

Discussion on the Draft Final Settlement Agreement on **Long-term Reform** of the FNCFS Program



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Note

- This presentation is provided for information sharing purposes. Insights are those of the presenter and should not be taken as legal advice.
- Focused the discussion due to time allotted for presentation.



**Eliminate
discrimination**

**Prevent its
recurrence**



**Complete justice will be achieved
when systemic discrimination no
longer exists.**



CHRT Decision on Revised FSA, July & Sept 2023

“This is the largest settlement of its kind in Canadian history. **Sadly, this stems from the magnitude of harms that were inflicted upon First Nations children, families, communities and Nations. Canada ought to bear this in mind as an important reminder as to never repeat history. The cycle of harm must be broken.”**

Par 1, 2023 CHRT 44, Full Decision Sept 26, 2023

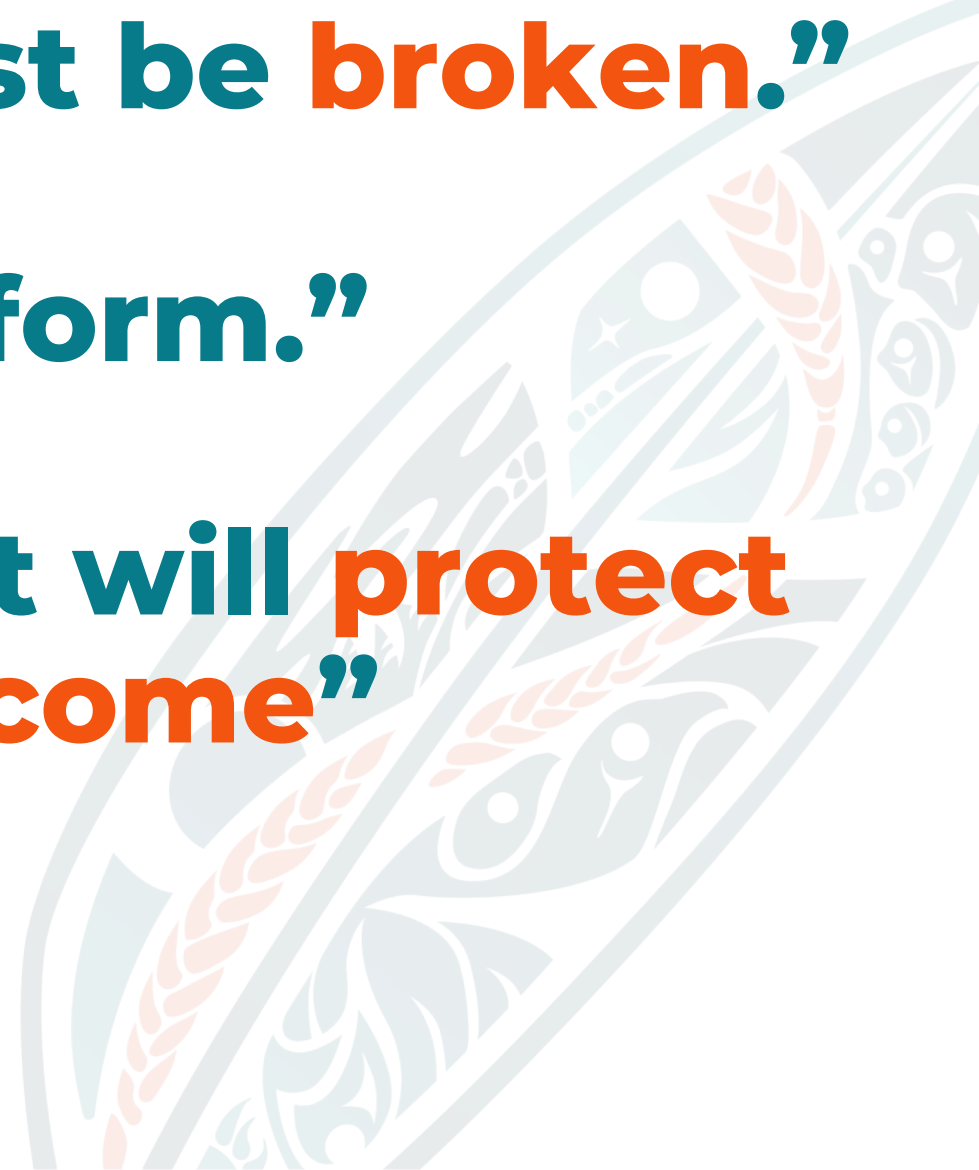
CHRT Decision on Revised FSA, July & Sept 2023

