Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

NOTICE OF MOTION FOR RELIEF OF THE COMPLAINANT FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

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NOTICE OF MOTION

TAKE NOTICE THAT THE COMPLAINANT, THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA (the "Caring Society") will make a motion to the Canadian Human Rights Tribunal located at 240 Sparks Street, 6th Floor West, Ottawa, Ontario, on Monday, December 17, 2018 at 3:00 PM or as soon thereafter as it may be heard.

This motion is for further relief to ensure that this Tribunal's Orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16) and May 26, 2017 (2017 CHRT 14) are effective, specifically regarding the definition of "First Nations Child" in those orders. This motion is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure*, pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction in this matter. The proposed motion will be heard orally.

AND TAKE NOTICE THAT THIS MOTION IS FOR:

1. An order that, pending the adjudication of the compliance with this Tribunal's orders of Canada's definition of "First Nations Child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle.

AND TAKE NOTICE THAT THE GROUNDS FOR THE MOTION ARE:

2. In its decision dated January 26, 2016 (2016 CHRT 2), this Tribunal found that Canada's failure to properly implement Jordan's Principle was discriminatory on the basis of race and national or ethnic origin contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;

3. In its decision dated April 26, 2016 (2016 CHRT 10), this Tribunal found that Canada had not taken sufficient measures to implement the full meaning and scope of Jordan's Principle and ordered Canada to immediately consider Jordan's Principle as including all jurisdictional disputes and involving all First Nations children. The Tribunal further ordered that pursuant to

the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided;

4. On July 6, 2016, Canada announced the Child First Initiative, which it described as a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition;

5. In its decision dated September 14, 2016 (2016 CHRT 16), the Tribunal ordered Canada to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. The Tribunal also requested an explanation from Canada regarding its limitation of Jordan's Principle's application to those First Nations children with a disability or a short-term condition;

6. On November 22, 2016, the Caring Society brought a non-compliance motion regarding Canada's implementation of Jordan's Principle;

7. In its decision on the Caring Society's motion, rendered on May 26, 2017 (2017 CHRT 14), the Tribunal found, among other things, that Canada's definition of Jordan's Principle did not fully address the findings in its January 26, 2016 decision (2016 CHRT 2) and was not sufficiently responsive to the Tribunal's previous orders.

8. The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on five key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve;

9. On June 23, 2017, Canada filed an application for judicial review of the Tribunal's May 26, 2017 order. No part of this judicial review questioned or challenged the Tribunal's order that Canada's definition and application of Jordan's Principle must apply equally to all First Nations children, whether resident on or off reserve (in any event, the application for judicial review was discontinued on November 30, 2017);

10. Beginning in early 2018, the Caring Society began receiving reports from community members that children without *Indian Act* status were being denied services and products when they submitted Jordan's Principle requests;

11. On April 17, 2018, counsel for the Caring Society wrote to counsel for Canada to raise the issue of the exclusion of children without *Indian Act* status from Canada's definition and application of Jordan's Principle, contrary to the panel's May 27, 2018 Order (2017 CHRT 14), as amended on November 3, 2017 (2017 CHRT 35);

12. On April 24, 2018, Canada, the Caring Society, and the other parties discussed the issue of First Nations children without *Indian Act* status at an all-party meeting and at the invitation of Indigenous Services Canada senior officials. No resolution was reached;

13. On May 9, 2018, during cross-examination on his November 15, 2017 and December 15, 2017 affidavits, Sony Perron (Indigenous Services Canada Associate Deputy Minister) provided the Tribunal with assurances that as part of Canada's commitment to help families and children, Indigenous Services Canada would act upon urgent services needs and make sure that Canada was helping families;

14. The parties continued to discuss the application of Jordan's Principle to First Nations children without *Indian Act* status in the context of the Consultation Committee on Child Welfare;

15. On July 5, 2018, Canada advised the parties that its definition of "First Nations child" for the purposes of applying Jordan's Principle would encompass First Nations children without *Indian Act* status who are ordinarily resident on-reserve;

16. In making its July 5, 2018 determination to expand its definition of "First Nations child", Canada did not seek directions from the Tribunal. Indeed, Canada has not sought directions at any time from the Tribunal regarding the scope of the definition of "First Nations child" that ought to apply in its implementation of Jordan's Principle;

17. Since July 5, 2018, there has been no progress in discussions at the Consultation Committee on Child Welfare with respect to expanding the definition of First Nations child to

include First Nations children who are not ordinarily resident on-reserve and who do not have *Indian Act* status;

18. First Nations children who are not ordinarily resident on-reserve and who do not have *Indian Act* status are accordingly excluded from Canada's application of Jordan's Principle;

19. Canada's failure to seek direction from the Tribunal or to take measures to address urgent requests from First Nations children who do not have *Indian Act* status and who are not ordinarily resident on-reserve risks undermining the effectiveness of the Tribunal's orders by risking irremediable harm to these children. For example, the Caring Society recently intervened to pay for medical transportation for a young First Nations child without *Indian Act* status who required a medical diagnostic service to address a life-threatening condition because Canada would not pay due to the child's off reserve residence and lack of *Indian Act* status. The Caring Society raised this case with Canada directly by November 29, 2018;

20. First Nations children may not have *Indian Act* status for reasons that are entirely unrelated to their needs and circumstances as First Nations children, such as the "second-generation cut-off rule" under subsection 6(2) of the *Indian Act* or as a result of social and cultural displacement of their parents or grandparents as a result of the Sixties Scoop;

21. Excluding First Nations children who do not have *Indian Act* status and who are not ordinarily resident on-reserve discriminates against these children based on race, national or ethnic origin, contrary to section 5 of the *CHRA*;

22. Subsection 91(24) of the *Constitution Act, 1867*;

23. Section 53(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;

24. Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure; and

25. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) The affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018; and

(b) Such further and other materials as counsel may advise and this Tribunal may permit.

Dated: December 5, 2018

David P. Taylor
Sarah Clarke

Counsel for the Caring Society

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