Docket: Tl340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and
ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

SUBMISSION IN REPLY TO THE RESPONDENT'S APRIL 6, 2016 SUBMISSION
REGARDING IMMEDIATE RELIEF ITEMS,
PURSUANT TO THE PANEL'S APRIL 1, 2016 DIRECTION

APRIL 11, 2016

Anne Levesque
David **P.** Taylor

Sebastien Grammond, Ad.E. University of Ottawa
Sarah Clarke, Clarke Child & Family Law

JURISTES POWER ⏐ POWER LAW
Suite 1 103 - 130 Albert Street
Ottawa, ON KI P 5G4

Counsel for the First Nations Child and Family Caring Society of Canada

I. Overview

1. In its January 26, 2016 decision, the Tribunal found that the Respondent has been knowingly discriminating against First Nations children for nearly two decades. Specifically, the Tribunal found that "[d]espite being aware of the adverse impacts resulting from the FNCFS Program for many years, [the Respondent] has not significantly modified the program since its inception in 1990."[1]

2. After leading a case that the Tribunal found to be "unreasonable, unconvincing and not supported by the preponderance of the evidence",[2] the Respondent now seeks to circumvent the Tribunal's process by making vague claims that it will make changes to the FNCFS Program. However, under the *Canadian Human Rights Act*, it is the Tribunal's responsibility to determine what measure needs to be taken in order to cease the discriminatory practice rather than the party that engaged in discriminatory conduct.

3. The Caring Society notes that although nearly three months have passed since the Tribunal's decision was rendered, the Respondent's submissions contain no measures to implement the Tribunal's decision beyond a vague funding announcement and a website text change. Vague promises are not enough to remedy the discrimination experienced by First Nations children, who are at a very delicate stage of development.

4. Children have only one childhood, and First Nations children have waited long enough for equality. As such, the Caring Society respectfully asks the Tribunal to issue specific orders for immediate relief and remain seized to ensure the implementation of these measures of immediate relief. This will ensure that First Nations children living on reserve and in the Yukon receive relief to redress the pressing conditions that have led to their overrepresentation in the child welfare system and that have left them without vital social services available to other Canadian children due to the Respondent's discriminatory definition of Jordan's Principle.

5. The Respondent's approach of deferring implementation of the Tribunal's decision, providing vague responses to the Caring Society's specific remedial proposals, taking an incremental approach to remediating discrimination against children who are at a vulnerable developmental stage and defaulting to government approaches that are the source of the ongoing discrimination facing First Nations children, demonstrates a significant government failure to act in the best interests of the child(ren), as required by the United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples. To the contrary, the Respondent's approach appears to consistently put its own convenience ahead of the needs of the children.

6. Moreover, the Respondent's failure to consult with the Assembly of First Nations and the Caring Society in the preparation of its budget allocations and immediate relief proposals is contrary to the Prime Minister's commitment to a Nation to Nation relationship, the Truth and

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[1] *FNCFCSC et al v Attorney General of Canada*, 2016 CHRT 2 at para 461.
[2] *FNCFCSC et al v Attorney General of Canada*, 2016 CHRT 2 at para 460.

Reconciliation Commission's Calls to Action, and the principles of free, prior and informed consent.

II. The Respondent's attempt to circumvent the Tribunal's process

7. The Caring Society acknowledges the Respondent's provision of further details in its April 6, 2016 submission. However, the Respondent has only provided general details. It remains unclear to what extent the funds announced in the March 22, 2016 federal budget will address the systemic breach of the *Canadian Human Rights Act* identified in the Tribunal's January 26, 2016 ruling.

