Timeline of Long-Term Reform of First Nations Child & Family Services (FNCFS)

1997–2007
Canada becomes aware of flaws and inequities in the funding of the FNCFS program, but does not make any meaningful changes despite expert recommendations.

2007
The AFN and the First Nations Child & Family Caring Society file a human rights complaint against Canada.

2007–2016
Canada fights the complaint on legal technicalities, using a delay & defer strategy, and retaliates against the Caring Society and Dr. Cindy Blackstock.

2016
The Canadian Human Rights Tribunal orders Canada to cease its discriminatory practices and reform the FNCFS program.

2016–2021
Canada's response is slow and ineffective, leading the Tribunal to issue increasingly specific orders for reform.

2018
The Tribunal orders Canada to reimburse the actual costs of child and family services, including buildings and capital assets.

2021
The Tribunal orders Canada to reimburse the actual costs of any infrastructure necessary for service delivery.

Present
A draft Final Agreement on Long-Term Reform is completed by AFN, Chiefs of Ontario, Nishnawbe Aski Nation, and Canada, seeking endorsement from First Nations Chiefs.

Background

The Assembly of First Nation, Chiefs of Ontario, Nishnawbe Aski Nation and Canada have completed a draft Final Agreement on Long-Term Reform of the First Nations Child & Family Services Program. The parties are seeking endorsement of the draft agreement from First Nations Chiefs.

For decades, Canada has discriminated against First Nations children and families through flawed and inequitable funding of the First Nations Child & Family Services (FNCFS) program. That discrimination caused egregious harm to children and their families.

The draft agreement seeks to fully resolve Canada's discrimination.

In assessing the draft FSA, it is important to understand the degree to which Canada has, for decades, refused to reform the FNCFS program.

Between 1997 and 2007, Canada became aware that funding for the FNCFS program was flawed and inequitable and that children were removed from their families and placed in foster care as a result. During that time, experts made a series of detailed recommendations for reform, but Canada did not make any meaningful changes to the program.

After a decade of failed attempts to work with Canada, the Assembly of First Nations (AFN) and the First Nations Child & Family Caring Society (Caring Society) filed a human rights complaint against Canada. In response, Canada deployed its enormous legal resources to fight the complaint on legal technicalities rather than directly engaging with the question of discrimination.

Canada worked hard to get the human rights complaint dismissed on legal technicalities. Canada also pursued a delay & defer strategy to prolong the proceedings, and interfered with due process by failing to disclose tens of thousands of documents that it was legally required to share. During the human rights process, Canada also retaliated against the Caring Society and the Society's executive director, Dr. Cindy Blackstock.

When Canada's efforts to delay were exhausted and hearings finally moved forward, the evidence overwhelmingly demonstrated Canada's discrimination against First Nations children and families. In 2016, the Canadian Human Rights Tribunal ordered Canada to "cease its discriminatory practices and reform the FNCFS Program." Over the next two years, the Tribunal issued a series of increasingly specific orders for Canada to immediately implement.

In 2018, after two years of slow and ineffective responses from Canada, the Tribunal ordered Canada to fully reimburse the actual costs of child & family services—including prevention services—as determined by FNCFS agencies to be in the best interests of the child. In 2021, the Tribunal further ordered Canada to reimburse the actual costs of any buildings or other capital assets required to deliver those services. Those "actual cost" orders were to remain in place until a fully reformed funding approach was developed.

The Tribunal made those "actual costs" orders after Canada repeatedly failed to implement the Tribunal's orders to cease discriminating. The Tribunal also retained jurisdiction over the complaint to ensure Canada's compliance with and accountability to the orders. The Tribunal's orders are binding and permanent: unless the orders are repealed or replaced, Canada remains legally obligated to end the discrimination and ensure it never happens again.

This leaves First Nations in a strong negotiating position. Canada is already obligated to provide needs-based funding aligned with substantive equality. Canada is already under the jurisdiction of a tribunal that has shown a willingness to drag Canada into compliance with orders to end discrimination.

