

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, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI
NATION**

Interested Parties

**SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION
re Canada's Submissions of March 4, 2020 and re BRS and Capital**

April 9, 2020

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April 9, 2020

I. Overview

1. These are the written submissions of Nishnawbe Aski Nation ("NAN") in response to Canada's submissions of March 4, 2020, and regarding the issue of Band Representative Services and capital. Canada filed its submissions in response to the Tribunal's request of

February 20, 2020 that Canada provide multiple documents to show its implementation of the Tribunal's orders pursuant to its decisions of 2016 CHRT 2 finding discrimination, and subsequent decisions and orders since.

2. These submissions outline ongoing areas of concern for NAN regarding Canada's implementation of the Tribunal's order.

II. Issues and Argument

3. NAN's submissions will focus on the following topics in response to Canada's submissions, and in relation to the motion of Chiefs of Ontario ("COO") regarding Band Representative Services:

- a) the shortfalls of Bill C-92;
- b) concerns regarding the draft Capital Directive;
- c) concerns regarding the implementation of payment at actuals; and
- d) concerns regarding the implementation of capital funding for Band Representative Services.

A. An Act respecting First Nations, Inuit and Metis children, youth, and families

4. In its submissions, Canada refers to its passing of an *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (the "*Act*") as an example of its active engagement with Indigenous communities, going "beyond" the Tribunal's orders. However, while NAN was encouraged by the prospect of legislation that recognizes an inherent right to self-government in the area of child and family services, it has consistently expressed

concern with the “engagement” and “co-development” process undertaken by Indigenous Service Canada (“ISC”), as well as several shortcomings with the bill.¹

5. One of the key shortfalls in the *Act* is a failure to guarantee needed funding to enable First Nations to exercise the rights recognized in the legislation. This includes both (a) the resources necessary to do the required research, law revitalization work, and the legwork of establishing new systems, as well as (b) the resources to implement laws within these new systems once they are created.
6. The *Act* contains no legislative guarantee of funding for First Nations children and families. This is deeply concerning. Canada has not made adequate resources available to enable First Nations to do the extensive work required to meaningfully exercise the rights recognized in the *Act* - including the work that would need to be done before a Coordination Agreement could be negotiated.

B. Capital Directive

7. NAN has expressed several significant concerns with the draft Directive. NAN’s starting point for discussions regarding capital in the context of child and family services is the on-the-ground reality in many NAN communities: there is a significant capital infrastructure deficit that poses barriers to program delivery. For many NAN communities, the issue is not simply one of inadequate buildings to support program delivery, but an actual absence of such buildings.²

¹ See the Affidavit Exhibit A: a paper presented by NAN to then Minister of Indigenous Services Canada (“ISC”), Jane Philpott, regarding Canada’s “engagement” around Bill C-92, dated October 10, 2018; and Exhibit B: a copy of NAN’s submission to the Standing Committee on Indigenous and Northern Affairs regarding Bill C-92, dated May 9, 2019

² See the Affidavit Exhibit C: letter from Ms. Churchill to Natalie Nepton dated July 5, 2019

8. As a result of this, NAN has expressed the following concerns regarding the Draft Directive, in a letter of July 5, 2019 to Natalie Nepton, Executive Director of ISC and Martin Orr, Senior Analyst, Child Welfare at the Assembly of First Nations:

- Lack of clarity about what criteria will be used to determine/assess whether a proposed capital project “clearly contribute[s] towards the achievement of the intended outcome of the Program (i.e., reducing the over-representation of First Nations children in care)”;
- Limiting projects to building repairs or to actuals of prevention-related infrastructure costs (the Draft Directive suggests that capital needs for delivering Band Representation Services (“BRS”) will be limited to building repairs of existing assets: the only mention of BRS is in a footnote that reads, “Reimbursement on actuals also applies to Band Representatives’ needs for building repairs of existing assets”); and,
- Lack of clarity regarding interplay with the Capital Facilities and Maintenance Program.

9. While the draft directive regarding Capital has been modified since NAN first relayed concerns to Canada in writing on July 5, 2019, its concerns remain unaddressed. This is clearly evidenced in the Crosswalk Document found at Exhibit 7B of the Affidavit of Lorri Warner submitted by Canada, which details feedback taken from the Consultation Committee on Child Welfare (“CCCW”) to the Draft Capital Directive. NAN’s concerns are detailed therein, as well as Canada’s response, which includes a promise to address these concerns

with a Recipient Guide for Band Representatives to clarify ISC's requirement for eligible capital expenses.³ No such guide has been produced.

10. Notably, Canada has refused to address remoteness concerns expressed by NAN regarding the proposed limit of \$2.5M in the Draft Capital Directive on capital expenses, on the basis that such concerns could be addressed once further work on the Remoteness Quotient ("RQ") was completed. Canada has had the Final RQ Report for well over a year, but has given no indication of revisiting the \$2.5M cap.

11. NAN believes Canada has not lived up to its obligations regarding the RQ work and addressing underfunding for NAN agencies and First Nations. This is the subject of a motion currently before the Tribunal. As such, NAN will not address this issue in any detail here.

C. Payment at Actuals

12. In its submissions, Canada states that it has implemented new Terms and Conditions to "enable the Program to fund FNCFS agencies' costs for prevention/least disruptive measures, intake and investigation, legal fees, building repairs, the child service purchase amount, and for small agencies, based on actual needs."⁴

13. NAN has serious concerns regarding Canada's implementation of this Tribunal's orders regarding payment at actuals on February 1, 2018.⁵ NAN First Nations, and the family and services agencies that serve them, have raised numerous concerns that Canada has failed to implement payment and actuals.

