Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent

- and -

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

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TABLE OF CONTENTS

REPLY

1. The Assembly of First Nations (AFN) submits the following in reply to the Respondent's final submissions.

A. Federal Role in Child Welfare

2. A key feature of this complaint is the unique constitutional position of First Nations people and the special role of the federal government and their exclusive jurisdiction over Indians and their lands via section 91(24). While both the federal and provincial governments owe fiduciary obligations to the First Nations people and their communities, they must also act in a manner which upholds the honour of the Crown. As submitted, these (and others) are all constitutional principles the Respondent owes to First Nations people in Canada.

3. The Respondent is vested with the power over child welfare programs on reserve because the federal government historically asserted this jurisdiction – this has a particular constitutional significance which must be respected in consideration of the larger history Canada has maintained with First Nations people dating back to pre-Confederation times.

4. The Respondent incorrectly asserts that "the provision of CFS is derived from federal policy as set by cabinet and the treasury board, not the Constitution". This suggests that any treaty, Aboriginal or inherent right of First Nations or constitutional obligation that Canada maintains with First Nations people has no independent meaning at all. While the legal apparatus of the federal child welfare program may be directed by the treasury board, the scope of the Crown's responsibility over child welfare is derived by the Constitution. The Respondent's problematic assertions over who retains authority over child welfare on reserve produces a process that is unnecessary, complicated and problematic.

5. With respect, the Tribunal ought to disregard such assertions because they are

contrary to the Respondent's constitutional obligations under section 91(24). The AFN submits that the federal government's exclusive authority under section 91(24) of the *Constitution Act, 1867* precludes the Respondent of any attempt in limiting its role in this proceeding as suggested in their final submissions.

B. Other Federal Programs

6. At paragraphs 70 to 79 and 80 to 89, the Respondent lists a number of federal programs offered by the federal government to Aboriginal people in Canada. The implication is that First Nation child welfare agencies can access any of these programs for prevention purposes year around, however the Respondent has provided very little evidence to support these claims.

7. The Respondent has also failed to demonstrate if these additional programs are, in fact, used to support and supplement child welfare prevention programs, and how they are used in this capacity by addressing the inequities of the FNCFS Program.

8. The AFN submits that child welfare agencies do not have access to these federal programs as suggested by the Respondent, and that some of these programs are not funded in such a way as to fully support child prevention services.

9. For example, Mr. Phil Digby testified that the Family Violence Prevention funding offered by the AANDC is limited. Mr. Digby's letter to the Iskatewizaagegan First Nation regarding the AANDC's approval of First Nations' 2009-10 funding highlights this fact:[1]

> MR. WUTTKE: All right. And the second paragraph says:
> "This is to inform that funding for your First Nation Family Violence Prevention Program for the 2009-2010 has been approved in the amount of $4,800. These funds are to be used for prevention programs services and activities with the goal of reducing or

[1] HR-15 Tab 444.

preventing family violence. Projects may include community education, awareness, outreach, safety planning, mediation, anger management, healing and life skills." (As read) How far would $4,800 go for a fiscal year?

MR. DIGBY: Not very far, but you'd be amazed what First Nations do with the limited resources that they have, really their capacity to leverage other sources of funding, even volunteering.[2]

10. The AFN further submits that the programs offered by the federal family described by the Respondent cannot be used to fund expenses for child welfare purposes.

C. The Repeal of Section 67 of the CHRA

11. In reply to the Respondent's position that the First Nations child and family services program is a policy matter within the exclusive domain of the executive, the AFN submits that the repeal of section 67 of the *CHRA*, which formerly exempted the *Indian Act* from application of the *CHRA*,[3] provides the tribunal with the authority to review the policy and its impacts.[4]

12. Former Minister of Indian Affairs, Jim Prentice, provided a statement to the Parliamentary Standing Committee on Aboriginal Affairs in 2007, that reads as follows:

> "The repeal of section 67 will provide first nation citizens, in particular first nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them.

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[2] Pgs 228 & 229, Vol. 60, Phil Digby Transcript.
[3] *An Act to Amend the Canadian Human Rights Act*, S.C., 2008, c. 30.
[4] In *Pictou Landing Band Council and Maurina Beadle v. AG of Canada,* 2013 FC 342, the court found that the Assisted Living Program is inequitable.

> This could include access to programs, access to services, *the quality of services that they've accessed*, in addition to other issues."[5]

13. This statement reveals Parliament's intention in the repealing of section 67. The AFN submits this statement is relevant to interpreting the scope of s. 5(b) of the *Act* because it shows that Parliament intended the *CHRA* to apply broadly and not in a restrictive fashion to First Nations people on-reserve and elsewhere.[6]

14. The Tribunal has the flexibility and the discretion to have regard to all the factors which may be relevant in a given case.[7] One such factor includes the repeal of section 67 of the *CHRA* which demonstrates Parliament's intention to be bound by subsection 5(b) of the *CHRA* in relation to services the Government of Canada provides to First Nations people.

15. In reviewing the comments made at the Committee hearings leading to the passage of the Bill repealing section 67, the *CHRA* should provide First Nation individuals with a basis for reviewing federal actions, including the quality of services provided by the Government of Canada. To adopt the Respondent's approach would result in a denial of rights that goes beyond the immunity provided by section 67 prior to its repeal. Such an interpretation is inconsistent with the remedial purpose of the *CHRA* and also with Parliament's intent to extend human rights protection to First Nations people in Canada.

16. The Respondent's argument that as a policy of the executive the FNCFCS program should not be interfered with by the Tribunal will lead to further and more serious forms of discrimination.

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[5] Canada, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 39th Parl., 1st Sess. (22 March 2007).
[6] *Canadian Human Rights Commission v Canada (AG)*, 2012 FC 445 at para 347.
[7] Ibid para 338.

D. Remedies

17. The Respondent argues that the remedies sought by the Complainants are not appropriate, and that they cannot dictate policy and funding decisions of the federal government.

18. The AFN submits in reply that the Tribunal's authority to order how the Executive allocates resources stems from its enabling statute. In this case, the *CHRA* has the power to issue orders to "cease the discriminatory practices", which permits a generous and expansive approach.

19. Furthermore, Tribunal with power to decide Charter issues will not be able to fulfill the purpose of section 24(1) of the Charter unless they have the capacity to tailor the remedy to the right and to the infringement.[8] As a body that deals with matters that are quasi-constitutional, the AFN submits that the Tribunal has the authority to grant the remedies that both the AFN and Caring Society request.

20. In the alternative, should there be a finding of discrimination the Tribunal has the authority under its statute to order that the Commission address the root causes through ongoing dialogue. In this respect, the AFN encourages the Tribunal to consider the First Nations special status within the Constitution as well as the jurisprudence relating to the duty to consult and accommodate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 14, 2014

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Counsel for the Assembly of First Nations

[8] *Doucet-Boudreau v. Nova Scotia (Ministerof Education)* [2003] 3 S.C.R. 3.