

TERMS OF REFERENCE
National Advisory Committee on
First Nations Child and Family Services (FNCFS) Program Reform

Purpose:

The purpose of these Terms of Reference is to set out the mandate, membership and roles and responsibilities of the National Advisory Committee.

Background:

1. The Joint INAC/AFN NAC met regularly from 2001-2008, primarily to oversee implementation of the National Policy Review's 17 Recommendations to the Minister of INAC on changes needed to the DIAND policy governing the FNCFS Program. In 2004 and 2005, the NAC produced three reports regarding the FNCFS Program known as the *Wen:De* reports.

2. On January 26, 2016, the Canadian Human Rights Tribunal ("the Tribunal") released its decision (2016 CHRT 2 "Decision") in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* ("the Complaint"). The Complaint had been filed in 2007. The Tribunal determined that the federal government discriminated against First Nations children on the grounds of race and national ethnic origin by failing to ensure substantive equality in the provision of child and family services for First Nations peoples. The Tribunal also found that the federal government's definition, policies and application of Jordan's Principle to be discriminatory. The Tribunal has retained jurisdiction over the matter and issued a subsequent order on April 26, 2016 (2016 CHRT 10). A further Tribunal order is pending.

3. The Tribunal ordered Aboriginal Affairs and Northern Development Canada (now Indigenous and Northern Affairs Canada ("INAC")), to cease its discriminatory practices and reform the First Nations Child and Family Services ("FNCFS") Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario ("1965 Agreement") to reflect the findings in the Decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle. In 2016 CHRT 10, the Tribunal further clarifies that the order is to "immediately implement" not immediately start discussions to review the definition in the long term. The Tribunal further "orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided." In 2016 CHRT16, the Tribunal further noted that Jordan's Principle applies on and off reserve and ordered INAC to immediately implement several measures regarding child and family services funding.

4. INAC has committed to working with First Nations leadership and organizations; child and family services agencies; front-line service providers; the parties to the Complaint; and other stakeholders, on steps towards FNCFS Program reform and meaningful change for First Nations children and families.

5. The Tribunal has deferred consideration of medium- to long-term relief until its consideration of immediate relief has concluded. In their submissions to the Tribunal, both the AFN and the Caring Society sought the establishment of a joint policy development initiative between INAC and the Complainants to reform the FNCFS Program, and which also may guide the Tribunal in determining appropriate Orders on mid-terms and long-term relief.

6. INAC has undertaken to immediately establishing and adequately resourcing a NAC, in order to begin the necessary and critical reform of the FNCFS Program. Establishing a NAC is a crucial first-step in addressing the medium to long-terms changes to the FNCFS Program.

Guiding Principles

7. The National Advisory Committee's process will be guided by the following principles:

- a. Consistent with the United Nations Convention on the Rights of the Child, the United Nations Committee on the Rights of the Child General Comment 11, the United Nations Declaration on the Rights of Indigenous Peoples and the TRC's Calls to Action, the best interests and well-being of First Nations children will be paramount.
- b. Federal, provincial/territorial and First Nations' decision-making processes must be respected.
- c. Involvement of community, parents, and extended family as a corner stone of effective and culturally based child and family services.
- d. INAC and other federal government departments engaged in the provision of services to First Nations children and families have a legal obligation not to discriminate against those children and families.
- e. Policies, programs and services must be responsive and relevant to the distinct needs of children and to community needs and realities.
- f. Whenever possible, families have the right to stay together. All services and preventative measures ought to be exhausted before a child is removed from the family.
- g. First Nations have an interest in the well-being of all of their members, regardless of where they live.

Mandate

8. The NAC is mandated to provide advice, input into the design and assist in the development of reforms of First Nations child and family services policies and programs on-reserve to First Nations leaders and agencies and the Minister of INAC. The NAC shall review across-the-board reforms, including federal government authorities, policies and practices, to the national framework to support FNCFS Agencies, the greater needs of First Nation children, each First Nations community's cultural vision of safe and healthy children and families, provincial/territorial variances, and mechanisms to ensure communication, accountability and dispute resolution.
9. The National Advisory Committee will provide advice on future reforms to the First Nations Child and Family Services Program in a way that promotes the safety and best interests of First Nations children, taking account of the distinct needs and circumstances of First Nations children and families – including historical and ongoing disadvantage and their cultural, linguistic and geographical needs and circumstances – in order to ensure substantive equality in the provision of child and family services to them.
10. Upon agreement by the members of NAC, NAC may select and retain experts to assist it in its work, on an as-needed basis. Preference will be given to experts with demonstrated expertise regarding First Nations child and family services.
11. In addition, the NAC may establish action tables to further the goals, work and objectives of NAC, as appropriate.
12. The NAC will address, but will not be limited to, the elements of the current FNCFS Program. The NAC can provide advice to assist in the reform of the program on an interim basis throughout its term as well as producing reports or research as it sees fit.
13. The NAC's deliberations, and the information provided to and/or produced by the NAC, will be made available to the public.
14. The copyright of materials produced at the direction of the National Advisory Committee will be determined within the individual service contracts. Members of the NAC and participating member organizations respect the intellectual and moral property rights regarding Indigenous cultures, languages and traditional knowledge. All research will be conducted in keeping with the OCAP research principles (Ownership, Control, Access and Possession) and observe ethics review processes, including First Nations research ethics boards where they operate.
15. INAC agrees to provide documentation on an ongoing basis of all CFS and Jordan's Principle documents, reports, data, budgets and policies that it is legally able to provide to the NAC and the NAC will be provided with copies of documents

requested (including portions of documents that are not redacted), in a timely manner, to enable the NAC to complete its work and mandate.

