

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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RESPONDENT'S REPLY SUBMISSIONS – Major Capital

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Atlantic Regional Office  
5251 Duke Street, Suite 1400  
Halifax, NS B3J 1P3  
Fax: (902) 426-8796

Per: **Jonathan Tarlton, Kelly Peck &  
Patricia MacPhee**

Tel: (902) 426-5959

Email: [Jonathan.Tarlton@justice.gc.ca](mailto:Jonathan.Tarlton@justice.gc.ca)

[Kelly.Peck@justice.gc.ca](mailto:Kelly.Peck@justice.gc.ca)

[Patricia.MacPhee@justice.gc.ca](mailto:Patricia.MacPhee@justice.gc.ca)

Counsel for the Respondent

## Overview

1. Canada has complied with the Tribunal's order to fund building repairs at actual costs, retroactive to January 26, 2016. Canada has robustly implemented the Tribunal's immediate relief measures, including almost doubling the annual expenditures of the First Nations Child and Family Services (FNCFS) Program, radically altering how the Department budgets and manages its finances, and prompted long-term substantial reform to ensure that planning is informed by the principle of substantive equality. Since February 2018, Canada has paid over \$15.4 million in actual costs and building repairs.<sup>1</sup> These amounts continue to increase as more claims are processed.
2. Consistent efforts have taken place to work with the Parties through the Consultation Committee on Child Welfare (CCCW), including the expansion of the Terms and Conditions of the Program to allow for greater flexibility and to expand on eligibility for expenditures related to capital/building repairs. This approach has been instrumental in enabling agencies and communities to maximize the use of their available funds towards targeted capital needs. Canada intends to continue to work with the CCCW for addressing capital needs for First Nations Child and Family Services.
3. The Parties are seeking orders requiring Canada to:
  - i. Fund the major capital costs of small FNCFS Agencies, and for administration and governance, prevention, intake/investigation, and legal services at their actual cost;
  - ii. Provide funding for FNCFS Agencies to conduct major capital needs and feasibility studies;
  - iii. Based on the feasibility needs, to fund the design, land purchase (if required) and fulfillment of permit and other administrative requirements to facilitate construction;
  - iv. Where projects are ready to proceed, Canada shall fund the major capital needs of FNCFS Agencies at actual cost;

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<sup>1</sup> Affidavit of Joanne Wilkinson dated April 16, 2019, para 49.

- v. Based on the above, to create a long-term capital envelope for FNCFS agencies to address their major capital needs as they continue to arise, with the initial size of the envelope to be guided by the Institute of Fiscal Studies and Democracy (IFSD) report.
4. All of these requests go beyond the scope of the complaint and go beyond the Tribunal's orders regarding capital expenditures. They also do not take into account the need for coordination among First Nations and agencies on capital planning.
5. The effect of such proposed orders would not only bypass and ignore established programs and processes currently in place, it would, more significantly, impact First Nations' decision-making and ability to prioritize on-reserve infrastructure for their respective communities. As Canada previously stated, the Department has an existing and dedicated program within the Department to plan, manage and build infrastructure in a safe manner that respects the prioritization process that First Nations have undertaken through their community plans. The proposed orders would go against Canada's efforts on reconciliation and runs contrary to its Nation-to-Nation relationship with Indigenous Peoples.
6. With respect to the IFSD report, there is no order requiring Canada to implement the IFSD report fully without appropriate evaluation and consideration. While Canada agrees that the IFSD report can help to guide the work on identifying capital needs, both Canada and the Parties agree that more work and research is required. The report also calls for further research and the Assembly of First Nations has submitted a proposal to ISC for this work. Following discussion with the Parties, Canada has approved the additional research for up to \$1.7 million. In this context, it is premature at this stage to proceed with the funding as it stands; it would be inappropriate to rely on this report exclusively for the expenditure of such large sums of public money.

### **Canada is Compliant**

7. At paragraph 411 of its February 2018 Ruling, the Tribunal ordered Canada to provide funding on actual costs for building repairs. Canada has complied with the Tribunal's order to reimburse on building repairs for their actual costs. Since the February 2018

orders, Canada has been funding actual costs and has retroactively reimbursed those agencies for their actual costs back to January 26, 2016. Canada will continue to work with agencies to review other requests as they are received on a case-by-case basis.

8. Canada has updated and expanded the FNCFS Program's Terms and Conditions. They now allow for greater flexibility and expansion on eligibility for expenditures, including expenditures related to capital/building repairs, the purchase or construction of capital assets (e.g., buildings), and the purchase and maintenance of information technology equipment.
9. Based on recommendations from the CCCW, Canada has also increased the funding threshold within the FNCFS Program from \$1.5 million to \$2.5 million for agencies to use their available funds on capital needs, which would help account for inflation and other pressures. As communicated to the CCCW, agencies can use the increased Budget 2018 funding (ramp-up & remoteness allocations) or any surpluses they may have for capital expenditures. Capital-related expenses are also eligible for communities under the Community Well-being and Jurisdiction Initiatives. Canada is implementing these immediate relief efforts, and has firmly committed itself to respecting these orders, while working on a long-term capital plan.