“Complete justice will be achieved when First Nations children have **an opportunity equal to other individuals** to make for themselves the lives that they are able and wish to have **when systemic racial discrimination no longer exists**. The compensation in this case is only one component. The Tribunal, assisted meaningfully by the parties, has always focused on **the elimination of the systemic racial discrimination found and the need to prevent similar practices from arising**. The Tribunal has found this requires **a complete reform**. **Making available to First Nations children and communities the rights, opportunities, and privileges they have been denied and ensuring Canada ceases the discriminatory practices at issue in this case requires a transformation that will protect generations to come**. This continues to be the Tribunal’s focus.”

“The cycle of harm must be broken.”

“A complete reform.”

“A transformation that will protect generations to come”



First Nation children and families were denied equal child and family services and treated differently in the provision of CFS contrary to section 5 of the *Canadian Human Rights Act*.

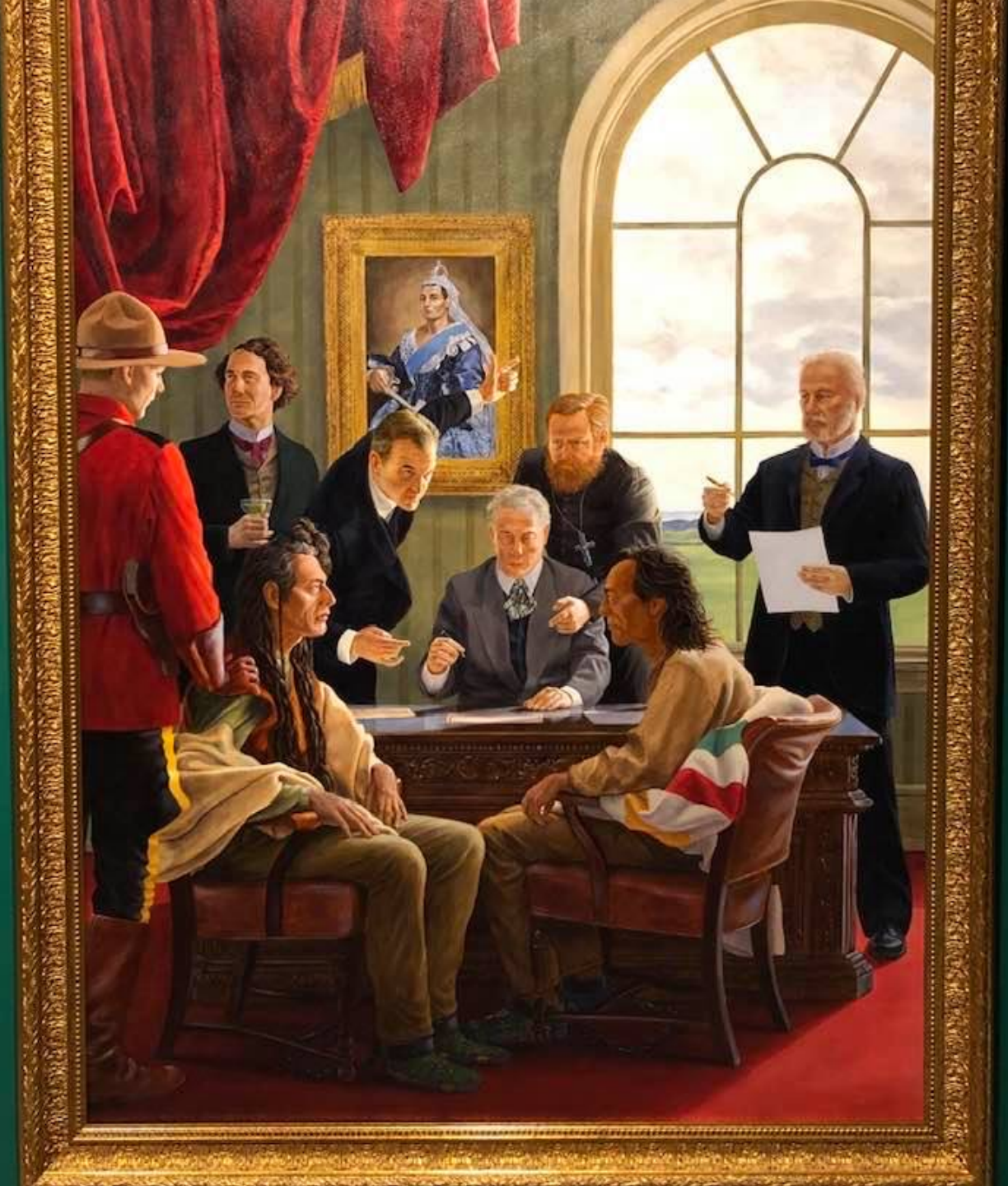
This was done by **underfunding the FNCFS Program in the manner it was **designed, managed and controlled.****

