



August 26, 2021

By e-mail

(See Distribution List)

Dear Parties,

**Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008**

The Panel wishes to convey the following to the parties:

Letter-decision with reasons to follow (equivalent of an oral ruling made from the bench)

The Tribunal is seized of a number of outstanding issues that were taken under reserve. The parties advised that they are currently discussing those issues. The parties, except for Canada, did not wish to delay the issuance of a ruling on those issues, which are listed below. The Tribunal agreed to rule on those issues and also agreed to wait for a report on long-term reform that will be filed with the Tribunal by **September 17, 2021**. This decision does not address all aspects of the previous orders on the broader long-term reform of its cease and desist the discrimination identified in the *Merit Decision* and reform the FNCFS Program in accordance with the findings in the *Merit Decision*. As the Panel strongly supports the parties resolving issues through negotiation, the Panel hopes this letter-decision will assist all the parties in their current discussions. However, it is an interim decision designed to assist the parties in their negotiations and does not reflect the Panel's entire final reasons. In the event of a conflict between this interim decision and the Panel's final reasons, the final reasons are authoritative. That said, the Panel fully expects and intends the final reasons to be entirely consistent with this letter-decision.

I. Major Capital/Capital/Buildings (Purchase and/or construction of capital assets that support the delivery of FNCFS)

The Panel used the terms Capital and Capital Infrastructure in previous decisions. The terms Major Capital and Minor Capital are terms Canada used to distinguish between the two. Since then, Canada has indicated the FNCFS Program's Terms and Conditions have been amended and this distinction has been removed. The Panel will address this further in its upcoming reasons. For the purposes of this letter-decision the Panel will refer to the recent terminology as amended in the FNCFS Program's Terms and Conditions: "Purchase or construction of capital assets that support the delivery of FNCFS services".

- **Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of FNCFS**

As it will be further explained in the reasons to follow, the issue of capital infrastructure/capital/buildings was addressed in the Panel's findings from the beginning and forms part of the evidence before it. It is well within the scope of this claim and forms part of the reform the Panel is monitoring. Unchallenged orders were already made on Capital/Capital Infrastructure in previous rulings. The 2018 CHRT 4 orders for building repairs rather than building construction recognized the need for further consultation on needs before issuing further specific orders. This order did not eliminate previous Tribunal orders. Rather, it considered the need for more consultations and this was clearly stated in the ruling (See paragraph 407).

Additionally, the Panel did not separate services offered from office space or safe, culturally appropriate and confidential buildings in which to offer those services. It is erroneous to conclude the Panel made such a distinction. The Panel's orders always focused on specific needs and keeping with substantive equality using provincial standards as the floor rather than as the ceiling. This reasoning applies to the Panel's overall approach to all aspects of its orders. As discussed in the *Merit Decision* and subsequent rulings, provincial standards require safe, confidential spaces in which to offer services to First Nations children. Furthermore, a piecemeal fragmented approach has been rejected by this Panel from the beginning. Similarly, a one size-fits-all approach was also rejected by this Panel.

Since the motion on Major Capital was brought before the Tribunal, Canada indicated that on September 5, 2018, the Consultation Committee determined a gap existed in the infrastructure authorities, which could be addressed by amending the Terms and Conditions. Canada has since amended the FNCFS Program's Terms and Conditions to include the purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS for First Nations children. Moreover, the purchase or construction of capital assets (e.g. buildings) is now included as an eligible expenditure for FNCFS agencies.

In addition, the Terms and Conditions also include infrastructure purchase, maintenance and renovations as eligible expenditures under the Community Well-Being and Jurisdiction initiative. Furthermore, Canada has also advised of the introduction of a new funding stream within FNCFS for Community Well-being and Jurisdiction Initiatives (CWJI), which is designed to enable projects of up to five years in duration to expand the availability of prevention and well-being initiatives that are responsive to community needs, and to support First Nations in developing and implementing jurisdictional models.

While this is a positive step, three and a half years have now passed since the 2018 ruling and no concrete plan has been presented to the parties on this issue. The parties did not agree on this issue and required adjudication of the matter. The Caring Society, the AFN, the COO and the NAN recently confirmed the need for further orders. Moreover, adverse impacts linked to this issue were identified in the 2016 *Merit Decision* and subsequent rulings. The Tribunal agrees with Canada that finality is needed. However, the Panel reiterates that this is appropriate once long-term reform has been settled or ruled upon, hopefully in the near future. The Panel's statutory role is to ensure the discrimination found is eliminated and does not reoccur. The Panel will further elaborate in its reasons to follow, however, at this time, the Panel believes in keeping with its approach in this

case (see 2018 CHRT 4 at para. 303) that a further specific order is required to ensure discrimination is eliminated in a timely fashion.

Orders for purchase and/or construction of capital assets that support the delivery of FNCFS on-reserve including prevention services.

- **Order**

Pursuant to section 53(2) of the *CHRA* the Tribunal orders Canada to:

Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of receipt of the forthcoming reasons concerning this order advising them on how to access this Capital asset funding. Canada will post this information on the ISC website.

For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of FNCFS to children on-reserve including in Ontario and in the Yukon that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of receipt of the forthcoming reasons concerning this order. Canada shall post this information on the ISC website.

The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of FNCFS services on-reserve. This also includes studies for First Nations that also operate under the Federal FNCFS Program off-reserve such as Ontario.

*The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.

