

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

Respondent

-and-

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

Interested Parties

**WRITTEN SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI
NATION (“NAN”) RESPONDING TO CANADA’S UPDATE TO TERMS AND
CONDITIONS RE. BAND REPRESENTATIVE SERVICES AND CAPITAL AND
RESPONDING TO CANADA’S *FINANCIAL ADMINISTRATION ACT* SUBMISSIONS**

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Julian N. Falconer L.S.O. # 29465R
Akosua Matthews L.S.O. # 65621V
Molly Churchill L.S.O. # 72510P

Tel.: (416) 964-0495
Fax: (416) 929-8179

**Lawyers for the Interested Party,
Nishnawbe Aski Nation (“NAN”)**

OVERVIEW

1. These are the written submissions of Nishnawbe Aski Nation (“NAN”) on two matters. First, they are further responding submissions on an issue raised by Chiefs of Ontario (“COO”) in March of 2019 relating to capital costs required for Band Representative Services (“BRS”). NAN filed brief submissions on this issue on April 3, 2019, and these present submissions respond to Canada’s recent update to the Tribunal (on September 18, 2020) about changes to the Government’s approach on capital expenditures and BRS. Second, these are NAN’s responding submissions to Canada’s September 18th submissions on an issue the Tribunal asked the parties to comment on: whether Canada’s current financial approach, in line with the *Financial Administration Act* (“FAA”) and Treasury Board’s authorities, supports the implementation of the Panel’s orders effectively.

PART I: RESPONSE TO CANADA’S SEPTEMBER 18TH UPDATE REGARDING BRS AND CAPITAL

2. This Part of NAN’s submissions starts by demonstrating how, over the last 16 months, ISC has narrowed its interpretation (1) of the scope of this Tribunal’s order that Canada reimburse First Nations, Tribal Councils, and Agencies at the actual cost of providing BRS, and (2) of the scope of the First Nations Child and Family Services Program’s Terms and Conditions (“Terms and Conditions”) as they relate to BRS. This Part of the submissions goes on to outline NAN’s concerns with the inequitable nature of Canada’s new approach to BRS and capital recently announced by ISC with a change in the Terms and Conditions: ISC has limited BRS-related capital costs to a one-time claim capped at \$1.5M per First Nation, regardless of remoteness or need.

A. BRS-RELATED CAPITAL EXPENSES: FROM ELIGIBLE TO INELIGIBLE

3. As outlined below, in June of 2019, ISC made representations to NAN, under oath, that BRS-related capital claims could be eligible for reimbursement at actuals pursuant to this Tribunal's orders of February 1, 2018. By March of 2020, ISC was taking a new position: that major capital for BRS was not eligible under the Terms and Conditions. Now, ISC has modified the Terms and Conditions, not to clarify that BRS-related capital claims are eligible through the payment at actuals process, but instead to introduce an inequitable and impractical approach of limiting "actual" reimbursement of capital claims to a one-time claim capped at a maximum of \$1.5M.

4. More than a year after this Tribunal ordered Canada to reimburse First Nations, Tribal Councils, and agencies at the actual cost of providing BRS,¹ NAN tried to clarify with ISC the mixed messaging NAN had been receiving about claims for BRS expenses. In May of 2019, NAN co-hosted a conference which it hoped would provide a forum for ISC to clarify mixed messaging about how to access prevention and child welfare-related funding, including BRS-related funding.² On June 3, 2019, NAN's Director of Social Services, Bobby Narcisse, sent a letter to the Director of Child and Family Services Reform and Transformation for ISC's Ontario Region, Catherine Thai, in follow-up to the conference ("the June 3rd letter").³

¹ 2018 CHRT 4 at para 427 (and amendment thereto)

² Exhibit "D" to the affidavit of Odi Dashesmbuu sworn May 11, 2020 (Letter from Bobby Narcisse to Catherine Thai dated June 3, 2019), at p. 1 [The June 3rd Letter].