*A long-term capital plan requires ongoing consultation and time*

10. Canada recognizes that a better understanding of long-term capital needs for First Nations Child and Family Services is needed and notes consultation on this issue is ongoing within the CCCW. It is imperative that First Nations communities have a voice in discussions concerning the process for capital planning and expenditures. Therefore it would be inappropriate and unreasonable for the Tribunal to intervene at this stage. Such an intervention would represent a departure from the Tribunal's statutory role as an adjudicator of a specific complaint.

11. Orders that require specific infrastructure to be built on-reserve without consultation with First Nations would impact other types of on-reserve infrastructure (e.g., water, roads, electricity etc.). In this context, decisions for building infrastructure on reserve is significantly more complicated than simply funding the construction of a building or repairing an existing one. These decisions cannot be made in isolation and should take into consideration the community's priorities and planning already in place.
12. Canada has described to the Tribunal previously on how infrastructure planning and approvals work on reserve. Specifically, Canada indicated in 2014 to the Tribunal that the Community Infrastructure Branch is responsible for infrastructure.<sup>2</sup> This was also reiterated by Canada in May 2019.<sup>3</sup>
13. Most recently, Canada addressed how the Department has made significant investments in infrastructure to First Nations and is working closely with the Assembly of First Nations to continue to identify the needs.<sup>4</sup>
14. Canada also noted how the Department (via the Community Infrastructure Branch) works in collaboration and in partnership with First Nations communities in identifying and prioritizing their infrastructure needs.<sup>5</sup> Within this context, and to support communities fully, capital needs for First Nations Child and Family Services cannot be considered in isolation.<sup>6</sup>
15. Well before construction commences, First Nations identify and prioritize infrastructure projects through community plans developed in consultation with ISC's Community Infrastructure Branch. Thus planning begins with the First Nations' assessment of their needs. If a hospital is built without supporting infrastructure including power, sewage, and roads, it will not be effective in fulfilling the needs of the child.

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<sup>2</sup> Transcript of the April 4, 2014 Cross-examination of Sheilagh Murphy, p.112, lns. 12-16.

<sup>3</sup> Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 81, lns. 8-13.

<sup>4</sup> Transcript of the May 15, 2019 Cross-examination of Paul Thoppil, p. 155, lns. 1-23.

<sup>5</sup> Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 155, lns. 1-20.

<sup>6</sup> Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 75, ln. 24 – p. 76, ln. 5; p. 79, lns. 3-7.

16. The Community Infrastructure Branch also works with First Nations to prioritize needs based on health and safety. Conversely, the FNCFS program does not have the capacity to ensure that completed repairs meet building code / health and safety standards, and therefore needs to leverage the expertise outside of the Program with respect to major capital needs. An additional capital program for FNCFS agencies would be duplicative, would increase the complexity of the interaction with ISC's bureaucracy for First Nations, and would ignore the community's established voice in the process.
17. ISC has indicated numerous times that it is willing to have conversations about a long-term solution for building needs. Consultation with the CCCW is one avenue for exploring needs; direct consultation with First Nations communities is another. As indicated at the Consultation Committee, ISC will be presenting a capital directive to the Parties shortly for review that will jumpstart those conversations on long-term capital needs.

*Funding for ancillary major capital costs is funding outside of the FNCFS Program and Jordan's Principle*

18. The Caring Society disagrees with Canada's argument that they are seeking an order to direct the expenditure of funds outside the FNCFS Program and submits the requested funding is for the provision of ancillary major capital costs to accompany the Tribunal's existing orders. With respect, the Caring Society's interpretation goes beyond the language and spirit of the order.
19. As stated above, there is an existing and dedicated program within the Department to plan, manage, and build infrastructure in a safe manner that respects the prioritization process that First Nations have undertaken through their community plans.
20. While Canada appreciates that the reasoning behind the Tribunal's orders must be taken into account in considering how the orders are implemented, to suggest that major capital costs are ancillary to an order on building repairs to bring agencies up to code is an unreasonable interpretation. Canada recognizes that identifying the actual needs of FNCFS

agencies with respect to major capital is needed, but these conversations are ongoing at the Consultation Committee on Child Welfare and must also involve First Nations communities directly.

21. Substantive expansion of the FNCFS Program, such as by adding on a complex capital program as well as providing capacity and dedicated investments, would need to factor in federal policy development and budgetary processes which ISC must follow. These processes require obtaining authority for expenditures from Cabinet, and securing the appropriation of funds from Parliament.