Analysis of the Draft Agreement

In the opening sentence of the 2016 decision, the Canadian Human Rights Tribunal wrote: "This decision concerns *children*." The draft agreement also concerns children. In determining whether to endorse the draft agreement, the key deciding factor must be whether the agreement promises to meet the needs of First Nations children, now and into the future.

There are numerous features of the draft agreement that are not well aligned with the goal of meeting the needs of children. Funding was central to the original human rights complaint and remains central to the shortcomings of the draft agreement. There are additional shortcomings related to: respect for rights and title holders; governance of the reformed FNCFS program; and accountability.

1. Funding

   Adequate prevention funding is critical to meeting children's needs. Without fulsome prevention supports and services, the removal of First Nations children from their families, communities and cultures will continue. The draft agreement does not provide for needs-based prevention funding that considers the distinct circumstances of First Nations children, families and communities. Instead, the draft agreement calls for a one-size-fits all, population-based funding formula of the variety the CHRT has already ruled is discriminatory.

   The prevention funding allocation is loosely based on community-driven research conducted by the Institute of Fiscal Studies & Democracy. That research indicated that, once an agency has established prevention programs and built the necessary capacity and infrastructure, the cost of delivering prevention services is in the range of $2,500 per capita—not including the operational costs of the agency.

Many agencies have not had time to build capacity and infrastructure for prevention services. This is especially true in British Columbia, where Canada withheld prevention funding until 2018 and where the COVID pandemic derailed initial efforts to build prevention programs and services. Without additional funding, First Nations and their agencies will not be resourced to build the prevention services that children and their families need.

The operational funding contemplated in the draft agreement is also not needs-based. The draft agreement proposes to provide operational funding to FNCFS agencies based on the amounts they expended in 2022/2023. That amount is not based on any evidence of meeting children's needs. Rather, it is based on the availability of financial data. The fiscal year 2022/2023 is the most recent year for which Canada has complete financial data on agency expenditures, so that is the baseline year going forward.

The draft agreement also proposes to split the funding so that FNCFS agencies will receive operational funding and First Nations will receive the prevention funding. This is ostensibly to provide First Nations with more control over their child and family services, but it is a funding approach that threatens to set up both agencies and Nations to fail. Without prevention funding, FNCFS agencies will be without resources to support families in staying safely together. In theory, First Nations can step in to provide any needed prevention services. But First Nations will not have any resources to build capacity or infrastructure to deliver prevention services, nor will they have any operational funding to support their service delivery.

Under the draft agreement, Ontario will receive substantially more funding for First Nations Representative Services than any other region. Outside of Ontario, the funding allocation appears inadequate to meet the participatory provisions of federal and provincial legislation.

The draft agreement currently lacks detail regarding capital and post-majority services (i.e., services for young adults leaving foster care). However, the draft agreement caps funding for both—though they are currently both funded under "actual costs" orders.

The Tribunal has ordered Canada to end discrimination and to ensure the discrimination does not recur. The inadequate funding fails to end the discrimination. The short-term nature of the draft agreement, which is set to expire after ten years, means there is no long-term prevention of further discrimination.

2. Respect for Rights and Title Holders

   Canada has committed to achieving reconciliation with Indigenous peoples through a renewed nation-to-nation relationship based on respect and recognition of Indigenous

rights. Canada is also under a legal obligation to respect those rights. The draft agreement does not, however, reflect respect for those rights.

Canada's actions in negotiating the draft agreement in relative secrecy and without consulting rights holders fails to advance the goal of reconciliation and does not show respect for the right to self-determination of individual First Nations. Canada has furthered that disrespect in subsequently failing to consult with First Nations regarding the draft agreement.