³ *ibid.*

5. The June 3rd letter outlined some of the mixed messaging from ISC.⁴ It went on to articulate NAN’s understanding – based on information shared by ISC officials at the recent conference – of some of the key areas of concern, including about major capital and BRS.

The letter asked ISC to explain in writing if it disagreed with NAN’s understanding:

While the Conference did not result in the clarity communities require to fully avail themselves of child welfare funding, as was hoped, we are glad that some items have been clarified. Specifically, **we understand the following to be true:**

- **Major capital funding requests are eligible under BRS funding;**

....

If you disagree with any of the above statements – which are based on information shared by you, Victoria Pezzo, and Vanessa Follon at the Conference – **I ask that you write back with a prompt response explaining the disagreement.**⁵

6. The June 3rd letter was presented to ISC Assistant Deputy Minister Joanne Wilkinson (“ADM Wilkinson”) during cross-examinations on June 4, 2019. Counsel for NAN asked ADM Wilkinson to answer some of the questions that Mr. Narcisse posed in his June 3rd letter.
7. ADM Wilkinson, while noting that ISC was looking into this to respond to Mr. Narcisse’s letter, stated that capital expenses such as renovation of existing spaces and brand new capital builds for BRS would be looked at on a case-by-case basis:

Q. So, an example would be renovating existing spaces. Is that something that you believe could be covered under Band Representative Services?

A. So, again, we don’t have it listed as an eligible expense, so that’s something that we are again, looking into as well. [...] It’s not specified in the Terms and Conditions in terms of Band Reps, but it’s certainly

⁴ The June 3rd Letter, at pp. 1-4.

⁵ *ibid.*, at p. 5 (emphasis added).

something that we can look at when we deal with the claims on a case-by-case basis.

Q. Okay. Now **what about brand new capital**, where there isn't any existing space to renovate, they need to actually create a brand new building or place to provide a service. What is your understanding of whether or not that's eligible?

A. So, that again, would **fall into the same category as I just described.**⁶

8. ADM Wilkinson undertook to provide a response to questions such as those above, in which her response indicated the question was one that ISC was looking into. ADM Wilkinson's response to her undertakings came in the form of a letter dated June 28, 2019 ("the June 28th letter") from the Director, Child and Family Services Reform of ISC's Ontario Region, responding to Mr. Narcisse's June 3rd letter.⁷

9. The June 28th letter confirms that BRS-related capital claims can be reimbursed through the payment-at-actuals process:

"Capital costs required to deliver Band Representative Services may be considered as eligible costs and are reviewed on a case by case basis. Some examples of approved capital costs include: 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 Department has also received claims through the Band Representative Services reimbursement process where funding for capital projects have been requested, but may be beyond the purview of Band Representative Services, and would be ineligible expenses. Some examples of these requested capital projects include: 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.⁸

⁶ Cross-examination of ADM Wilkinson, June 4, 2019, p. 29, l. 3 to p. 30, l. 15 (emphasis added).

⁷ Exhibit "E" to the affidavit of Odi Dashsambuu sworn May 11, 2020 (Letter Catherine Thai to Bobby Narcisse, June 28, 2019), at second last paragraph of letter.

⁸ *Ibid.*, at 3rd page of letter (emphasis added).

