**First Nations Child &
Family Caring Society**

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Liability and prevention services: An information sheet for First Nations providing prevention services

This information sheet provides general information on potential liability concerns for First Nations and their employees who take on prevention funding as part of Canada's reformed funding model for the First Nation Child and Family Service Program ("**FNCFS Program**"). This information sheet does **not** consider potential liability for First Nations who have exercised jurisdiction over child and family services under *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families* (commonly known as "**Bill C-92**") or s. 35 of the *Constitution Act, 1982*.

IMPORTANT NOTE TO READERS: The information contained in this information sheet is not legal advice. Consult with your own legal counsel and insurance experts in order to seek advice and guidance with respect to your specific situations and circumstances. Issues of liability are highly fact specific, and the result of any claim will be based on the individual facts of any individual case.

Liability exposure and core policy immunity

When a First Nation is involved in supporting its children, youth, and families through prevention services in the area of child and family services, the First Nation and its employees could be exposed to legal action. These possible legal actions include but are not limited to class action lawsuits, negligence claims, and human rights complaints.

Liability exposure is different for a First Nation than it is for child and family service agencies. While provincial and territorial child welfare statutes often include a provision protecting social workers who are acting in good faith under child and family services legislation, the legislation does not apply to other kinds of service providers who are involved in child and family services. This means others (such as band representatives, prevention workers, and employees of the First Nation) may be open to claims in negligence that are not protected under existing child and family services legislation. These could include: First Nations governments who are providing secondary and tertiary prevention services and who have not exercised jurisdiction over child and family services under Bill C-92 or s. 35 of the *Constitution Act, 1982* and their employees; and other entities authorized by a First Nation to deliver certain prevention services (including Elders/knowledge keepers, and those providing kinship care, foster care, and group care).

Where a First Nation faces a legal action, it is possible (but not guaranteed) that the First Nation will be immune from liability. This is called "core policy immunity." For this type of immunity to apply, the court will consider whether the decisions made in relation to the harm suffered by a plaintiff meet the following requirements: (i) they were based on social, economic, or political factors; (ii) they were made in good faith; (iii) they are rational; and (iv) they involve at least some level of consideration or deliberation. This immunity will be entirely dependent on the nature of the claim, the facts, and the legal parameters of the proceeding. Talk to your legal counsel about core policy immunity and whether it could apply to your First Nation.

Duty of care, proximity, and foreseeability

The law of negligence is complicated and fact specific. Always consult with legal counsel if your First Nation or its employees have questions about any potential claims.

A negligence claim is most often brought for compensation when it is alleged that someone breached their legal duty in a way that caused loss or injury. To succeed in a negligence action, a plaintiff must successfully prove the following:

1. The defendant owed the plaintiff a duty of care;
2. The defendant's conduct breached the standard of care;
3. The plaintiff sustained damage;
4. The damage was caused, in fact and in law, by the defendant's breach.

Establishing that a defendant has a **duty of care** to the plaintiff requires that the plaintiff prove three (3) things: (i)

"foreseeability" (ii) "proximity" and (iii) that there are no residual policy considerations that may negate the imposition of a duty of care. These are complex legal tests that will be based on the facts of the case and the relationship between the parties. The court will consider questions such as whether the harm suffered by the plaintiff was reasonably foreseeable and whether the defendant should have known the plaintiff would be injured by its negligent acts or omissions. There is case law about this part of the analysis in relation to government entities, including First Nations. First Nations should receive legal advice about how this body of case law applies to their unique circumstances, including with respect to the provision of child and family services.

To avoid liability in negligence, defendants need to exercise the **standard of care** that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. Different standards of care may apply in a given situation, and professionals may be held to a higher standard of care as compared to other members of the public. In any case, this is a complex analysis and will be fact specific. First Nations should seek legal advice applicable to their unique circumstances.

