

TERMS OF REFERENCE FOR THE NEGOTIATION TEAM FOR THE FIRST NATIONS CHILD AND FAMILY SERVICES LONG-TERM REFORM

1. PURPOSE

These Terms of Reference set out the mandate, principles, and structure for the Negotiation Team (NT) operating under the direction of the National Children's Chiefs Commission (NCCC). Tasked with ending Canada's discriminatory conduct in First Nations child and family services (FNCFS) and Jordan's Principle in a manner that upholds First Nations' inherent and treaty rights throughout negotiation processes.

2. AUTHORITY

The First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a *Canadian Human Rights Act* complaint in 2007 alleging Canada's inequitable provision of First Nations Child and Family Services (FNCFS) and failure to implement Jordan's Principle were discriminatory. The Canadian Human Rights Tribunal (CHRT) substantiated the discrimination claim in 2016, resulting in 24 non-compliance and procedural orders between 2016 and 2024. Following AFN Resolutions 60/2024, *Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle*, and 61/2024, *Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services*, First Nations-in-Assembly set a path forward for FNCFS LTR. The direction from First Nations-in-Assembly necessitates new negotiations under the direction of the NCCC, in alignment with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

3. OBJECTIVES

The NT operates under the direction of the NCCC and is accountable to First Nations¹. The NT is tasked with negotiating a long-term reform (LTR) final agreement for FNCFS

¹ For the purposes of these terms of reference and in accordance with the mandate set out by First Nations Leadership through AFN Resolutions 60/2024 and 61/2024, "First Nations" means First Nations-in-Assembly and First Nations not represented by the AFN.

reform, in accordance with AFN Resolutions 60/2024, 61/2024, and 40/2022. The objectives for the NT are based in the following core criteria, which are essential to ensuring a fair, equitable, and transformative agreement:

- a) **Elimination of Systemic Discrimination:** LTR must fully eliminate Canada's systemic discrimination in FNCFS and Jordan's Principle implementation and ensure it does not recur. This includes addressing structural inequities and adhering to all applicable CHRT orders.
- b) **Needs-Based Funding:** LTR funding arrangements must be evidence-informed and based on needs as defined by First Nations themselves. First Nations are best positioned to determine the needs of their children, families, and communities. Funding must not solely rely on per capita formulas, especially those tied to the Indian Registration System.
- c) **Advancing Substantive Equality:** LTR must provide funding and services that advance substantive equality, ensuring First Nations children and families have substantively equitable access to culturally, linguistically, socially, and developmentally appropriate services, products and supports.
- d) **Recognition of Inherent and Treaty Rights:** LTR must affirm First Nations' inherent jurisdiction and self-determination over FNCFS. This includes recognition of their authority to legislate in these areas, independent of delegated powers under section 91(24) of the Constitution Act, 1867.
- e) **Agreement with the Crown in Right of Canada:** LTR should be with the Crown in right of Canada as a whole, ensuring accountability across all federal jurisdictions. It cannot be limited to individual departments, such as Indigenous Services Canada or Crown-Indigenous Relations.
- f) **Respecting First Nations Experts and Service Providers:** LTR must support First Nations experts and service providers in discharging their responsibilities and respect their contributions.
- g) **Dispute Resolution and Oversight:** LTR must include a robust dispute resolution mechanism with powers and remedies that are at least as effective as the CHRT. The CHRT's jurisdiction must also be preserved to ensure accountability, compliance, and enforcement.