10. At no point did ISC state to NAN that capital costs, including major capital costs, claimed through the BRS funding at actuals process were not captured by the Tribunal's order. At no point did ISC state to NAN that these costs were not eligible under the Terms and Conditions. NAN's understanding in June 2019 that major capital expenses can be claimed through the payment at actuals process was confirmed by ISC. By December 2019, ISC was taking a problematic and narrower position, stating that BRS capital funding claims will be approved only where they are specific to a child or family being served by an agency.⁹ Then, by March of 2020, ISC was using a lack of authority in the Terms and Conditions as justification to deny BRS requests relating to major capital: "unfortunately, Major Capital investments are not eligible under the FNCFS Terms and conditions of the program for Band Representative Services".¹⁰
11. The Terms and Conditions in place in May and June of 2019 are the same Terms and Conditions that were in place in March of 2020.¹¹ The wording had not changed, but ISC's interpretation of the wording apparently had.
12. ISC has now recently announced that the Terms and Conditions have been modified permitting a one-time claim for BRS-related capital expenses capped at a maximum of \$1.5M.¹² It is NAN's position that such limitations are incompatible with full implementation of this Tribunal's interim order for ISC to reimburse BRS expenses at the actual cost of providing BRS services on an ongoing basis, for the time being. Furthermore,

⁹ Exhibit G to the Affidavit of Odi Dashsambuu, sworn May 11, 2020 (Correspondence from Anne Scotton to Bobby Narcisse, December 4, 2019).

¹⁰ Tab 4 of the Documentary Record filed by COO with Canada's consent on April 9, 2020 (Email of March 27, 2020 from Catherine Thai to Sinead Dearman), at 70th page of the PDF [COO Record of April 9, 2020].

¹¹ Affidavit of Lori Warner, sworn March 4, 2020, at paras 9-10 and Exhibit 6B.

¹² AGC Update to the Tribunal on September 18, 2020, enclosing email of August 24, 2020 regarding changes to Terms and Conditions.

ISC's representations to NAN in May and June of 2019 demonstrate that ISC also believed the Tribunal's order to reimburse BRS costs included reimbursement for BRS-related capital costs. Seen in this light, the recent change to the Terms and Conditions is troubling. Furthermore, as outlined below, the \$1.5M cap is inequitable and reflective of a lack of needed systemic change.

B. INEQUITABLE NATURE OF THE \$1.5M CAP

13. NAN is disheartened by the manner in which the new Terms and Conditions further entrench, rather than remedy, inequities faced by remote First Nations in the provision of Band Representative Services. Because it is possible to purchase/renovate/build much more with \$1.5M in a southern First Nation than in a northern remote First Nation, ISC's current approach effectively gives less to remote First Nations than to non-remote First Nations. Furthermore, it appears the figure of \$1.5M is based not on evidence, but on old ISC/INAC policy.

i) \$1.5M For All Is Not Equality For All

14. The fact that the new Terms and Conditions do not in any way recognize or address the increased costs faced by remote and northern First Nations is deeply troubling to NAN.
15. In its decision on the merits in this case, this Tribunal highlighted some of the challenges in providing child welfare services in remote and isolated First Nations in Ontario, including "the added time and expense to travel to the communities [...], where some communities do

not have year round road access and where flying-in can be the only option for accessing a community.”¹³

16. The challenges and expenses relating to travel and access to remote First Nations, as found by this Tribunal, impact the costs of capital projects in remote First Nations. The increased costs associated with capital projects in remote and northern First Nation as compared to southern First Nations is a matter of common sense and is not news to ISC, who runs a Capital Facilities and Maintenance Program and First Nation Infrastructure Fund, and has even developed a Cost Reference Manual.¹⁴ This Manual can be used to generate cost estimates, per square mile, of constructing buildings. It uses geographic indices and a site-specific index to inform the estimate.¹⁵ ISC is aware that there are increased costs associated with infrastructure investments in northern and remote communities as compared to southern and non-remote communities, and therefore the inappropriateness of a one-size-fits-all cap.¹⁶
17. Costs associated with transportation of material can be quite high for capital investments in remote and northern First Nations. The more cost-effective freight option for transportation of materials has a limited window for NAN communities that rely on winter roads. Thirty NAN communities rely on the limited winter road season to reduce costs, and when project timelines do not align with this varying – and increasingly short¹⁷ – season, NAN

¹³ 2016 CHRT 2 at para 231.

¹⁴ Affidavit of Shelby Percival, sworn October 2, 2020, at para 12 [the Percival Affidavit].

