

February 19, 2025

Sent by e-mail

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Greetings AFN National Chief Woodhouse Nepinak:

RE: Urgent Need for Collaboration on Caring Society's Non-Compliance Motion

The National Children's Chiefs Commission ("NCCC") is aware of the Canadian Human Rights Tribunal ("CHRT") letter dated February 10, 2025 in *First Nations Child and Family Caring Society of Canada et. al v. Attorney General of Canada (Representing Minister of Indian Affairs and Northern Development Canada)* – T1340/7008. We concur with the CHRT that the Caring Society's non-compliance motion for consultation and reconciliation is urgent and needs immediate action. The CHRT set a deadline of **February 24, 2025** for the parties to share their views on the dialogical approach for the long-term remedial phase to address Canada's discrimination against First Nations children. This requires our collective, focused attention.

This non-compliance motion for consultation and reconciliation concerns Canada's lack of adherence to the CHRT orders – notably 2016 CHRT 2 and 2018 CHRT 4, which incorporate an obligatory consultation protocol for Canada – an issue central to the honour of the Crown and the long-term reform of First Nations Child and Family Services ("FNCFS") and Jordan's Principle.

The February 24 deadline for submissions adds immense urgency to the collaboration discussions between the NCCC and the AFN Executive. We invite an immediate partnership, in accordance with the resolutions passed by First Nations-in-Assembly, to respond to the CHRT. The AFN must take a clear position on this significant matter. The NCCC stands ready to assist the AFN and its legal counsel so that further, unnecessary, delays may be avoided. By working together, the AFN can demonstrate to all parties that it remains fully prepared for national long-term reform negotiations. First Nations children and families have an urgent need for justice. Canada urgently needs to account for and eliminate its systemic discrimination against First Nations children and families. Delay frustrates both of these objectives.

The CHRT has repeatedly ordered Canada to immediately eliminate systemic inequalities in the FNCFS program and to fully implement Jordan's Principle. However, Canada has consistently failed to comply with these orders, perpetuating the discrimination and harm to First Nations children and families.

The ongoing non-compliance by Canada is a grave injustice to First Nations children and families. Each day without meaningful action causes more children to suffer the consequences of Canada's discriminatory laws, policies, and practices. The urgency of this situation cannot be overstated. The NCCC is committed to working with the AFN to hold Canada accountable and to ensure that the rights and responsibilities of First Nations, and the rights and well-being of First Nations children, are finally upheld. In these circumstances, the NCCC calls on the AFN to:

- (i) immediately collaborate with the NCCC on the AFN's submissions for the February 24, 2025 deadline; and
- (ii) provide immediate and clear instruction to AFN's legal counsel at the CHRT, enabling them to actively participate in the CHRT hearings without further delay and to collaborate with the NCCC's legal counsel in relation to AFN's submissions.

The CHRT's February 10 letter raises questions concerning the dialogic approach, honour of the Crown, and the Consultation Protocol. The honour of the Crown, a foundational constitutional principle, guides all interactions and obligations between the Crown and First Nations. It recognizes First Nations' pre-existing self-determining sovereignty and inherent rights. This guiding principle remains central in all Crown dealings: it applies to treaty-making, compliance with Tribunal orders, statutory interpretation (such as Parliament's statutory promise of rights recognition in an *Act Respecting First Nations, Inuit and Métis Children Youth and Families*, SC 2019 c 24), and reconciliation agreements. The honour of the Crown is always at stake and demands Crown integrity and good faith because it is deeply connected to reconciliation – a respectful, long-term relationship and just claim settlements.

The honour of the Crown is not optional and has substantive legal implications, giving rise to actionable duties such as diligent implementation, consultation and accommodation, avoidance of sharp dealing, and a fiduciary duty. The Crown's discretionary power and the vulnerability of First Nations children create this fiduciary duty. As with human rights obligations, the Crown cannot contract out of honour of the Crown obligations. The honour of the Crown dictates that the Crown must implement commitments purposefully, diligently, and in good faith, especially Tribunal-ordered commitments like the Consultation Protocol. Failure to do so creates a legal cause of action. The legally binding and Canada-funded Consultation Protocol aims to fulfill the CHRT's orders. It establishes negotiations to eliminate discrimination, consistent with the honour of the Crown, and applies to the immediate, mid- and long-term remedies and to the correct implementation of Jordan's Principle.