II. Small agencies

Canada submits that the requested additional order for non incurred expenses is in effect a request for compensation and general damages for small FNCFS Agencies. The Panel agrees with Canada on this part. The Tribunal's order to fund small agencies at actual costs retroactive to January 26, 2016 did not include the Caring Society's additional request. The Panel agrees it is a form of

compensation under another section of the *Act* and did not form part of the 2018 CHRT 4 orders. While the Panel believes it is within the scope of the claim, such arguments on compensation and general damages were not advanced by the Caring Society. No order will be made on this request as part of this ruling.

On the issue of funding the costs for administration and governance, prevention, intake/investigation, and legal services at their actual cost, the Panel clarifies this is already covered under the 2018 CHRT 4 orders that Canada confirmed it is implementing.

III. Funding for Capital assets for the Purchase and/or construction of capital assets that support the delivery of Jordan's Principle services

- **Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of Jordan's Principle services**

Jordan's Principle services are part of this claim and have been the subject of numerous orders by the Tribunal in these proceedings. Divorcing the services from provincial requirements for safe, confidential spaces to offer the services would amount to discrimination. It would also perpetuate gaps, denials and delays in hindering the delivery many services that can only be offered indoors. In other words, denying funding for safe, confidential and culturally appropriate spaces respecting provincial requirements would be the equivalent of refusing services otherwise allowed under Jordan's Principle.

- **Order**

Pursuant to section 53 (2) of the *CHRA* the Tribunal orders Canada to:

Fund all FNCFS Agencies including small agencies and/or First Nations at actual costs for the purchase of capital assets that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon and advise the FNCFS Agencies and First Nations in writing within 30 days of receipt of the forthcoming reasons concerning this order advising them on how to access this Capital asset funding. Canada shall post this information on the ISC website.

For the construction of capital assets, the Tribunal orders Canada to fund the actual costs of projects that support the delivery of Jordan's Principle services to children on-reserve including in Ontario and in the Yukon for First Nations and FNCFS Agencies that are ready to proceed advising them in writing on how to access the capital assets funding within 30 days of receipt of the forthcoming reasons concerning this order. Canada shall post this information on the ISC website.

The Tribunal orders Canada in consultation with the CCCW, to provide funding for FNCFS Agencies and First Nations to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital

assets that support the delivery of Jordan's Principle on-reserve and in the Yukon and off-reserve where applicable under Jordan's Principle.

The Tribunal orders Canada in consultation with the COO and the NAN, to provide funding for First Nations and FNCFS Agencies to conduct capital needs and feasibility studies regarding the purchase and/or construction of capital assets that support the delivery of Jordan's Principle on-reserve and off-reserve, where applicable under Jordan's Principle in Ontario.

*The above orders recognize First Nations inherent rights to self-government and that this Tribunal cannot force First Nations that are not a party to these proceedings to do anything. The above orders recognize that complex processes must be followed in order to be ready to proceed to build on reserve and that this cannot be done unilaterally by FNCFS Agencies, Canada or by order of this Tribunal. Consequently, the purchase and construction orders above only include projects that are ready to proceed.

IV. Capital for prevention services/Band Representatives services in Ontario

- **Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of prevention services and Band Representatives in Ontario**

The Ontario child welfare services, the *1965 Agreement* and Band Representatives services have always formed part of this claim.

The 2018 CHRT 4 orders did not exclude actual costs for prevention for Band Representatives services, the orders targeted Band Representative services as a whole. Band Representatives are also part of the broader prevention efforts made by First Nations communities in Ontario to keep First Nations children in their homes, families and communities. Their actual costs including the purchase or construction of capital assets that support prevention services and Band Representatives should be funded by Canada.

- **Order**

Pursuant to section 53 (2) of the *CHRA*, the Tribunal orders Canada to:

Fund actuals costs for Band Representatives and prevention services on-reserve within 30 days of receipt of the forthcoming reasons concerning this order and advise the First Nations in writing.

Consult with COO and the NAN, advise in writing and provide funding for Ontario First Nations to conduct feasibility studies and needs-assessments for the purchase and/or construction of capital assets that support the delivery of Band Representatives and prevention services on-reserve and off-reserve when applicable under the Federal Program in Ontario within

30 days of receipt of the forthcoming reasons concerning this order. Canada shall post this information on the ISC website.

V. Reallocation

The Panel has already ruled on this issue in 2018 CHRT 4 and will clarify what it meant in the reasons to follow. There will be no further order made at this time.

VI. Financial Administration Act

As it will be further explained in the reasons to follow, the *Financial Administration Act (FAA)* is law in Canada however, it should not be interpreted in a way that hinders the Panel's quasi-judicial statutory role under the *CHRA*. Rather, it should be interpreted harmoniously with quasi-constitutional legislation such as the *CHRA* including orders made under the *CHRA*. Canada's liability was established and cease and desist and reform orders were accepted by Canada. The Tribunal's findings addressed the Program authorities at length in the *Merit Decision*. The Program authorities formed part of the Tribunal's orders.

The Tribunal's orders are to be read harmoniously with the *FAA* and, in the event of conflict, the orders under the *CHRA* have primacy over the *FAA*.

The *FAA* or its interpretation could be studied for possible amendments should Parliament deem it appropriate. The *CHRA* fulfills Parliament's paramount goal in regards to human rights in Canada.

None of the orders above affect the Panels' previous *Merit Decision*, subsequent rulings and previous orders.

VII. Retention of jurisdiction

The Panel retains jurisdiction on all its previous orders including the clarification orders in this letter-decision and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or until all the outstanding issues including long-term relief have been resolved by the parties or ruled upon by the Panel. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Should you require any assistance in these proceedings, please do not hesitate to contact the Registry by e-mail at registry.office@chrt-tcdp.gc.ca by telephone at 613-878-8802 or by fax at 613-995-3484.

Yours truly,

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Registry Officer

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