Canada has a duty to consult and accommodate First Nations whenever it considers decisions which may impact on their Aboriginal and Treaty rights. Free, prior and informed consent also requires Canada to engage with rights holders before adopting measures that may affect them, arguably in a manner more extensive than the duty to consult and accommodate. In both the negotiation process and the subsequent engagement period, Canada has failed to discharge its duty to consult and accommodate and has failed to respect the right to free, prior and informed consent.

Lack of respect for rights and title holders goes much further in the draft agreement, which treats First Nations as service providers rather than self-determining governments. This plays out most prominently in the governance mechanisms, which deny individual First Nations any ongoing role in decision-making.

Allowing Canada to ignore Aboriginal and Treaty rights will ultimately degrade the practical value of those rights to benefit the best interests of children and families.

3. Governance of the Reformed FNCFS Program

   The draft agreement provides no ongoing decision-making role for individual First Nations, instead it leaves governance in the hands of the signatories to the agreement: Canada, the AFN, COO and NAN. Each of the signatories will appoint three members to the Reform Implementation Committee, which will oversee and monitor all aspects of the reformed FNCFS program—including all the remaining governance tables and committees.

   The Reform Implementation Committee (RIC) will be the only body to make recommendations to Canada regarding the FNCFS program and will operate in secrecy. RIC meetings will be confidential, and all members and any meeting guests will be required to sign a confidentiality agreement.

   The draft agreement contemplates six additional governance tables/committees to be overseen by the RIC. This creates space for a complex bureaucracy operating in secrecy without providing any space for or accountability to individual First Nations.

4. Accountability

   Since 2016, the Canadian Human Rights Tribunal has retained jurisdiction to ensure Canada's compliance and accountability to the Tribunal's orders to end discrimination. The draft agreement would replace the Tribunal but would not retain the same authority to compel Canada to end discrimination.

   The draft agreement proposes a Dispute Resolution Tribunal, but that Tribunal would not have the authority to order Canada to increase funding for the FNCFS program or to make systemic changes to the program.

   The draft agreement also proposes that Parliament would pass legislation to enable the Dispute Resolution Tribunal; however, the draft agreement is silent regarding any details of that legislation. This leaves Canada with immense power to determine how the proposed Tribunal will function.

   The draft agreement also diminishes the accountability role of the Expert Advisory Committee. Under current CHRT orders, the Expert Advisory Committee (EAC) works independently and with a mandate to develop and oversee the implementation of a work plan to reform Indigenous Services Canada to prevent the recurrence of discrimination. Under those orders, Canada is required to make reasonable efforts to implement the work plan.

   Under the draft agreement, the EAC will no longer be independent, but instead will be overseen by the Reform Implementation Committee—of which Canada is a member. Canada will no longer be required to make reasonable efforts to implement the EAC's work plan. Instead, the RIC will consider the work plan and make recommendations to Canada, "*recognizing that certain recommendations may not be acceptable to Canada*" (paragraph 213).

Next Steps

The draft agreement falls far short of meeting the needs of First Nations children. The AFN has agreed to advocate for three amendments to the draft agreement that would: expand the Reform Implementation Committee to include regional representation; ensure the President of the Dispute Resolution Tribunal will be a First Nations person fluent in English and French; consider an alternative population source to replace the Indian Registration System.

None of these amendments will address the fundamental flaws in the draft agreement. Real reform requires a new or substantially re-negotiated agreement that centers the wellbeing of First Nations children and their families.

A just agreement must include a needs-based sustainable funding model that addresses the unique needs and circumstances of First Nations children, families and communities. The funding model must be driven by the principle of substantive equality for First Nations children—now and for the next seven generations. The agreement must generate governance structures in which decision-making rests with First Nations, and accountability mechanisms strong enough to compel Canada to end discrimination and prevent it from happening again.

A new negotiation process is needed, one that is transparent and involves meaningful consultation to reflect diverse First Nation voices, experiences and expertise. The process must be accountable to First Nations from beginning to end.