8. The Caring Society remains concerned regarding the manner in which the Respondent has provided information to the Tribunal to this point, given that:

a. The Respondent's March 10, 2016 submission provided areas in which the Respondent "might" act, with the possibility of further details being provided following the budget announcement.

b. The Respondent delayed providing such details until April 6, 2016, even though these details were known, or ought to have been known, to the Respondent since before March 22, 2016.

c. The Respondent did not advise the parties or the Tribunal that such details would be forthcoming until March 31, 2016 (the same day reply submissions regarding immediate relief were due), despite receiving requests for that same information from both the Caring Society and the Tribunal on March 24, 2016.

d. The Respondent's delay pushed back the conclusion of the exchange of submissions regarding immediate relief by nearly two weeks, causing First Nations children to experience further unlawful discrimination unnecessarily and the Caring Society, the AFN, the COO, and the Commission to incur additional costs.

e. On April 6, 2016, having finally provided additional detail regarding the March 22, 2016 budget announcement, it only provided a number of items covered in the global figures of $54.2 million and $16.2 million, failing to demonstrate how the funds would be specifically allocated within to the categories in question. For example, the Respondent claims it will increase the per-child amount for prevention, but provides no details regarding the amount of the increase or why it believes this amount would remediate the discrimination. Precise information regarding costing was left to a future "information sharing session", set for an undetermined time, while the Respondent's justification as to why the amounts set out in the budget are sufficient to address any of the remedial measures sought was simply not provided.

9. There is no reasonable or rational ground to delay the Tribunal's consideration of the question of immediate relief. At this stage, there is no need to accommodate the Respondent's promised "information session", particularly given that there is no indication that further or

greater immediate relief will be forthcoming in the context of such a session. The Tribunal now has the information required to render a decision on immediate relief, such that any further delay to the Tribunal's process is unwarranted and contrary to the best interests of the children.

10. The Caring Society remains hopeful that the Respondent's pattern of delay and vague replies will not be repeated throughout the consideration of medium- to long-term reform.

11. Despite the lack of detail provided, the Respondent's April 6, 2016 submissions confirm the areas requiring positive intervention from the Tribunal in order to begin narrowing the gap between First Nations children living on-reserve and in the Yukon. Indeed, the Respondent's submissions confirm the areas the Caring Society has identified as requiring immediate action that will *not* be addressed, but proposes no alternatives to address the discrimination in these areas nor does it present an argument that such immediate relief is unnecessary.

12. However, the Respondent's April 6, 2016 submissions do not provide sufficient clarity regarding the impact of the immediate relief measures that the Respondent *will* address. Given that there is insufficient detail to assess the extent to which the immediate relief measures funded will remedy the ongoing and unwavering discrimination in the FNCFS Program, the Tribunal ought to include a reporting order in its decision on immediate relief.

III. The Respondent's March 10, 2016 and April 6, 2016 submissions ignore important areas in which immediate relief is required

13. As noted in the Caring Society's March 31, 2016 reply submission at para 16, the Respondent has failed to address a number of areas in which immediate relief is required.

14. Most notably, the Respondent's only commitment with regard to the application of Jordan's Principle concerns a consultation process with no clear timelines for providing relief to First Nations children living on-reserve and in the Yukon. The Respondent's failure to immediately cease the use of its discriminatory definition of Jordan's Principle and its failure to implement Jordan's Principle's full meaning is unacceptable. The Respondent's stated commitments do not ensure substantive equality for First Nations children who seek access to essential government services that all other Canadians take for granted.

15. Jordan's Principle was unanimously endorsed by the House of Commons in 2007, and was never properly implemented. The Respondent's 2016 assertion that it has commenced discussions with Health Canada and "will begin engaging First Nations and the provinces and territories in these discussions"[3] bears a striking resemblance to the Respondent's 2007 announcement that it was "working closely with Health Canada as well as provincial and First Nations partners to ensure that jurisdictional issues do not impact a child's quality of care."[4] It is discouraging to see the Respondent excluding the complainants from these discussions, instead choosing to use the same process that resulted in the narrow definition of Jordan's Principle to

[3] Respondent's April 6, 2016 further submissions on immediate relief at para 9.
[4] Hon. Chuck Strahl and Hon. Tony Clement, *Statement from the Federal Minister of Health and Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians regarding Motion 296, Jordan's Principle,* December 12, 2007 (CBD, Vol 3, Tab 22, p 1).

attempt to implement the Tribunal's decision. The Respondent's narrow and delayed approach to properly implementing Jordan's Principle will result in further discrimination against First Nations children.