¹⁵ *Ibid.*

¹⁶ In contrast to the recent Terms and Conditions changes, a *draft* FNCFS Directive on Agency Capital Expenditures at least acknowledged that remoteness is a factor in determining the cost of a capital project that might make hard, one-size-fits-all caps inappropriate: Exhibit 7A to the Affidavit of Lori Warner, March 4, 2020.

¹⁷ Exhibit A to the Affidavit of Bobby Narcisse, sworn April 3, 2019: “There is progressive deterioration of seasonal roads. The duration of winter road season has decreased from an average of 77 days a decade ago to as few as 28 days in 2013” (at p. 31).

communities are disproportionately impacted.¹⁸ This reality has been discussed with ISC at meetings of the Consultation Committee on Child Welfare (“CCCW”).¹⁹

18. Practically, what does this mean for a claim for BRS-related capital? For a First Nation who has made an advance claim for BRS-related capital and who cannot afford to carry the debt load associated with the project, the importance of a quick processing time by ISC can be critical. If the claim is not processed in time to permit transportation of material during the winter road season,²⁰ the result will be either (a) the inability to start the project according to the claimed amount until the following year when the winter road system returns – thus further delaying provision of critically needed culturally appropriate services – or (b) a potentially dramatic increase in costs.²¹
19. This latter consequence raises a further concern with the recent Terms and Conditions. If capital expenses are limited to a one-time claim, what will happen for a First Nation whose initial estimate of the cost of the project proves lower than the actual costs? This could occur in instances where a claim is not processed in time to permit transportation of goods via winter road, and the material ends up being transported by air instead. It can also happen in instances such as that outlined at para 6 in the affidavit of Shelby Percival, where a First Nation omitted the cost estimate for site preparation in an initial claim for modular homes.²²
- The extra costs associated with site preparation for the First Nation in question is

¹⁸ *Ibid.*, at p. 11. See also paras 9-10 and Exhibit “G” to the Percival Affidavit.

¹⁹ Exhibit “C” to the Percival Affidavit [CCCW – Record of Decisions, Final, October 23, 2018, at p. 10]; also Exhibit “D” to the Percival Affidavit [CCCW – Record of Decisions, Final, June 17, 2019, at p. 4]

²⁰ Percival Affidavit at paras 9-10 and Exhibits “F” and “G”. See also COO Record of April 9, 2020 at PDF p. 27 for an example of lengthy processing.

²¹ Percival Affidavit at para 9.

²² *Ibid.* at para 6.

approximately \$226,000.²³ Limiting First Nations to a one-time claim risks precluding them from being reimbursed for such necessary but initially overlooked expenses.

20. This Tribunal has found, in unequivocal terms, that ISC's (then INAC's) failure to take remoteness costs seriously in its funding of agencies through the FNCFS program contributed to denials of services and created various adverse impacts for First Nations children and families.²⁴ The Tribunal ordered ISC (then INAC) to cease its discriminatory practices and reform the FNCFS Program to reflect the Tribunal's findings, including in relation to the need to fund to account for remoteness.
21. It is troubling that ISC has now introduced Terms and Conditions relating to BRS and capital that do not address remoteness costs in any shape or form.
22. Following this Tribunal's January 2016 decision on the merits, when ISC/INAC did not take any immediate steps to address funding deficiencies relating to remoteness, this Tribunal stated the following:

The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada, numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them.²⁵

²³ Percival Affidavit at para 6.

²⁴ 2016 CHRT 16, at paras 153, 157, 181, 264, 275, 287, 291, 313, 384, 389, 392, and 458.

²⁵ 2016 CHRT 16, at para 29.