(Merit Decision, 2016)

**INTOISENEWEN
MAMAWITOWIN
UNITY**



The Subjugation of Truth
Kent Monkman, 2016



Review of Draft FSA

- Draft FSA is soft on Canada's discrimination. Equitable, fair, reasonable, non-discriminatory provisions needed to protect children, families and Nations.
- Completely tailored to Canada. Does not go far enough in holding Canada accountable and could perpetuate discrimination.
- Creates a divide between FNCFS Agencies and Nations to distract from Canada's accountability.



Review of Draft FSA

- Focus is on FNCFS Agencies being accountable to First Nations vs. Canada being accountable to First Nations, children, families and Nations (Nation/Agency divide)
 - Started out unified and then Nation vs. Agency divide became stronger in recent years
 - Focus on First Nations as the recipients of funds and not on Canada funding fairly and equitably to eliminate discrimination and prevent its recurrence.
 - Negotiated by people who don't understand “US” – FNCFS Agencies & Nations in the same canoe and the on-the-ground realities



Soft on Canada's Discrimination

- **Preamble is written by Canada** – not what you would expect in historic settlement to repair what the CHRT called “**harms of the worst kind**” to First Nations children, families and Nations.
 - Discrimination provisions framed on findings of discrimination by CHRT – not referring to discrimination.
 - “AND WHEREAS the accountability structure built into the FNCFS Program is intended to ensure **FNCFS Agencies** are accountable to the **First Nations governments and communities they serve**, while fostering positive First Nation-FNCFS Agency relationships;
 - **Accountability structure must ensure Canada is accountable to children, families and Nations** to end discrimination and ensure it does not re-occur.
 - “AND WHEREAS the Parties agree this Final Settlement Agreement is a comprehensive settlement agreement and a record of the necessary steps and actions as well as the embodiment of the Parties’ **best efforts**, to eliminate the discrimination found by the Tribunal in relation to the FNCFS Program and prevent its recurrence.



Nation/Agency Divide

- **Prevention Funding** – allocated to First Nations, \$2,603.55/person on reserve, adjusted for inflation and remoteness plus minimum \$75,000 for each First Nation. Nations can choose to transfer prevention funds to FNCFS Agencies.
 - Full circle prevention - primary (workshops, cultural & rec activities), secondary (home visit/mentoring, reunification supports), tertiary (crisis intervention, intensive family preservation services)
 - In AFN Information Sessions Winnipeg August 19-21 – since changed position and noted FNCFS Agencies will get tertiary prevention funding in materials – but this is not in the Draft FSA as drafted and not sure where/how will be amended.