16. Despite a clear finding that Jordan's Principle's promise has yet to be implemented, the Respondent has fallen back to the same approaches that led to the Tribunal's finding of discrimination. Without further oversight and scrutiny by the Tribunal, it is unclear to the Caring Society when a First Nations child seeking a service that is subject to dispute between two federal departments, or between provincial/territorial and federal governments will be able to access public services on the same terms as other children.

17. Additionally, the Respondent has not addressed the circumstances of small agencies. The impediments to small agencies delivering substantively equal services given their inability to achieve the same economies of scale as larger agencies will continue without further intervention from the Tribunal. This is yet another example of how the Respondent, left to its own devices, will continue to discriminate against First Nations children.

18. Equally, the Respondent has provided no assurance that, without further intervention from the Tribunal, it will cease its discriminatory internal budgeting practices, such as recovering maintenance cost overruns from the prevention and operations funding streams, or reallocating funds budgeted for other First Nations programs to cover shortfalls in the FNCFS Program.

19. Further, there is no indication that funds will be forthcoming to deal with the cost of building repairs for FNCFS Agencies to ensure health and safety standards and compliance with building codes, or to adjust for inflation, without an order from the Tribunal. There is also no indication that, of its own volition, the Respondent will review its past decisions regarding applications for new FNCFS Agencies.

20. Critically, none of the measures the Respondent indicates it is prepared to take will provide funds to allow communities to develop a culturally-based vision for their future FNCFS needs. Such community-based exercises are crucial to the success of the medium- to long-term reform of the FNCFS Program, given that, as the Tribunal held:

> human rights principles, both domestically and internationally, require [the Respondent] to consider the distinct needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances -in order to ensure equality in the provision of child and family services to them.[5]

This vision cannot be achieved without source information on which the costing out of culturally based services and service delivery approaches can be based..

21. Moreover, the Respondent's failure to prioritize the best interests of the children since the Tribunal ruling underscores the importance of training and policy remediation outlined in the submissions by the Assembly of First Nations. It is essential that such training be provided under

[5] *FNCFCSC et al v Attorney General of Canada*, 2016 CHRT 2 at para 465.

the supervision of the Complainants and the Commission and that the Respondent not be left to decide for itself what training is required to ensure a cessation of the discrimination.

22. All of these issues require immediate attention. Immediate orders must be made to alleviate the discrimination faced by First Nations children in these regards, and the Tribunal must retain jurisdiction to ensure their implementation without delay.

IV. The details provided by the Respondent in its April 6, 2016 submission provide no assurances that funds allocated will be sufficient to the task at hand, or with regard to the impact of these funds in remedying the discrimination inherent to the FNCFS Program

23. While the Respondent's April 6, 2016 submissions respond to some of the questions raised by the Caring Society in its March 31, 2016 reply submission, a number of important questions remain outstanding.

24. The Respondent's April 6, 2016 submission identifies two relevant funding envelopes, without indicating how funds will be allocated to functions within those envelopes or how they will be adjusted in future years.

25. Accordingly, on the face of the Respondent's submission, it is unclear how much of the $54.2 million identified will be allocated to each of the items the Respondent ascribes to that envelope. Given this lack of detail, it is impossible to determine whether the funds allocated will be sufficient to address the discrimination that each of these measures is intended to address. As such, the need for clear immediate relief orders from the Tribunal remains.

26. For instance, it is unclear whether the portion of the $54.2 million that will be allocated to "upward adjustments for agencies with more than 6% of children in care" will be sufficient to provide all FNCFS Agencies with funding commensurate to the number of children in care. Based on the information the Respondent has provided, it is entirely possible that a First Nation with 12% of its children in care would only see an upward adjustment from 6% to 8%.

27. Further, it is unclear how the portion of the $54.2 million dedicated to "immediate adjustments to Operations and Prevention through additional investments to update existing funding arrangements" will address the "incentive to remove children from their homes as a first resort rather than as a last resort"[6] identified in the Tribunal's January 26, 2016 decision.

28. With regard to the $16.2 million allocated to prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador, and Yukon, it is unclear how much funding is to be allocated to each jurisdiction. Further, it is unclear whether providing funding at "nationally-consistent levels across all jurisdictions" will be sufficient to address the greater cost of providing prevention services in remote communities, notably in northern Ontario and Labrador.