- h) **Children's Rights to Intergenerational Equity:** LTR must prioritize the rights of First Nations children, including future generations. Reforms must address immediate needs and ensure sustainable, culturally and linguistically relevant supports and services that promote intergenerational equity.
- i) **Cultural and Linguistic Continuity:** LTR must support the revitalization and continuity of Indigenous languages and cultures as critical elements of First Nations children's well-being and identity.
- j) **Self-Determination instead Indian Act-Centric:** LTR must not be Indian Act-centric and must reflect self-determination and First Nations governance structures.
- k) **Delegated Jurisdiction:** LTR must reflect and respect First Nations' authority over child and family services including jurisdictional and delegation models. Where First Nations choose to operate under their own jurisdiction, Canada must respect that jurisdiction is rooted in inherent and treaty-protected rights, not federal delegation under Canadian law.
- l) **Regional Implementation Mechanisms or Agreements:** LTR must establish mechanisms to ensure effective implementation, funding, oversight, outcome measurement, and accountability tailored to the unique needs of each region. These mechanisms must complement CHRT orders and uphold a long-term commitment to eliminating discrimination. Recognizing regional diversity, LTR will necessitate the development of region-specific sub-agreements to address localized priorities and contexts effectively.
- m) **Regional Secretariats:** Regional technical secretariate functions to be set up in each region to provide culturally relevant, language-based expertise. These technical secretariats will offer region-specific insights, support self-determined service delivery, and collaborate to share best practices while preserving regional autonomy.
- n) **National Secretariate:** National technical secretariate function to collaborate with regions on national policy matters, share best practices, collect national outcome data in partnership with regions, and convene Regional Secretariats.

The NT will be duty-bound by the directives of the NCCC and First Nations, as mandated in AFN Resolutions 60/2024 and 61/2024. CHRT orders establish the foundation for comprehensive FNCFS and Jordan's Principle LTR. More specifically, and for greater clarity, the NT must ensure that LTR negotiations do not compromise on the following:

- a)** The recognition of First Nations jurisdiction over children and families. This means that First Nations Chiefs must be restored as the key decision-makers on the implementation of LTR and all LTR governance structures must be transparent and accountable to First Nations Chiefs.
- b)** Overhauling funding principles, definitions, structures, methodologies, policies, conduct and instruments to reflect the needs of First Nations children, youth and families, as defined by First Nations.
- c)** Ensuring Canada's systemic racial discrimination towards First Nations children, youth and families found by the CHRT ends and does not recur.
- d)** Ensuring the negotiations process incorporates ongoing and meaningful oversight by, and consultation with, the NAC.
- e)** Ensuring that Canada discloses all federal-provincial-territorial service level agreements during the negotiations process.
- f)** Ensuring that Canada provides sufficient liability coverage and statutory immunity for First Nations and FNCFS Agencies in relation to the services they provide and ensuring that Canada is the insurer of last resort for First Nations and FNCFS Agencies that have acted in good-faith in performing duties.
- g)** Ensuring that the CHRT retains jurisdiction over the implementation of LTR and that any Dispute Resolution Tribunal established by LTR is truly independent of Canada and is vested with comparable remedies available to the CHRT.
- h)** Full alignment with the principles of UNDRIP and CHRT orders.
- i)** Ensuring all resources and materials are available in both French and English.
- j)** Incorporating the findings from a comprehensive regional and sub-regional engagement across Canada into LTR.
- k)** Fully implementing Jordan's Principle to eliminate delays, denials, and barriers to services.

- l) Ensuring positive and effective measures and resources are in place for First Nations to develop the necessary capacity to deliver child and family services and/or Jordan's Principle.
- m) Positive and effective measures to ensure First Nations and their service providers to effectively addresses the structural drivers of disadvantage for First Nations children, youth and families whilst providing the necessary services, products and supports to meet existing needs arising from the structural drivers.
- n) Ensuring Canada discharges its duty to not discriminate regardless of jurisdictional or service deliver model.
- o) Ensuring that the EAC discharges its mandate to develop positive and effective measures to reform Canada in order to ensure it learns from its repeated harms to First Nations children, youth and families and takes positive and effective measures to ensure it does not recur.
- p) Ensuring that all Parties to LTR are free from any obligation to procure approval of, or speak favourably about, any draft LTR agreement.

For Greater clarity, the NT is not permitted to negotiate outside the parameters of this Terms of Reference.

