfare legislation, meet the needs of clients, or provide culturally appropriate services at the community-level. Although the Tribunal's findings are with respect to First Nations agencies, it is COO's position that these challenges apply equally to Band Representative Services programs which are now being provided pursuant to the Tribunal's order.

12. COO's position on Canada's obligation to provide capital funding for Band Representative programs is as follows:
 - (a) Canada's failure to fund capital for Band Representative programs is inconsistent with the Tribunal's Order in 2018 CHRT 4 as capital expenses are a necessary "actual cost" for these programs in many circumstances
 - (b) Canada's failure to fund capital for Band Representative programs means that First Nations are unable to take full advantage of their rights or exercise their duties under the *Child, Youth and Family Services Act, 2017*³, such that the discrimination the Tribunal sought to correct is perpetuated.

² *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2, para. 389 [2016 Merits Decision].

³ *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1 ("CYFSA").

- (c) Canada's failure to fund the capital needs of Band Representative programs inhibits the delivery of community-based, culturally appropriate child welfare services to First Nations children.
- (d) First Nations' continued delivery of Band Representative programs without a safe, secure, confidential space in which to do so risks contravening child welfare and privacy legislation and is contrary to ethical standards of practice when serving vulnerable children and families.
- (e) Canada is required by reason of the Tribunal's 2016 decision on the merits and Section 11 of *An Act respecting First Nations, Inuit and Métis children, youth and families*,⁴ to fund child welfare for First Nations in a manner consistent with the principle of substantive equality. Failure to fund capital expenses for Band Representative programs does not meet the requirements of *An Act respecting First Nations, Inuit and Métis children, youth and families*, nor the requirements of the *Canadian Human Rights Act*.⁵

The Role of a Band Representative under the *Child, Youth and Family Services Act, 2017*

13. When COO first made submissions to the Tribunal on Band Representatives it was under legislation which has since been repealed and replaced. To contextualize the capital needs of Band Representatives, we will provide an inventory of the rights and duties of a Band Representative under the current legislation, the *Child, Youth and Family Services Act, 2017* ("CYFSA").

⁴ *An Act respecting First Nations, Inuit and Métis children, youth and families*,⁴ SC 2019, c 24.

⁵ *Canadian Human Rights Act*, RSC 1985, c H-6.

14. First Nations have a unique role under the *CYFSA* whenever a society, person, or entity seeks to provide a prescribed service or exercise a prescribed power under the *Act* in relation to a First Nations child.⁶
15. Throughout the *CYFSA* there are references to the role of the “representative” of the First Nations child’s Band or First Nations community. Colloquially, such a person is often referred to as the “Band Representative”. It is the Band Representative who actualizes the First Nations’ participatory, consultative, and informational rights under the *CYFSA*.
16. The Band Representative’s participatory rights under the *CYFSA* include, but are not limited to, the right to:
 - (a) act as a party in all proceedings under Part V – Child Protection;
 - (b) seek access to a First Nations child in a Children’s Aid Society’s (“Society”) care and custody or supervision;
 - (c) seek a status review of a First Nations child in a Society’s care;
 - (d) appeal a court’s order;
 - (e) prepare a plan of care for a First Nations child whom a Society seeks to place for adoption;
 - (f) seek an openness order with respect to a First Nations child whom a Society seeks to place for adoption;
 - (g) apply for the extension, variation, or termination of a restraining order;
 - (h) participate in the review of the residential placement of a First Nations child;
 - (i) participate in a proceeding before the Child and Family Services Review Board.⁷

⁶ *CYFSA*, *supra*, s. 73.

⁷ *CYFSA*, *supra*, ss.: 79(1), 104(2)2, 113(4)(d), 121(e), 186(2)(a), 197(5), 137(4)(f), 66(4)(c), and O. Reg. 155/18, s. 41(3) and 46(2).