16. The members of the Committee agree to work together to achieve the mandate of the Committee and to collectively provide recommendations for the program reform of the FNFCS program.

Term of the NAC

17. The NAC will commence its work in January 2017 and will complete its recommendations by January 31, 2018. Extension of time will be agreed to by the members of the Committee.

Membership

18. The National Advisory Committee will be composed of the following members:

- a. One (1) national chair;
- b. Three (3) representatives of the Federal Government including one or more regional INAC representatives;
- c. One (1) representative of the AFN;
- d. One (1) representative of the First Nations Child and Family Caring Society of Canada;
- e. Ten (10) regional representatives, one representative from each of AFN's regions, with alternates available when needed;
- f. One (1) First Nation youth representative; and
- g. One (1) First Nation Elder(s) representative.

19. The ten (10) regional representatives/their alternates, youth and elder members will be selected by the AFN through its ordinary processes. Observers are also welcome to attend.

20. INAC will provide adequate funding that is necessary for the NAC to complete its work, activities and mandate.

21. The National Advisory Committee will be chaired by a person agreed to by INAC, the AFN, and the First Nations Child and Family Caring Society of Canada.

22. By consensus representatives of the Provinces and Yukon Government may be invited to participate in the NAC's work, in order to provide assistance to the NAC and its members.

23. The Canadian Human Rights Commission may participate as an interested party.

Responsibilities of the National Advisory Committee

24. The Committee will be responsible for:
- a. Making recommendations, input into the design and assist in the development of FNCFS Program reform(s).
 - b. Making recommendations on the design of engagement processes to assist in developing approaches for reform.
 - c. Providing an advisory and support role to existing regional tables in the engagement processes and supporting the development and operation of regional tables in regions where they do not currently operate.
 - d. Developing mechanisms for sharing information of the work and the activities of NAC, including with First Nations and Provincial Territorial Organizations, as appropriate.
 - e. Developing and providing approval of a work plan for the work of the committee and the work of any advisory or expert action tables
 - f. Overseeing processes for decision making, and recording decisions, understandings and minutes of NAC meetings.
 - g. Making recommendations regarding implementation activities and following-up as appropriate.

Operating Principles

25. The NAC will operate on the basis of consensus and any dispute will be resolved by the Chair, with the assistance of an Elder.

26. The costs for regional representatives to participate in the work of the NAC shall be borne by the INAC/AFN.

Canadian Human Rights Tribunal (Tribunal)

27. These Terms of Reference shall be filed with the Tribunal. The Committee shall provide reports and/or minutes of its meetings to the Tribunal as long as the Tribunal retains jurisdiction over the complaint or until it orders otherwise or the parties to the complaint agree otherwise.

ANNEX A

Suggested Topics to be addressed by the National Advisory Committee (to be discussed once Committee is fully formed)

The National Advisory Committee may address the following elements of the FNCFS Program:

A. General

- i. Jurisdictional models eligible for funding under the FNCFS Program
- ii. General funding structure, stacking provision considerations, and considerations of eligible costs including funding arrangements between INAC and Provinces/Territories and non-Aboriginal service providers.
- iii. Provisions for First Nations children not served by a FNCFS Agency to ensure comparable and culturally appropriate services.
- iv. Provisions for extraordinary costs related to unusual occurrences that engage higher child welfare costs such as natural disasters, substantial increases in mental health or substance misuse, and unusual requirements for mandatory staff participation in inquiries.
- v. Provisions for organizational networking and learning to promote the sharing of research and best practices among FNCFS Agencies.
- vi. A process for economically modelling revisions to funding policy and formula and evaluating the efficacy of such changes on an ongoing basis to ensure they are non-discriminatory and safeguard the best interests of the children.
- vii. A funding structure that takes into account costs related to historic disadvantage and distinct cultures and languages of First Nations.
- viii. FNCFS Agency staff salaries, benefits, and training.
- ix. Training for public servants involved in the FNCFS Program to ensure proper training for management of the program, including professional development on child development, First Nations cultures/histories, the Truth and Reconciliation Commission, and the history of the FNCFS Program including the Tribunal decisions.
- x. Creating a new definition of “neglect” that takes into account First Nation norms, values and culture.
- xi. Mechanisms for ensuring that reforms do not reduce current funding levels or numbers of arrangements for FNCFS Agencies.