4. REFERENCES

The following documents, decisions, and declarations will be taken into consideration in the NT'S work:

- The direction of First Nations-in-Assembly, including through AFN Resolutions 40/2022, *To Ensure Quality of Life to the First Nations Child and Family Services Program and Jordan's Principle*, 60/2024, *Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle* and 61/2024, *Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services*;
- The Canadian Human Rights Tribunal decisions in *First Nations Child and Family Caring Society et al. v Attorney General of Canada* T1340/7008;
- *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*;
- The United Nations Convention on the Rights of the Child (UNCRC), the United

Nations Committee on the Rights of the Child General Comment 11, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);

- The Truth and Reconciliation Commission of Canada's (TRC) Calls to Action, the National Inquiry on Murdered and Missing Indigenous Women and Girls (MMIWG) Calls to Justice;
- Respect for evidence, particularly First Nations-based and First Nation regionally developed evidence, to achieve the goals of non-discrimination towards First Nations children, youth, and families and preventing its recurrence.
- And any other document, decision, declaration, or other, referred to by the NCCC

5. DELIVERABLES

Under the direction of the NCCC, the NT will deliver the following to the NCCC:

- a) Available options and supporting financial resources and materials for LTR.
- b) A draft agreement on FNCFS long-term reform that meets the criteria identified in this Terms of Reference and identifies issues critical to ending Canada's discrimination and preventing its recurrence that ought to be addressed through further litigation before the CHRT
- c) Detailed documentation of the negotiation process, decisions, and outcomes for review by the NCCC and First Nations.
- d) Ensure that all drafts have a French language translation.

6. COMPOSITION & QUALIFICATIONS

The NT shall consist of members appointed by the NCCC, with regionally diverse and specialized expertise to effectively address the complex requirements of ending Canada's discrimination and supporting LTR including, where possible, through a LTR Agreement. All members must demonstrate a commitment to transparent processes, meaningful engagement with First Nations, and the principles of reconciliation. The NT shall be persons of good character, committed to human rights and dignity and will conduct themselves personally and professionally in a manner that does not bring the reputation of the NT or NCC or its mandate into disrepute. Persons who have been convicted of violent crimes or crimes against children are not eligible. Members shall be persons possess knowledge and experience in the following areas:

a) Commitment to the Rights of First Nations Children, Youth and Families

- Demonstrated knowledge of the rights of First Nations children, youth and families including the right to live free of discrimination pursuant to the Canadian Human Rights Act consistent with the UNDRIP and the UNCRC.

b) Commitment to First Nations Priorities and Values

- Demonstrated understanding and respect for First Nations' cultural, linguistic, and governance systems, emphasizing intergenerational equity and First Nations-determined and directed solutions for First Nations priorities.
- Demonstrated and proven ability to engage meaningfully with Elders, youth, and community leaders, ensuring that their voices and priorities are reflected.

c) Advanced Communication and Advocacy Skills

- Demonstrated proficiency in articulating complex legal, policy, and technical concepts in accessible terms to support transparent communication with diverse First Nations governments, experts and stakeholders.
- Demonstrated experience in facilitating dialogue and consensus-building among multiple parties.
- Demonstrated experience conducting negotiations within the context of active litigation and existing legal orders.

d) Professional Integrity and Independence:

- A record of ethical conduct, free of conflicts of interest, with a clear commitment to maintaining independence from the Crown or external influences that conflict with First Nations' self-determination and the substantive equality rights of First Nations children, youth and families.
- Demonstrated experience with adherence to confidentiality protocols and commitment to safeguarding sensitive information.

e) Knowledge of International and National Frameworks:

- Familiarity with UNDRIP, TRC's Calls to Action, and other international instruments relevant to FNCFS and human rights.
- Demonstrated experience, expertise and knowledge of CHRT and related Court

rulings.

f) Ability to Work Collaboratively:

- Capacity to work effectively as part of a multidisciplinary team, recognizing and integrating expertise from diverse fields, such as law, finance, and social policy.
- Flexibility to navigate high-pressure environments and adapt strategies based on emerging challenges or opportunities.

g) Technical, Policy, and Legal Expertise:

- Specialized knowledge in Indigenous law, treaty rights, human rights law, and public administration.
- Understanding of funding mechanisms, including needs-based funding models, financial analysis, and accountability frameworks.
- In-depth knowledge of the CHRT orders, Jordan's Principle, and systemic issues within FNCFS.

h) Lived and Professional Experience:

- Lived experience with First Nations governance, FNCFS, or related areas, providing personal insight into the challenges faced by First Nations children and families.
- An ability to not only share lived experience but to learn from the experiences of others and to use that new knowledge when participating.
- Previous work in high-pressure negotiation and litigation settings, particularly those impacting First Nations.