17. The Band Representative is also entitled under the *CYFSA* to receive notice and be consulted in the following instances:
- (a) when a proposal is made for alternative dispute resolution;
 - (b) when recommendations are made respecting a First Nations child's placement by a residential placement advisory committee;
 - (c) when an application for access is made respecting a First Nations child in a Society's care or supervision;
 - (d) the proposed removal of a First Nations child in the care or supervision of a Society where the child has lived continuously with a foster parent for two years (or a review thereof);
 - (e) a status review application;
 - (f) an appeal from a court's order under Part V;
 - (g) a Society's intention to begin planning for the adoption of a First Nations child;
 - (h) a Society's intention to place a First Nations child in extended society care for adoption;
 - (i) the removal of a First Nations child after adoption or refusal to place a First Nations child in an adoptive home;
 - (j) the entering into of a Voluntary Youth Services Agreement with a 16 or 17 year-old First Nations youth;
 - (k) a Society's proposal to transfer a file to another Society;
 - (l) when a Society opens a new investigation regarding citizens of the Nation;
 - (m) when a Society closes an investigation;
 - (n) when a Society transfers a file to ongoing services;
 - (o) preparation and review of a safety plan for a First Nations child;
 - (p) developing a service plan for a First Nations child;
 - (q) when considering the termination of child welfare services;
 - (r) when a child is apprehended (brought to a place of safety);
 - (s) developing a plan of care for a First Nations child;

- (t) choosing or changing a First Nations child's residential placement;
 - (u) entering into a Temporary Care Agreement respecting a First Nations child;
 - (v) establishing emergency houses;
 - (w) providing family support services.⁸
18. In short, there is a participatory or consultative role for Band Representatives in virtually all proceedings or actions under the *CYFSA*. If properly resourced, the *CYFSA* enables Band Representatives to be involved in almost every step of the child welfare agency's intervention in a First Nations family, and by extension in the First Nation community. Band Representatives are not ancillary to the child welfare system for First Nations children, they are integral.

The Legal and Ethical Context of Confidentiality and Client Records for Band Representatives

19. In order for a First Nation to take advantage of its legislated rights and duties under the *CYFSA* a First Nation requires safe, secure, confidential space to offer Band Representative Services. This is – first of all – a basic practical matter of having a space from which to provide services, meeting space, cultural space, and so on. But it is also prescribed by law and ethics; those serving vulnerable children and families must respect client confidentiality and follow certain processes for the collection, retention, and disposal of client records. In what follows, we provide an overview of the laws and ethical norms concerning client confidentiality and record security in order to contextualize the capital needs of Band Representative programs.
20. The *CYFSA* prohibits the identification of a child who is subject to a proceeding under the *Act* or the identification of the child's family.⁹ The penalty upon conviction

⁸ *CYFSA, supra*, ss.: 17(2) & 17(4), 65(1)5, 104(4)(d), 109(7)(b), 109(10), 113(5)(e), 121(e), 186(1), 197(2)1 & 192(2)(c), 73, 73, 73, 73, 72(c), 73, 72(a), 72(c), 73, 72(e), 72(h), 72(b).

⁹ *CYFSA, supra*, s. 87(8).

for contravening the prohibition is a term of imprisonment of up to three years, or a fine of up to \$10,000, or both a fine and a term of imprisonment.¹⁰ These provisions are intended uphold the integrity of client confidentiality.

21. Part X of the *CYFSA* also prescribes minimum safeguards for personal information protection applicable to “service providers” as defined by the *CYFSA*. We are not asking this Tribunal to determine whether Band Representatives are “service providers” as defined in the *CYFSA* and its associated regulations; we reference these provisions only as illustrative of legal standards for privacy that Band Representatives may aspire to. Part X prescribes the following minimum standards for the protection of personal information:
 - (a) Service providers shall take all reasonable steps to ensure information is protected against theft, loss, copying, modification, disposal;¹¹ and
 - (b) Records must be retained, transferred, and disposed of in a safe manner.¹²
22. These provisions in Part X of the *CYFSA* were interpreted by the Information and Privacy Commissioner of Ontario (“IPC”), who provides oversight of Part X. The IPC analyzed Part X and found that the minimum physical safeguards for records containing personal information include:
 - (a) “controlled access to locations where personal information is stored”
 - (b) “locked cabinets”
 - (c) “access cards and keys”
 - (d) “identification, screening and supervision of visitors”.¹³
23. In summary, the *CYFSA* has strict rules around respecting client confidentiality and the collection, retention, and destruction of records containing clients’ personal

¹⁰ *CYFSA, supra*, s. 142(3).