In terms of **causation**, a defendant will not be liable in negligence unless their breach of the standard of care caused the plaintiff's loss both in fact and in law. Factual causation requires a plaintiff to prove that "but for" the defendant's negligent act, the harm would not have occurred. Legal causation assesses whether the breach was too remote and whether the plaintiff's injury was a reasonably foreseeable consequence of the defendant's breach.

While seeking legal advice applicable to their particular circumstances, First Nations may wish to consider how their employees may be held liable for negligence in various circumstances. It is also possible that a First Nation itself could be held vicariously liable for the conduct of its employees.

Duty to report

Employees and services providers working for a First Nation who are providing any type of prevention services have a duty to report a child in need of protection. Most provincial and territorial child and family service statutes require those who have a concern for the safety of a child to report that concern to a child and family service agency. Talk to your counsel about whether those providing prevention services have a duty to report. Failure to report a child protection concern that results in harm to a child may result in liability to those who failed to report, including certain consequences under child and family service statutes.

Human rights complaints

Core policy immunity does not apply in the context of human rights law. When a First Nation is directly providing prevention services and/or making decisions about which prevention services will be provided, at what level and/or to whom, it is likely the *Canadian Human Rights Act ("CHRA")* will apply, such that a First Nation could be found liable for discrimination if it occurs. This will be highly dependent on the facts, on the nature of the allegation, and on the First Nation's level of involvement in the service in question. For example, where a First Nation is only making high-level and general decisions about how much funding will be available for each level of prevention, it is less likely to be liable for potential discrimination that occurs in relation to the service that is provided. However, where the First Nation is directly involved in program development, delivery, and funding decisions, the First Nation would likely be considered a "service provider" under the Act, thus triggering its liability for discrimination contrary to the *CHRA.*

Anyone offering a service to the public has a general duty not to discriminate on prohibited grounds. The prohibited grounds of discrimination include race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, disability, genetic characteristics, and a conviction for which a pardon has been granted or a record suspended. In a human rights case, the complainant must establish that they have one or more of the characteristics protected from discrimination; they have been denied services or adversely impacted in the provision of a services by the service provider; and the protected characteristic(s) are a factor in the denial of services or the adverse impact of services. If these elements are proven, the respondent can argue the defence of "undue hardship": that accommodating the complainant would have caused the service provider undue hardship, specifically in relation to health, safety, and cost.

A First Nation may be named in a human rights complaint regarding prevention services even if these services are funded by Canada. If this occurs, it will not be sufficient for the First Nation seeking to defend itself against the discrimination complaint to show that it did not provide a service, or the level or quality of a service sought, because the funding from Canada is too low. In order to benefit from the undue hardship defence, the First Nation would need to show (with evidence)

that the quantifiable cost related to providing the service would significantly affect its viability. Even in these circumstances, a First Nation must show that it made reasonable efforts to find money to pay for the service from outside sources and considered other options to offset expenses or deliver an alternative service in order to defend itself against a discrimination complaint.

Human rights proceedings are technical, complex, and require strong evidence. Always talk to legal counsel about any allegations of discrimination or concerns about potential discriminatory claims.

General safeguards against liability

First Nations should seek legal advice that is applicable to their unique circumstances and needs when considering how they can safeguard themselves from liability. In this respect, some non-exhaustive considerations for First Nations could include:

- Exercising good faith in all decision making;
- Making decisions based on well thought out policies that are consistent with legal requirements;
- Avoiding arbitrariness in decision making;
- Providing prevention services based on objective factors;
- Maintaining thorough, up to date records;
- Keeping up to date on developments in the law, including the law of negligence.

Other things to consider include checking existing insurance policies to determine what legal fees may be covered in the case of negligence claims or human rights complaints and recommending that Canada provides universal liability coverage. The universal liability coverage could be a combination of the following: reimbursing at actual cost for agency insurance; ensuring adequate coverage for First Nations delivering secondary and/or tertiary care; premium relief provisions; and a national pool to fund insurance coverage.