23. The recent changes to the Terms and Conditions are reflective of the “old mindset” not only for failing to account in any way for increased costs due to remoteness, but also for being inspired by old policy rather than evidence-based numbers, as discussed below.

ii) *\$1.5M Cap is Arbitrary*

24. ISC has provided no evidence to suggest that its decision to cap BRS-related capital costs at \$1.5M was “based on an evaluation of the distinct needs and circumstances of First Nations children and families and their communities.”²⁶

25. Indeed, as detailed immediately below, discussions at the Consultation Committee on Child Welfare about caps placed on capital expenses for agencies suggest that the \$1.5M cap is an arbitrary amount that somehow became engrained in policy that ISC continues to unreflectively follow.

26. When then-ADM Paula Isaak was asked in August of 2018 how a cap of \$1.5M was arrived at for “minor capital” for agencies, she explained it is the default amount used in the Terms and Conditions and stated it is presumably based on industry standard.²⁷ She agreed to gather more information and report back, which she did a month later:

With respect to the minor capital, that specific authority was rescinded in 2007 during which time Treasury Board stated that every program must create their respective authority. **The former INAC simply adopted the \$1.5M as a minor capital threshold, with a few programs having increased it. It’s not clear as to exactly when that amount came into force. It was unanimously agreed this amount will not meet the actual needs for new facility** and was strongly recommended for ISC to look into the Land Management approach as a guideline. It was reminded that there are 2 kinds

²⁶ 2016 CHRT 16 at para 33.

²⁷ Exhibit “A” to Percival Affidavit [CCCW – Record of Decisions, Final, August 2, 2018, at p. 7].

of capital needs: space requirements and life of the building (*e.g.: need for engineers, facility condition etc.*)²⁸

27. At least in part based on discussions at the CCCW, the \$1.5M cap for agencies was increased to \$2.5M to adjust for inflation.²⁹ It is perplexing that, almost two years later, ISC is reverting to an arbitrary cap of \$1.5M, this time for BRS-related capital.

C. Conclusion

28. It is NAN's position that BRS-related capital expenses fall within the scope of the Tribunal's orders of February 1, 2018. The recent changes to the Terms and Conditions as they relate to BRS and capital are inconsistent with ISC's obligation to cover the actual cost of providing BRS. Furthermore, by inserting an arbitrary cap based on old INAC policy rather than an estimate of actual need, and a cap that does not account for remoteness costs in any way, ISC is reverting to the very practices that this Tribunal found resulted in discrimination against First Nations children and families.

PART II: FINANCIAL ADMINISTRATION ACT, TREASURY BOARD POLICY, AND TRIBUNAL'S FINDINGS AND ORDERS

29. On August 11, 2020, the Panel wrote to the parties asking for submissions on "the relationship between the *Financial Administration Act* (FAA), Treasury Board policies and the systemic racial discrimination found in this case" and specifically whether or not Canada's "current financial approach, in line with the FAA and Treasury Board's authorities, support[s] the implementation of the Panel's orders effectively." In NAN's recent

²⁸ Exhibit "B" to Percival Affidavit [CCCW Meeting – Record of Decisions, Final, September 5, 2018, at pp. 8-9].

²⁹ Exhibit "C" to the Percival affidavit [CCCW Meeting – Record of Decisions, Final, October 23, 2018, at p. 10].

experience, Canada's current approach has permitted the *FAA* and Treasury Board policies and authorities to act as a roadblock to implementation of this Tribunal's orders.

30. This Tribunal has already discussed the quasi-constitutional nature of the *Canadian Human Rights Act* ("CHRA") citing appropriate authorities.³⁰ This Tribunal has already discussed Supreme Court jurisprudence establishing that the Government's right to allocate resources must be done in accordance with the law, meaning it cannot override the *Canadian Human Rights Act*.³¹ NAN will not repeat these points here, as they have been appropriately considered and relied upon by the Tribunal in this case.
31. In the context of this case and the Tribunal's finding of discrimination and resulting remedial orders, the principles and authorities referenced in the paragraph above lead to the following imperative: Canada must implement the *FAA* in a manner that is consistent with the purpose of the *CHRA*³², which is given expression and life in this Tribunal's orders. In other words, Canada must use the *FAA* as a tool to facilitate implementation of the orders, not as a roadblock to implementation. In NAN's experience, unfortunately, the *FAA* and related Treasury Board policies are too often being used as roadblocks rather than facilitators.
32. While Canada has argued that an issue of primacy does not arise in this case, Canada may be missing the point: it must not implement the *FAA* and related policies in a manner that is inconsistent with the *CHRA* and remedial orders issued under the *CHRA*. It is possible to implement a non-discriminatory piece of legislation in a discriminatory manner ---- but the