¹¹ *CYFSA, supra*, s. 308.

¹² *CYFSA, supra*, s. 309.

¹³ Office of the Information and Privacy Commissioner of Ontario, May 2019, *Part X of the Child, Youth and Family Services Act: A Guide to Access and Privacy for Service Providers*, p. 27. [IPC Guide].

information. These rules require those delivering child welfare services to take reasonable measures to ensure that privacy and security are maintained for all client meetings, discussions about client files, and client personal information, and demonstrates both legal obligations and best practice. It is self-evident that these reasonable measures cannot be undertaken without a safe, secure, confidential space in which to operate.

24. The ethical norms and laws applicable to social workers are also a useful reference point for the confidentiality and privacy issues facing Band Representative programs. While not all Band Representatives are registered social workers or social services workers, these standards are illustrative of the norms for those serving vulnerable children and families. Key laws/ethical standards include:
- (a) The legal requirement to keep client information secret, contravention of which is punishable by a fine of not more than \$25,000.¹⁴
 - (b) The legal requirement to maintain records to the regulations and standard of the profession, contravention of which constitutes professional misconduct.¹⁵
 - (c) The ethical imperative to “not discuss confidential information in public or semi-public areas such as hallways, waiting rooms, elevators, and restaurants”.¹⁶
 - (d) The ethical imperative to store client records in a secure place for at least seven years.¹⁷
25. The legal and ethical standards of those serving vulnerable children and families require respect for client confidentiality and security of client personal information. Contravention of these standards is met with serious consequences including the potential for incarceration, large fines, or sanction by the professional regulator.

¹⁴ *Social Work and Social Services Work Act, 1998*, SO. 1998, Ch 31 ss. 50(1), 55(6)).

¹⁵ O Reg 384/00: Professional Misconduct, s. 20.

¹⁶ Canadian Association of Social Workers, 2005, *Guidelines for Ethical Practice*, s.1.5.6.

¹⁷ Ontario College of Social Workers and Social Service Workers, 2008, *Code of Ethics and Standards of Practice Handbook*, “Principle IV: The Social Work and Social Service Work Record”, s. 4.2.3

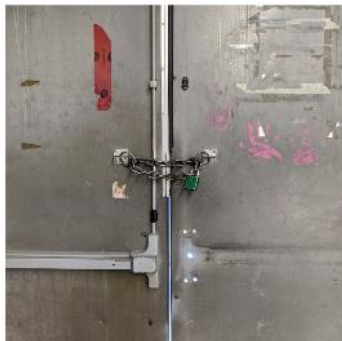
Yet Band Representative programs are unable to meet these legal and ethical standards as Canada will not fund capital for Band Representatives and there is a severe and widespread capital and infrastructure crisis in First Nations. For those Band Representatives that are governed by these standards, that this is unacceptable is an obvious conclusion.

Examples: The Actual Capital Needs of Two Band Representative Programs

26. There are two examples in the documents filed on consent of Canada that are before the Tribunal—from Wabaseemoong Independent Nations and Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation) – that illustrate the capital and infrastructure issues facing some Band Representative programs. Both of these First Nations sought modest amounts of funding to meet the capital needs of their programs. Canada denied both claims.
27. In Wabaseemoong the Band Representative program operates out of a corner of the shared Community Hall and a hallway in the First Nation's administration office. In Asubpeeschoseewagong Netum Anishinabek the Band Representative program operates out of a single room in a shared trailer in what used to be the Chief and Council Chambers before the leadership moved out in order to allow the Band Representatives to use the space. Consequently, the Chief and Council no longer have offices or chambers. Please see below some photographs of the current Band Representative facilities in these communities (which are also included at .Tabs 3 & 4 of COO's Record of Documents).

**temporary office and
program area for
band representative
program at
wabaseemoong**

**offices have no
privacy our
community hall
serves as temporary
program area. there
is no bathroom for
our clients to use.
our private intake
area is a corner in
community hall.**



Pictures of the interior and exterior of the trailer in which the Band Representative Program is operating in Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation).