³ Affidavit of Lorri Warner, Exhibit 7B: Crosswalks Document, at page 5

⁴ AGC Submissions of March 4, 2020, at para 23

⁵ *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)*, 2016 CHRT 2

14. Of particular concern to NAN is the evidence of ISC employees attempting to discourage applications,⁶ shifting goal-posts, and increased “red tape”,⁷ as well as unilaterally “pausing” the 15-day timeline ordered by the Tribunal for processing claims.⁸
15. Additionally, NAN and other members of the Consultation Committee on Child Welfare have in good faith provided feedback to ISC on various documents shared at CCCW meetings, include ISC’s Claimant Guides. Draft versions of the Guide have been brought to the CCCW by ISC for input, and NAN and the Caring Society and others have consistently provided feedback relating to deficiencies with various versions of the draft Guide, particularly in relation to its description of prevention services. The Guide that was presented at the January 14, 2020 CCCW meeting was presented as a final Guide, but NAN and the Caring Society continued to have serious concerns that they expressed. For example, the description of prevention services in the Guide seemed to imply that claims for primary prevention services would not be eligible for reimbursement:

Programming and costs subject to reimbursement and funding under the February 1, 2018 CHRT decision are based on actual needs to implement targeted interventions (as identified in the intake assessment, family service plan, family care/case plan, child’s service plan, case plan, care plan, family enhancement agreement or similar document) to address concerns identified and notifications and incidents reported on child maltreatment, abuse and neglect. (p. 6)

16. It was NAN’s understanding at the January 14, 2020 CCCW meeting that ISC was going to try to address the concerns raised by NAN and the Caring Society regarding the January 2020 Guide and circulate a revised version to the CCCW.⁹ This has not occurred.

⁶See the Affidavit Exhibit L: an email from Benjamin Loewen, a Financial Consultant for Tikinagan, dated February 19, 2020; and Exhibit M: email chain between Tikinagan and ISC referenced in Mr. Loewen’s email of February 19, 2020

⁷See the Affidavit Exhibit H: a letter dated November 8, 2019, from NAN Deputy Grand Chief Walter Naveau to Assistant Deputy Minister Joanne Wilkinson

⁸Ibid, see also the Affidavit Exhibit I: an email sent by Ms. Churchill on September 5, 2019, for circulation to CCCW members

17. The concerns raised by NAN at CCCW meetings regarding the limiting and inaccurate definition of prevention is directly impacting First Nations, with at least one NAN agency stating it is being denied claims for primary prevention.¹⁰ This limiting approach to prevention services is perpetuating the discrimination found by this Tribunal.
18. The exhibits attached to the Affidavit filed in support of these submissions detail the struggles of NAN First Nations and Agencies to receive funding at actuals pursuant to the Tribunal's order.¹¹ While NAN First Nations have seen some positive impacts as a result of this Tribunal's orders, there have been significant challenges in achieving payment, which appear to be on the rise.

D. Band Representative Services and Capital Expenses

19. Finally, despite Canada's claim that it has successfully implemented Band Representative Services funding at actuals in Ontario,¹² NAN First Nations have expressed significant frustration with mixed messaging and delayed processing of claims by ISC.
20. This Tribunal's order was that expenses for Band Rep Services be reimbursed at their actual cost. This must include capital costs. This position has been clearly articulated to ISC by NAN.¹³ NAN has been asking for explicit confirmation since at least June of 2019 that capital claims are eligible under the Band Rep program.¹⁴ Rather than be clear on what its

⁹See Affidavit of Lorri Warner, Exhibit 2A: National Recipient Guide (2018/2019 version); and Exhibit 2B: National Recipient Guide (January 2020 version)

¹⁰See the Affidavit Exhibit K: an email from Anne Morgan, Executive Assistant at Tikinagan Child and Family Services

¹¹ For further evidence see also: the Reply Affidavit of Bobby Narcisse in Support of Motion re Non-Compliance and Relief for Remote Communities (sworn February 21, 2020), at paras 33-46

¹²AGC Submissions of March 4, 2020, at para 23

¹³See the Affidavit Exhibit C, *supra* note 2

¹⁴See the Affidavit Exhibits D-F: chain of letters from NAN's Director of Social Services, Bobby Narcisse, to Director of Child and Family Services Reform and Transformation for ISC's Ontario Region, Catherine Thai (June-September 2019)

position is regarding capital and Band Rep services, ISC has sent mixed messages and stated that its position will become clear in an eventual Recipients Guide that NAN has yet to see.¹⁵

21. The only guidance that has been provided to NAN First Nations on this issue can be found in Exhibit G of the Affidavit: an email from Anne Scotton of December 4, 2019 responding to concerns raised by NAN Director of Social Services Bobby Narcisse. In this letter, Ms. Scotton takes the limited position that Band Rep capital funding requests will be granted only where they are specific to a child or family being serviced by an agency. This raises the issue that agencies in some NAN communities are *unable* to provide such services without space in which to do so. Band Rep capital requests are a necessary pre-condition to successful provision of Band Rep services in NAN First Nations. There are significant and serious confidentiality obligations that attach to the provision of Band Rep services, and a failure to fund capital costs under Band Rep Services jeopardizes the ability of Band Reps to meet these obligations.

III. Conclusion

22. As the above makes clear, notwithstanding important change that has been brought about for NAN children, youth and families since this honourable Tribunal's ruling in January of 2016, NAN has significant and ongoing concerns with Canada's current implementation of this honourable Tribunal's orders.

¹⁵Affidavit of Lorri Warner, Exhibit 7A: Draft Capital Directive Document, at page 3; and, Exhibit 7B: Crosswalks Document, at page 5

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 9th DAY OF April, 2020



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