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[6] *FNCFCSC et al v Attorney General of Canada*, 2016 CHRT 2 at para 344.

29. Importantly the Respondent provides no explanation as to why the amounts announced on March 22, 2016 fall far short of the $108.13 million identified in 2012 by the Respondent as being required to implement a "fully expanded EFPA" in all jurisdictions.[7] Given inflation and increasing needs, the cost of implementing relief that would have mitigated the discrimination in the FNCFS Program to a similar extent as the proposed "fully expanded EPFA" should have increased, instead of decreasing by $48.83 million as the Respondent's submissions suggest.

30. Similarly, the Respondent provides no explanation as to why the $16.2 million it says is allocated to prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon falls far short of the $32 million identified in 2012 as necessary to implement a "non-expanded" version of EPFA in those jurisdictions.[8]

31. The Respondent has also failed to provide any explanation as to what measures it will implement in existing EPFA jurisdictions to relieve discrimination arising from the EPFA formula, beyond providing an unspecified amount for intake, investigation, and legal services. It also provides no information as to how inflation losses arising from the EPFA's lack of an annual inflation adjustment will be addressed in its proposal. Here it is important to recall, that the *Way Forward* presentation suggested that, as of 2012, Departmental officials pegged the funding shortfall in existing EPFA jurisdictions at $43.10 million, excluding adjustments for a variety of items including, but not limited to, capital, inflation, and cultural requirements.[9]

32. The Caring Society also notes that the budgetary allocations include a generous amount ($700,000.00) for "INAC resources" to implement reforms, but nothing to support the participation of FNCFS Agencies, the Complainants, or the interested parties.

Tile Tribunal ought to retain jurisdiction over immediate relief and require tile Respondent to report progress within 30 days of tile Tribunal's order

33. The lack of information provided by the Respondent to these points, as well as the Respondent's failure to provide detailed information in a timely manner, demonstrate the need for the Tribunal to retain jurisdiction in this matter.

34. The Respondent continues to reserve to itself the capacity to decide the measure of immediate reliefrequired following from the Tribunal's January 26, 2016 decision. As the Tribunal determined, for nearly two decades, the Respondent has squandered its repeated opportunities to ensure that its FNCFS Program is comparable, culturally appropriate and in the best interest of First Nations children.

35. Numerous findings of discrimination have been made against the Respondent, such that the Respondent cannot be left to its own devices to remedy these wrongs. In order to prevent the Respondent from acting unilaterally (as it has done in determining which of the Caring Society's

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[7] CHRC Book of Documents, Vol 12, Tab 248, *First Nations Child and Family Services Program (FNCFS): The Way Forward* at p 16.
[8] CHRC Book of Documents, Vol 12, Tab 248, *First Nations Child and Family Services Program (FNCFS): The Way Forward* at p 15.
[9] CHRC Book of Documents, Vol 12, Tab 248, *First Nations Child and Family Services Program (FNCFS): The Way Forward* at p 16.

immediate relief measures to fund, how much funding to provide), the Caring Society requests that this Tribunal remain seized. By remaining seized, the Tribunal will ensure that it, and not the Respondent, remains the final arbiter of the Respondent's compliance with the *Canadian Human Rights Act.*

36. In light of the foregoing, the Caring Society seeks an order that the Respondent provide the requisite detailed costing information for the inunediate relief measures it agrees to undertake, and for the further immediate relief measures the Tribunal may order, to the parties and to the Tribunal within 10 days of the Tribunal's order on immediate relief. The Caring Society also seeks an order requiring the Respondent to provide further information on its costing model(s), and the evidentiary basis supporting the costing model(s) should the parties require such infonnation after reviewing the Respondent's information.

37. The Caring Society also seeks an order that it, the Assembly of First Nations, the Chiefs of Ontario, and the Canadian Human Rights Commission have an opportunity to make submissions on the sufficiency of the Respondent's implementation of these measures within 7 days of such details being provided, and that the Respondent have an opportunity to file reply submissions within 4 days of the complainants and interested parties' submissions being filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 11, 2016

Sebastien Gram / Anne Levesque
Sarah Clarke / David P. Taylor

Counsel for the Caring Society