28. The Band Representative programs in Wabaseemoong Independent Nations and Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows) are plagued with many of the same issues with the space they currently operate out of, for example:
- (a) No privacy for client meetings or discussions among staff
 - (b) No secure records storage
 - (c) Unable to meet clients without risking identification as being involved with child welfare by others present
 - (d) Unable to host Elders or have ceremonies or store medicines or sacred items
 - (e) Unable to control access to the space or records
 - (f) Unable to conduct confidential phone calls
 - (g) Unable to receive confidential faxes
 - (h) Total absence of fire protection or fire safety equipment
 - (i) Poor isolation and heating (in Northwestern Ontario)
 - (j) Overcrowding
 - (k) Lack of security
 - (l) Not wheelchair accessible
 - (m) Minimal or absent bathroom and kitchen facilities
 - (n) No space to meet cultural needs
 - (o) No space for larger gatherings such as ceremonies or alternative dispute resolution or family meetings
29. The cases of Wabaseemoong and Asubpeeschoseewagong Netum Anishinabek are raised for illustrative purposes only, to give the Tribunal a sense of the capital needs for Band Representative programs that Canada refuses to meet. These two First Nations are unable to operate their Band Representative programs in a manner consistent with the governing legal and ethical standards. Without adequate space, Band Representatives cannot ensure that client confidentiality is protected, or that records of personal information are collected, retained, and

disposed of properly. Yet the programs in these two First Nations continue to operate, despite the risks, to provide community-based, culturally safe child welfare supports that offer children a connection to their land, kin networks, language and culture, and a voice within the child welfare system.

30. COO echoes the submissions of the Caring Society of April 9, 2020; Canada's guiding policies and documents on Band Representative Services appear to reflect an "old mindset" and to be out of alignment with the realities of First Nation communities.

Substantive Equality Requires Capital Funding for Band Representative Programs

31. In its 2016 decision on the merits the Tribunal held the following regarding Band Representative Services:

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*.

[...]

If funding does not correspond to the actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[...] The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community.¹⁸

¹⁸ 2016 Merits Decision, *supra*, paras. 348, 425, 426.

32. In this decision the Tribunal affirms that funding for Band Representatives must meet First Nations' "actual child welfare needs", account for the context of historical disadvantage, and enable First Nations to deliver culturally-appropriate supports; in other words, funding for Band Representatives must be consistent with the principle of substantive equality, in order to meet the legal test in s.5 of the *Canadian Human Rights Act*.
33. The government is further bound to provide services – in this case,¹⁹ to fund child welfare services – in First Nations consistent with substantive equality, pursuant to Section 11 of *An Act respecting First Nations, Inuit and Métis children, youth and families*. Section 11 of the *Act* provides that "child and family services provided in relation to an Indigenous child are to be provided in a manner that [...] promotes substantive equality between the child and other children". Accordingly, Band Representative Services funding, as a service provided by Canada, must be provided in a manner that promotes substantive equality.
34. After decades of discriminatory under-funding of Band Representative Services, this Tribunal ordered Canada to fund these programs "at actuals" in February 2018. Unfortunately, over two years after the Tribunal made this order, discrimination against Ontario First Nations persists as Canada will not fund the capital needs of Band Representative programs. The promise of funding "at actuals" is hollow if First Nations do not have safe, secure, confidential space in which to operate their Band Representative programs. Without space, First Nations cannot provide Band Representative services that meet the legal or ethical standards respecting client confidentiality and record security, or in some cases, provide any services at all. This results in either a lesser service, or a denial of a service to First Nations children. Canada's conduct is contrary to the principle of substantive equality and the best interests of the child and the Tribunal's orders to fund at actual costs.

¹⁹ Funding of this program is a service as per 2016 Merits Decision, *supra*.

All of which is respectfully submitted, this 9th day of April 2020.

A handwritten signature in cursive script, appearing to read "S Dearman".

Maggie Wente and Sinéad Dearman
Counsel for Chiefs of Ontario