7. INCLUSION AND REPRESENTATION

The NT will take positive and effective measures to seek out the input and expertise of:

- First Nations and their rightsholders including First Nations that are not members of the AFN
- National and regional FNCFS and Jordan's Principle providers and experts
- The National Advisory Committee (NAC)
- The Expert Advisory Committee (EAC)
- Youth in and from Care

- Other input and experts as determined by the NT and NCCC

The NT will meaningfully consider the input and recommendations provided by the NAC and EAC, ensuring that their expertise and insights are reflected in the negotiation process and align with the priorities and needs of First Nations communities.

8. ROLES AND RESPONSIBILITIES

The NT will have the following composition, with specific roles outlined below:

a) Lead Negotiator

- i. Serves as the primary spokesperson and strategist, directly managing and advancing negotiation efforts.
- ii. Coordinates between the Legal Team, Technical Experts, and Support Team to ensure informed strategies and cohesive negotiation tactics.
- iii. Provides regular progress updates to the NT, synthesizing information from all team members.
- iv. Delegates duties to Assistant Negotiators and other NT members, as required
- v. Oversees the negotiation process, ensuring adherence to the Terms of Reference and guiding principles.

b) Assistant Negotiator (as determined by the NCCC)

- i. Support the lead negotiator and perform duties as assigned by the lead negotiator.

c) Legal Team (3-5 members)

- i. Receives direction from the NCCC .
- ii. Has expertise in Indigenous law, treaty law, human rights law, children's law, administrative law and constitutional law.
- iii. Advises on all legal matters, ensuring compliance with legal standards and protection of First Nations rights.
- iv. Upon instruction of the Lead Negotiator, drafts, reviews, and finalizes agreements, coordinating with external legal advisors when needed.

d) Technical Experts (5-6 members)

- i. Specialists in areas such as child welfare, prevention services, Jordan's Principle, public finance and administration, funding models, Indigenous law, treaty law, human rights law and children's law.
- ii. Ensure the reforms are rooted in evidenced-based solutions and expert input to enhance negotiation outcomes.
- iii. Conduct research and analyze data to address gaps and inform negotiation positions.
- iv. Technical Experts may include members of the NAC or others designated by the NCCC
- v. Reporting responsibility to the NAC and relay feedback of the NAC to the NT

e) Support Team (3-4 members)

- i. As required by the lead negotiator, legal team, and technical experts, provide support.
- ii. Analysts and data experts who provide research, support community engagement, communications and strategic insights.
- iii. Facilitate feedback from diverse stakeholders, including families, youth, and Elders, to incorporate intergenerational perspectives.
- iv. Ensure proposals reflect the needs and values of First Nations communities, grounding recommendations in reliable data.

f) Secretarial Support

- i. Manages administrative functions, including maintaining secure records of meetings, decisions, and action items.
- ii. Prepares and distributes agendas, minutes, and updates for NT meetings, ensuring accessibility and clarity for all team members.
- iii. Coordinates communication between the NT, NCCC, and First Nations leadership.
- iv. Oversees logistical arrangements for meetings, workshops, and engagements, including virtual participation options.
- v. Provides secretariate support to the NCCC and NT

The NCCC will appoint the lead negotiator and other team members at its discretion.

The NT must be structured to ensure that First Nations-in-Assembly and First Nations not affiliated with the AFN are the primary clients, with all actions and decisions aligned with their directives. All NT members are accountable to the NCCC and First Nation and must act in alignment with these terms of reference.

9. DECISION MAKING

Whenever possible, the NT will operate on a consensus basis to maintain cohesion and alignment.

- a) In cases where consensus cannot be reached, the Lead Negotiator will mediate discussions to resolve differences.
- b) If an impasse remains, the NT may seek guidance from the NCCC to ensure decisions align with broader strategic priorities.

While the NT has the authority to make operational decisions independently, it must do so within the framework and principles outlined by AFN Resolution 40/2022, 60/20224 and 61/2024.