**An order requiring implementation of the IFSD report without appropriate consultation and evaluation is contrary to Reconciliation**

22. In response to the Tribunal's orders regarding consultation, Canada and the Parties retained the IFSD to prepare a report to inform the development of an alternative funding methodology. For building repairs, the IFSD report recommends a one-time investment of \$116-175 million (with a recommended further budgeting of 2% annual recapitalization rate). The Parties are requesting an order requiring Canada to allocate funds per the IFSD report.
23. While the IFSD report can help foster an initial understanding of some of the agency capital needs, failing to follow the letter of the report cannot be considered non-compliance with any order of this Tribunal. It would be inappropriate to rely on that report exclusively for the expenditure of such large sums of public money.
24. As mentioned previously and by Canada's affiants, First Nations decide annually which capital projects on reserve should be prioritized through their community capital plans. An order to implement IFSD's recommendations on capital investments would undermine First Nations and ISC's existing collaborative processes for identifying and prioritizing capital needs on reserve. The Tribunal should not issue an order that would effectively impose its estimation of what the community needs are in substitution for the plans

developed by First Nations. Partnership is the only path to successful implementation of capital needs.<sup>7</sup>

25. Although the IFSD report is a good starting point for providing valuable information on agencies' needs and key gaps, more work and research is needed to obtain a full analysis. Canada outlined a variety of factors that were not included in the report and that require further consideration, including Budget 2018 investments.<sup>8</sup>
26. A comprehensive and detailed understanding is also needed on the broad capital needs of all FNCFS agencies, which the report and its underlying evidence do not fulfill at this time.
27. Further, the FNCFS agency uptake on the immediate relief orders has not reached levels that were expected, and certainly does not support an order of that magnitude. The IFSD report does not adequately explain the need for such an investment and is lacking in substantive evidence to support it - more information is needed and can be informed through future research.
28. ISC has agreed to move forward with a second study with IFSD, and remains in active dialogue with the Parties as to how to move forward in a manner that is effective, objective, and enables the Program to make the strongest possible case for any new federal funding model through federal policy development and budgetary processes.<sup>9</sup>
29. With respect to off-reserve infrastructure funding, the Terms and Conditions and authorities for the FNCFS program do not permit the Program to spend funds on infrastructure off-reserve.<sup>10</sup> This level of expansion of the program would require additional authorities, and would be better facilitated through the Community Infrastructure Branch. As previously addressed, the Branch has the requisite expertise on

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<sup>7</sup> Transcript of the May 15, 2019 Cross-examination of Paul Thoppil, p. 167, ln. 3 – p. 168, ln. 13.

<sup>8</sup> Affidavit of Joanne Wilkinson dated April 16, 2019, paras. 10, i), j).

<sup>9</sup> Transcript of the May 15, 2019 Cross-examination of Paul Thoppil, p. 162, ln. 12 - p. 164, ln. 23.

<sup>10</sup> Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 154, ln.12.



supporting infrastructure (such as roads, water supply, sewer, etc.), as well as knowledge regarding building and safety codes.

### **Ontario-specific orders are a significant expansion of the complaint**

30. A process for First Nations to prioritize their capital needs within the Department exists.<sup>11</sup> The requested order would put First Nations Child and Family Services at the front of the line for funds on every reserve, which would fail to respect the prioritization identified by individual communities. This could cause delays to other important projects identified as being a priority by the community. ISC is open and willing to explore changes to the process as it currently stands, but that requires technical conversations that ought to take place during meeting of the CCCW as well as direct consultations with First Nations communities.

### **Remedy**

31. Canada is implementing the Tribunal's interim relief orders and has shown a willingness to be flexible to ensure First Nations children will not be subject to ongoing discrimination through Canada's health and welfare funding. Further orders regarding capital expenditures are not necessary. As indicated at the CCCW, ISC will be presenting a capital directive to the Parties shortly for review that will help inform a long-term plan.

### **Conclusion**

32. There is no ongoing discrimination regarding capital expenditures. Rather, Canada must now be given time to follow the democratic structures and rules in place to ensure accountability in spending public funds. Most importantly, there is no reason to disrupt the current system, which depends on communities to develop and prioritize their needs.


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<sup>11</sup> Transcript of the May 14, 2019 Cross-examination of Joanne Wilkinson, p. 155, lns. 1-20.

Canada is co-developing current reforms with Indigenous governing bodies.<sup>12</sup>  
Reconciliation demands no less.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at Ottawa, Ontario this 30<sup>th</sup> day of May, 2019.

  
for ATTORNEY GENERAL OF CANADA  
Department of Justice Canada  
Suite 1400 – Duke Tower  
5251 Duke Street  
Halifax, NS B3J 1P3  
Fax: (902) 426-2329

**Per: Kelly Peck**  
Tel: (902) 426-7038  
E-Mail: [kelly.peck@justice.gc.ca](mailto:kelly.peck@justice.gc.ca)

*Counsel for the Respondent*

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<sup>12</sup> Transcript of the May 15, 2019 Cross-examination of Paul Thoppil, p. 144, lns. 7-8.