Nation/Agency Divide

- Prevention Funding, cont'd
 - Legal obligations – Agencies and First Nations providing child and family services, are required to prioritize prevention services over other services under section 14(1) of *An Act respecting First Nation, Inuit and Metis children, youth and families (C-92)*
 - Legal obligation for Agencies, yet no funding
 - Legal obligation for Nations, yet no/little capacity and not the same level of liability insurance as Agencies
 - Creates gaps for prevention services that children and families are legally entitled to



Nation/Agency Divide

- **Results Funding** – 5% of FNCFS Agency’s annual Baseline Funding. Recommended by IFSD for FNCFS Agencies to track outcomes to demonstrate impacts that efforts are having on well-being of children and families.
- Results funding is allocated to First Nations but data tracking is the responsibility of FNCFS Agencies. Not clear how FNCFS Agencies will meet the requirements for data tracking under the Draft FSA. FNCFS Agencies are required to track data on:
 - (a) Knowledge of Indigenous languages; (b) Connection (access) to land; (c) Community-based activities; (d) Spirituality; (e) Family reunification; (f) Placement within community (kin and kith); (g) Stability (i.e. moves in care); (h) Incidence of abuse while child is in care; (i) Reason for entry; (j) Housing factor; (k) Reason for exit; (l) Time to exit; (m) Referrals to specialized services within the community: (i) pre- and post- natal services (ii) medical services (iii) mental health services; (iv) substance misuse services; (v) family violence intervention services; (vi) FNCFS prevention services; (n) Education; (i) Early learning childhood education (ii) meeting numeracy and literacy targets (iii) Secondary education completion rate (iv) Post-secondary education aspirations.



Will Result in Funding Shortfalls

- A breakdown of expected spending per region under the Draft FSA has not been made available by the Parties, and certain key pieces of information are missing to determine how that spending will be broken down.
- Despite this, IFSD did an analysis of expected spending for the first 5 years of the agreement based on available information and compared that with their projected spending required to bring an end to discrimination within the FNCFS program.
 - The IFSD found a significant spending shortfall. **IFSD projects a spending shortfall of \$2.379 billion over 5 years in the Manitoba region alone, with the Manitoba region being the most short-changed by the agreement. Across all regions, the IFSD projects a \$9.874 billion shortfall over the first 5 years of the agreement.**
- **The spending shortfall over 5 years in other jurisdictions: Ontario \$2.328B (second short-changed region); Alberta \$1.333B; British Columbia \$1.157B; Saskatchewan \$1.648B.** In this analysis IFSD notes, “Details on funding allocations are lacking to generate estimates by recipient type.”



Soft on Discrimination

- Service Provider Funding Adjustment Request (191-199)
 - Section 191 – a FNCFS Service Provider may bring a Service Provider Funding Adjustment Request if it is unable within its current funding, **for reasons beyond its reasonable control**, to deliver services required by law and eligible to be funded by the Reformed FNCFS Program.
 - Section 192 – a First Nation may bring a Service Provider Funding Adjustment Request if it is unable within its current funding, to provide prevention services which are adequate to respond to a prevention need created by **an unforeseen event(s), beyond its reasonable control, not including reasonably foreseeable natural events or circumstances covered by other government programs or policies.**
 - Section 193 – on requests received on same events, Nation's requests prioritized
 - Section 194 – Agency requests must be accompanied by written support of leadership of the FNCFS Agency's affiliated First Nations



Soft on Discrimination

- Service Provider Funding Adjustment Request, cont'd
 - Within 15 days of receiving request, ISC shall meet with the FNCFS Service Provider (s. 197)
 - Within 30 days of the meeting, ISC shall make a determination on the request. **“If ISC has not made such a determination within the 30 day period, the request shall be deemed to have been denied and the FNCFS Service Provider may access the Claimant Dispute Tribunal.”** (s. 198)
 - Requests on an **urgent basis** where delay in response would **significantly impact the health or safety of children, youth and/or families**. ISC shall take measures to ensure the safety and well-being of the identified children/youth/families within 5 days of receipt of request. **“If ISC has not made a determination with respect to the request within 10 days of receipt of the urgent request, the request shall be deemed to have been denied and the FNCFS Provider may access the Claimant Dispute Tribunal.”** (s. 199)



Soft on Discrimination

- **Claimant Dispute – Dispute Resolution Tribunal**

- Claimant Disputes handled by Dispute Resolution Tribunal (s. 229 – 371). Speaks of there being legislation to enable the Dispute Resolution Tribunal
- DRT made up of President and Adjudicators – President appointed by Governor in Council on recommendation of Minister of ISC in consultation with Parties. President selects Roster of Adjudicators and establishes Rules of Procedure. Navigators to assist in filing of Claimant Dispute and understanding Rules (325), also Duty Counsel for independent legal advice to Claimants (330)
- **Claimant submits Claimant Dispute Notice within 90 days of receiving notification from ISC of the action that gives rise to the Claimant Dispute.** Otherwise, the Claimant shall be deemed to have waived their right to have the Claimant Dispute heard. (328)
- Claimant Dispute Notice shall contain – **statement of the subject matter/issues of the Claimant Dispute and a summary of the underlying facts and a statement of the remedy sought.** (329)
- Claimant Dispute Resolution Process not abrogate or derogate from Claimant's rights under *Canadian Human Rights Act* (237).