³⁰ E.g. 2016 CHRT 2 at para 43; 2018 CHRT 4 at para 28, citing to numerous Supreme Court of Canada decisions.

³¹ 2016 CHRT 2 at paras 42, 44, citing to *Kelso v. The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199.

³² *Canadian Human Rights Act*, RSC 1985, c H-6, at s. 2.

fact that the legislation itself may not be discriminatory does not make the discriminatory implementation permissible.³³

33. While NAN does not deny that Canada has taken many steps to implement this Tribunal's orders, its recent experience has unfortunately been that ISC has been using shifting interpretations of the Terms and Conditions to limit the reach of the Tribunal's orders. Part I of these submissions track NAN's experience in this regard as it relates to BRS and capital.
34. As tracked in detail in Part I, correspondence in June of 2019 indicated that (a) ISC saw capital expenses for BRS as falling within the ambit of this Tribunal's February 1, 2018 order regarding payment of actual costs or BRS; and (b) ISC did not see the Terms and Conditions as preventing it from implementing the order, including by paying the actual cost of BRS-related capital expenses. But, by March of 2020, ISC had changed its tune and said major capital costs are not eligible under the Terms and Conditions --- but made no reference to the Tribunal's orders. If it is true that major capital expenses were not eligible under the Terms and Conditions, then given ISC's representations in June 2019 that capital costs would be considered eligible under the Tribunal's orders, the obvious course of action would have been to amend the Terms and Conditions to explicitly authorize major capital expenses. But this is not what was done. Instead, the Terms and Conditions appeared to be the first, and only, point of reference for decision-making.³⁴ And when the terms and Conditions were amended, the amendments introduced discriminatory funding practices.³⁵

³³ *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, [2000 SCC 69 \(CanLII\)](#), [2000] 2 SCR 1120, esp at paras 123, 160, 202.

³⁴ See also Exhibit "E" to the affidavit of Shelby Percival (Excerpt of CCCW Record of Decisions of November 8, 2019, at p. 3): ADM Wilkinson undertook to provide in writing "Canada's rationale for reverting to adjudicating claims based on terms and conditions as opposed to the paramountcy of the orders."

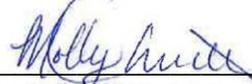
³⁵ See Part I(B) of these submissions.

35. Unfortunately, it appears to NAN that Canada is using the *FAA* and related Treasury Board policies as a roadblock to implementation rather than a tool to facilitate implementation.

CONCLUSION

36. In relation to the issue raised by COO in March 2019 of BRS and capital, Part I of these submissions provided NAN's response to recent changes to the Terms and Conditions relating to BRS and capital. NAN seeks the relief sought in its submissions of April 3, 2019, which closely mirror the relief sought by COO in its submissions of March 1, 2019.
37. In relation to the question of whether Canada's current financial approach, in line with the *FAA* and Treasury Board's authorities, supports the implementation of the Panel's orders effectively, Part II of these submissions built on Part I to explain that in NAN's experience, Canada's current approach has proved a roadblock to implementation.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2ND DAY OF OCTOBER,
2020**



FALCONER LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Julian N. Falconer	L.S.O. # 29465R
Akosua Matthews	L.S.O. # 65621V
Molly Churchill	L.S.O. # 72510P

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for Interested Party, Nishnawbe
Aski Nation ("NAN")