- xii. Levels of service provided by FNCFS service providers and INAC reporting requirements imposed on FNCFS service providers should be comparable to the level of service provided by or imposed on provincial territorial governments and not pose an undue burden on agency staff .
- xiii. FNCFS funding agreements should promote long term planning, sustainable service provision and evaluation.
- xiv. FNCFS services should be based on effective First Nations models, including jurisdictional models, for the design, delivery and evaluation of First Nations Child and Family Services and on sharing information and effective practices.
- xv. FNCFS service providers serving small populations of eligible children should receive sufficient resources to allow them to provide culturally appropriate services that are comparable to those provided by FNCFS service providers serving large populations of eligible children.
- xvi. FNCFS funding for service providers serving more than 1000 children in care must account for the full population served.
- xvii. There are to be no reductions or further restrictions in the level of FNCFS funding for any agency.
- xviii. INAC approval criteria and processes for the development and operation of new First Nations child and family service agencies.
- xix. First Nations efforts to exercise jurisdiction and/or initiatives to create separate self-governing child welfare regimes are to be supported and acknowledged
- xx. The Touchstones of Hope framework for the design and implementation of community based visions of child safety and wellbeing.

B. Creation of a new FNCFS regime

- i. Creation of a new FNCFS regime to fully replace the existing programs and services.
- ii. New regime shall consider the distinct needs and circumstances of First Nations children and families living on-reserve, including their cultural, historical and geographical needs and circumstances.
- iii. Program shall address the higher service needs of First Nation children resulting from intergenerational impacts of Indian Residential

School and effects of colonization, along with higher costs to deliver those services

- iv. Ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.
- v. Develop enhanced funding mechanisms to ensure isolated, remote and northern communities serviced by agencies will be provided with equitable services and a full range of programs offered elsewhere.

C. Maintenance

- i. Calculation of yearly maintenance.
- ii. Appeal mechanisms regarding eligible maintenance expenses.
- iii. Reimbursement of legal costs.
- iv. Funding of support services intended to reunite children in care with their family.

D. Operations

- i. Baseline assumptions of children in care for funding of FNCFS Agencies.
- ii. Mechanisms to account for historical and ongoing inflation losses and annual adjustments going forward to ensure FNCFS Agency funding keeps pace with inflation.
- iii. Corporate legal costs and costs for liability claims.
- iv. Funding of remote agencies and agencies in urban areas to account for higher operations and maintenance costs.
- v. Funding for records management, policy development and human resources management, liability insurance, audits, janitorial services, and security.
- vi. Funding of costs related to the receipt, assessment and investigation of child welfare reports for all FNCFS Agencies that hold delegation for these functions including costs for after-hours service delivery.
- vii. Funding of capital costs that takes into account increased need due to augmentation of prevention staff, services, and programs, and to ensure that buildings, computers, and vehicles meet the applicable safety regulations, are child safe, accessible by persons with disabilities, and support comparable child and family services.
- viii. Funding of emergency repairs and maintenance of buildings.

- ix. Funding for staff travel and travel costs related to children and families receiving child welfare services.
- x. Definition of eligible child.
- xi. Any changes to the funding structures to FNCFS Agencies or their reporting requirements.

E. Prevention Funding

- i. Funding for the adequate and sustained provision of primary, secondary, and tertiary prevention services.
- ii. Funding for the development, operation and evaluation of culturally-based prevention programs and reforms based on those evaluations.

F. Jordan's Principle

- i. An approach to implement the full meaning and scope of Jordan's Principle in compliance with the CHRT orders across all children, all jurisdictional disputes and all federal services ensuring no delays in service provision related to the child's First Nations status.
- ii. The creation of a non-discriminatory, accessible and transparent process for reporting of federal Jordan's Principle cases.
- iii. The creation of non-discriminatory and transparent assessment criteria and assessment processes for reports of federal Jordan's Principle cases.
- iv. The creation and implementation of an independent appeal process for federal Jordan's Principle cases.
- v. Recommending mechanisms and required resources for public education regarding Jordan's Principle among First Nations, FNCFS Agencies, federal/provincial/territorial government officials and other stakeholders (such as: health professionals, teachers, and early childhood educators).

G. Accountability

- i. The creation of an independent permanent expert structure with the authority, resources and mandate to monitor and publicly report on INAC's performance in maintaining non-discriminatory and culturally-appropriate First Nations child and family services and in fully implementing Jordan's Principle.
- ii. The creation of a mechanism to act as a national and publicly accessible repository for all non-privileged information relevant to the provision of FNCFS services.
- iii. All proposed reforms will be presented to the AFN Chiefs-in-Assembly for consideration, discussion and input.
- iv. INAC shall carry out its duty to consult with first Nation governments and accommodate any First Nation interests with regard to any final proposal for program reform.
- v. Training and capacity building for INAC and other federal government officials to ensure non-discriminatory, culturally based and equitable child and family services and implementation of Jordan's Principle.