Soft on Discrimination

- **Claimant Dispute – Dispute Resolution Tribunal, cont’d**
 - When receive Claimant Dispute Notice, President shall recommend to Claimant in writing that they seek independent legal advice from Duty Counsel (332).
 - After ILA or signing waiver of ILA, **Claimant provides written confirmation to President/Registrar that that Claimant consents to proceeding with a Claimant Dispute and not filing a complaint with the Canadian Human Rights Commission** on the substance of the Claimant Dispute and/or bringing the substance of the Claimant Dispute before Court.
 - Doesn't specify time frame
 - When President receives written confirmation, promptly **delivers Claimant Dispute Notice to ISC** (334).
 - **ISC shall deliver its response to Claimant Dispute Notice within 30 days** (335).
 - **Within 20 days** of Claimant written confirmation that proceeding with Claimant Dispute, **President appoints a single Adjudicator** or has discretion to appoint an Adjudication Panel
 - **Within 20 days after the delivery of Canada's response**, the Adjudicator/Panel shall convene a **pre-hearing meeting** of the parties in the hopes of reaching agreement on procedure and make procedural orders (345)



Soft on Discrimination

- **Claimant Dispute – Dispute Resolution Tribunal, cont'd**
 - **Cultural Officer, employed by Administrative Tribunals Support Service of Canada**, role to make recommendations to Adjudicator/Panel, on aspects of Claimant Dispute Process re: facilitating resolution in manner that is just, expeditious, cost-effective, culturally appropriate (348)
 - At anytime during Claimant Dispute Resolution Process, Adjudicator(s) may make interim Claimant Dispute Decision (347)
 - The Adjudicator(s) shall conduct a review of Canada's decision giving rise to the Claimant Dispute, **considering only the materials that were before Canada's decision maker**. (353)
 - The Adjudicator(s) **may consider the views of the Claimant and any associated First Nations, the legal traditions and protocols of the First Nation, the circumstances of the individual First Nation, the urgency of the funding that is subject of the Claimant Dispute and any evidence not before the decision maker tendered by the parties to the Claimant Dispute that the Adjudicator(s) find relevant and appropriate in the circumstances**. (354)



Moving Forward

- Nations were to have **160 days** to review Draft FSA – that was on understanding **technicians would be at the table** per the December 2022 Chiefs-in-Assembly Resolution.
- Voting scheduled for October 16 – 18 in Calgary.
- Complete reform – overhaul of Draft FSA
- Caring Society Position re: Dispute Resolution



Moving Forward

- Decision makers must have jurisdiction over their own process (i.e., be “master of their own house”) and have broad remedial powers to make individual and **systemic** orders to **stop discrimination and prevent its recurrence (including the power to grant injunctive relief), compensate victims, deter wilful and reckless discrimination, and order costs.**
- DR Process must be *nimble*: Dispute that could impact a child will be dealt with **on an emergency basis as expeditiously as possible.**
- *Disallow procedural stalling*: Because time is critical in administrative decisions that impact children, if an appeal from a denial is not heard or a decision is not rendered within the established timeline, it is **presumed to be granted**. The resulting order shall be final and not reviewable unless Canada can show prejudice.
- *Be proactive*: must include **mechanisms to proactively identify and remedy potential patterns of discrimination.**



Sources


- Assembly of First Nations, Chiefs of Ontario, Nishnawbe Aski Nation, Canada, “Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program”
- Institute of Fiscal Studies and Democracy, Estimate of the Draft Final Agreement’s Funding Allocation to FNCFS Agencies”, unpublished. Kindly shared by Dr. Cindy Blackstock.
- First Nations Child and Family Caring Society, Reformed Approach to Child and Family Services, May 2024






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