10. REPORTING & ACCOUNTABILITY

The NT will submit periodic reporting and accompanying documentation to the NCCC, highlighting key developments, challenges, and any decisions made. Further, and to ensure NAC is able to deliver on their advisory role for LTR, a negotiator from the NT will attend meetings and provide comprehensive progress updates to the NAC, when requested to attend by the NAC. The NT shall actively monitor and ensure that Canada fulfills its honour of the Crown, and fiduciary duties for First Nations children and families, throughout the negotiation process. This includes, but is not limited to, Canada's duty to act with integrity and good faith, not to engage in sharp dealing, and Canada's duty of diligent implementation of its treaty and statutory promises to First Nations. The NT will document and regularly report to the NCCC on any failures by Canada to meet this honour of the Crown and fiduciary duties. At the direction of the NCCC, the following documents shall be made accessible to First Nations:

- a) NT meeting minutes, action items, decisions, and required follow-ups
- b) Detailed account of negotiation outcomes, challenges, and recommendations.

Reports will include evidentiary submissions including but not limited to surveys, case studies, engagement summaries, among others.

- c) Summary of findings and perspectives from region-specific engagements, disaggregated by stakeholder group.

The NT will allocate sufficient time and materials to support meaningful participation. This may include logistical support or virtual participation options where necessary.

11. DATA PROTECTION & INFORMATION SHARING

To maintain trust, transparency, and security in information sharing with the NCCC, the NT will comply with the following provisions:

- a. Establish information sharing measures with the NCCC and regional representatives
- b. Data collected or generated will align with Indigenous data sovereignty principles, prioritizing First Nations' control, access, and ownership of their data, and ensuring use exclusively for agreed purposes.
- c. Track all data shared, including access details and requests, to ensure accountability and data security.

The NT will maintain confidentiality, data protection, and Indigenous data sovereignty to ensure high standards of secure data handling. The NT will submit themselves to an audit of managing confidential data, if needed.

12. FINAL DRAFT APPROVAL PROCESS

The approval process for the final draft FSA must ensure it reflects the intent of AFN Resolutions 60/2024 and 61/2024 and balances the need for thorough review with the sensitive nature of the negotiations. The following processes will be followed:

- i. The NT will conduct a comprehensive review of the draft to ensure alignment with the mandate outlined in this TOR and AFN Resolutions 60/2024 and 61/2024.
- ii. The NT will present the draft FSA to the NAC, EAC, IFSD, and other advisory bodies recommended by the NCCC for review and feedback.
- iii. Regional representatives and technical secretariats and experts will receive the

draft for review and will be provided adequate time for regions to assess the draft and submit feedback or proposed amendments. A summary of feedback and how it was addressed will be shared with all stakeholders.

- iv. The NT will ensure available options and supporting financial resources and materials for LTR is shared with regional representatives and technical experts.
- v. Based on the feedback from regional consultation, the NT will make necessary revisions to ensure the draft aligns with First Nations' priorities and the NT's mandate. Revisions will be validated through a final consultation with the NCCC.
- vi. The NT will provide a final draft to NCCC who will formally review and approve the draft after final consultation for release to ensure the document aligns with First Nations' objectives and meets the criteria outlined in the Terms of Reference and AFN Resolutions 60/2024 and 61/2024.
- vii. The approved draft, including appendices, will be provided to First Nations, FNCFS Agencies, service providers, NAC, and the EAC, at least 90 days prior to any decision-making or voting process.

13. CONFLICTS OF INTEREST

The NT is committed to maintaining the highest standards of professional conduct by implementing rigorous conflict of interest management protocols to ensure transparency, accountability, and independence in its operations. The following processes will be followed:

- i. All NT members must immediately disclose any actual, perceived, or potential conflicts of interest to the NCCC and members with disclosed conflicts must recuse themselves from any related discussions, decisions, or actions to preserve the integrity of the negotiation process.
- ii. Each NT member is required to sign an annual conflict of interest declaration affirming their adherence to the provisions outlined in this section. Declarations will explicitly affirm the member's independence from the influence of the Crown in right of Canada or any provincial governments.
- iii. The NCCC will establish and maintain clear procedures for managing conflicts of

interest, including processes for timely disclosure and acknowledgment of conflicts, assessment of the nature and impact of any disclosed conflicts, and implementation of appropriate mitigation measures, including recusal or reassignment.

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