Canada's ongoing systemic discrimination and non-compliance with Tribunal orders profoundly breaches the honour of the Crown. Discriminatory underfunding contradicts the Canada's fiduciary duty. This duty requires advancing substantive equality and holistic well-being for First Nations children and families. This breach fails to prioritize their well-being or protect them from harm. Systemic discrimination prejudices reconciliation.

Reconciliation requires addressing historical injustices and building respectful Nation-to-Nation relationships. Systemic discrimination perpetrates injustice and erodes trust. The Consultation Protocol supports negotiations that are meaningful and in good faith, that respect First Nations' self-determination and aim to forever eliminate Canada's discrimination against our children. The Consultation Protocol acknowledges that a discriminatory one-size-fits-all approach is unacceptable; Canada's negotiations must respond to distinct First Nations needs as the First Nations themselves define their own needs.

The CHRT ordered the Consultation Protocol in 2018 CHRT 4. The Consultation Protocol triggers the honour of the Crown as a Tribunal-ordered agreement that fosters reconciliation by ending discrimination against First Nations children and families. The Consultation Protocol is rooted in the honour of the Crown, *United Nations Declaration on the Rights of Indigenous Peoples*, the *Convention on the Rights of the Child*, and the Truth and Reconciliation Calls to Action. It ensures that negotiations align with the honour of the Crown and eliminate substantiated discrimination through a dialogic, collaborative, and rights-based approach. Canada remains responsible for fully implementing Tribunal orders and the Protocol remains in force until all remedies are fully implemented.

Canada's refusal to renegotiate a long-term reform agreement after First Nations-in-Assembly rejected the July 11, 2024 Draft Final Settlement Agreement is a serious breach of the honour of the Crown. It demonstrates a failure of diligent implementation by stalling urgently needed reforms and perpetuating systemic discrimination. It also constitutes sharp dealing by exploiting a contingency clause (s. 380) in bad faith, ignoring First Nations voices, undermining self-determination, including self-governance, meaningful consultation, and eroding trust. The honour of the Crown demands that Canada return to the negotiation table in good faith to develop a long-term reform agreement that is acceptable to First Nations leadership and effectively addresses the systemic discrimination against First Nations children and families, as mandated by the Tribunal's orders. Anything less is a continued violation of Canada's fundamental constitutional and human rights obligations.

Moreover, it is critical for AFN to take a position in its CHRT submissions to address the February 6, 2025 letter that Ms. Gina Wilson, Deputy Minister of ISC, sent to the CHRT parties, in which Canada took the position that: (i) "[e]ffective immediately, invoices for a Party's consultation related work, including legal fees, will no longer be accepted for reimbursement"; and (ii) ISC would provide each party with a "yearly budget forecast" to inform workplans which should "focus on matters pertaining to the implementation of the Tribunal's existing orders on the [FNCFS] Program." This, together with recent correspondence from Canada, suggests that Canada is no longer willing to fund the negotiation of a national, long-term reform agreement for the FNCFS Program.

The NCCC urges immediate collaboration with the AFN to address Canada's ongoing breach of the honour of the Crown. Canada's persistent non-compliance and refusal to negotiate long-term reform perpetuate injustices against First Nations children and families. The Assembly of First Nations must take a clear position at the CHRT. The AFN

and the NCCC must stand united to compel Canada to return to meaningful negotiations, diligently implement the Tribunal orders, and uphold its obligations, ensuring justice and reconciliation are no longer delayed.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pauline Frost', with a stylized flourish at the end.

Chief Pauline Frost
Chair, NCCC

c: NCCC
AFN Executive