
Assembly of First Nations

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November 22, 2016

Via email: dragisa.adzic@tribunal.gc.ca

Dragiša Adzic
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

Dear Mr. Adzic:

**Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008**

Please find enclosed and served upon all parties a Notice of Motion of the co-complainant, the Assembly of First Nations, regarding the above matter.

The motion is returnable for hearing before the Canadian Human Rights Tribunal on March 22, 23 and 24, 2017.

On or before December 20, 2016, the AFN will distribute and file its affidavit materials. Please forward any question or concerns to the undersigned. Thank you.

Sincerely,

Stuart Wuttke
General Counsel

Encl: Notice of Motion

Cc: Jonathan Tarlton, Melissa Chan & Patricia MacPhee
Terry McCormick & Ainslie Harvey
Counsel for the Respondent, the Attorney General of Canada

Anne Levesque, Sébastien Grammond, David P. Taylor, and Sarah Clarke
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Canada*

Daniel Poulin & Samar Musallam
Counsel for the Canadian Human Rights Commission

Maggie Wenté
Counsel for the Interested Party, Chiefs of Ontario

Justin Safayeni
Counsel for the Interested Party, Amnesty International

Julian N. Falconer, Akosua Matthews, & Anthony Morgan
Counsel for the Interested Party, Nishnawbe Aski Nation



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 (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent (Responding Party)

- and -

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA
and NISHNAWBE ASKI NATION**

Interested Parties

**NOTICE OF MOTION
Of the COMPLAINANT, ASSEMBLY OF FIRST NATIONS
TO ENFORCE RESPONDENT'S FULL COMPLIANCE WITH THE DECISION OF THE CANADIAN
HUMAN RIGHTS TRIBUNAL, 2016 CHRT 2, AND THE PANEL'S REMEDIAL ORDERS**

THE COMPLAINANT, ASSEMBLY OF FIRST NATIONS ("AFN"), will make a motion to the Panel on March 22, 23 and 24, 2017, commencing at 9:30 AM on March 22nd, or soon after that time as the motion can be heard, at the Canadian Human Rights Tribunal, at 160 Elgin Street, 11th Floor, Ottawa, Ontario.

This motion is part of a series of motions being brought by the Complainants and Interested Parties in this matter, including the First Nations Child and Family Caring Society (“Caring Society”), the Chiefs of Ontario (“COO”), and Nishnawbe Aski Nation (“NAN”), and is made in conjunction with those motions, under Rule 3 and 1(6) of the *Canadian Human Rights Tribunal Rules of Procedure*, and pursuant to the Panel’s continuing jurisdiction in this matter.

PROPOSED METHOD OF HEARING: The motion is to be heard orally or as otherwise directed by the Panel.

THE MOTION IS FOR:

The AFN supports and adopts the remedies requested by the Caring Society, the COO and NAN, and requests the following additional Declaration and Orders:

1. A Declaration that the Respondent is both technically and substantially in breach of the Panel’s Decision, including the Tribunal’s Orders in 2016 CHRT 2, 2016 CHRT 10 and CHRT 16, and therefore continues to be guilty of discrimination, by not addressing the immediate measures identified in the said Orders.
2. An Order that the Respondent immediately develop in consultation with the AFN, the Caring Society, COO and NAN, as well as the Commission, a protocol grounded in the honor of the Crown, for engaging in consultations with First Nations and FNCFC agencies that are affected by the Decision and the Remedial Orders herein, and that the Respondent engage in consultations in a manner consistent with the protocol and the honor of the Crown, to address the elimination of discrimination substantiated in the Panel’s Decision.
3. An Order that, pending long term reform to its funding models, the Respondent immediately eliminate that aspect of its funding models that creates a perverse incentive resulting in the unnecessary apprehension of First Nation children from their families and/or communities. To this effect, the Respondent be ordered to immediately implement a system for funding the cost of prevention/least disruptive measures, which

operates on the same basis as the Respondent's current funding practices for maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by FNCFC agencies to be in the best interests of the child.

4. An Order that the Respondent comply with the Panel's Remedial Orders regarding immediate relief in a manner which is effective, expeditious and in consultation with the AFN, the Caring Society, COO and NAN, as well as the Commission, and to avoid a phased piecemeal approach to funding and addressing immediate measures, in order to ensure that historic disadvantage and systemic discrimination is not further perpetuated.
5. An Order the Respondent be directed to address long term relief by establishing the National Advisory Committee in the consultation with the Complainants.
6. Such further and other relief as the Panel deems just and fit to allow in the circumstances.

THE GROUNDS OF THE MOTION ARE:

The AFN supports, relies upon and adopts the grounds as stated by the Caring Society, the COO and NAN, and provides the following additional grounds:

The Panel's Remedial Orders

7. The Panel's Remedial Orders are listed throughout 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16.
8. In 2016 CHRT 2, the Panel issued its initial Remedial Orders against the Respondent pursuant to section 53(2) of the *Canadian Human Rights Act* at paragraphs 468-494.
9. Two specific orders were issues against Respondent in 2016 CHRT 2 at paragraph 481:

"The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the

FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle." (Panel's emphasis)

10. Later, in 2016 CHRT 10, the Panel updated its Remedial Orders at paragraphs 10-37, which includes the following at paragraph 21:

"The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief."

11. In 2016 CHRT 16, the Panel continued its Remedial Orders at paragraphs 157-161, that included additional immediate measures to be taken, additional reporting, and additional information to be provided by the Respondent, as well as the Panel's continued jurisdiction over the remedies in this matter.

The Panel's concern about the Respondent's Submissions

12. In 2016 CHRT 16, the Panel wrote the following about the Respondent's submissions at paragraph 29:

"However, as stated in the *Decision* at paragraph 482, "[m]ore than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice." The Panel is concerned to read in INAC's submissions much of the same type of statements and reasoning that it has seen from the organization in the past. For example, that it is up to each FNCFS Agency to determine how they allocate their funding for such things as prevention and cultural programming (see *Decision* at paras. 187-189, 311, 313 and 314). This prompts the same question as at the time of the hearing: what if funding is not

sufficient to allow for that flexibility? How has INAC determined that each agency has sufficient funding to comply with provincial child welfare standards and is still able to deliver necessary prevention and cultural services? The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada, numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them." (emphasis added)

The Panel's comment about the Remedial Issues

13. In 2016 CHRT 10, the Panel wrote the following at paragraphs 40-42:

"[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.

[41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the *Decision* are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change. The time is now.**

[42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term." (Panel's emphasis)

Piecemeal Approach to Reform is not an Effective Way to Proceed

14. In 2016 CHRT 16, the Panel wrote the following at paragraph 34:

“Therefore, leaving some of the assumptions and flaws in the funding formulas for long term reform to ensure everyone is consulted may be problematic. As said in the *Decision*, a piecemeal approach to reform is not an effective way to proceed (see *Decision* at paras. 185 and 331). While the Panel understands that INAC is determined to reform the entire FNCFS Program and believes it intends do so, it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFS Program has fostered for the past 15 years. Over that time, despite well documented problems with the program and consultations with its partners and at tripartite tables, INAC’s system has failed to adapt to the needs of First Nations children and families (for example, see *Decision* at paras. 134, 138-141, 203, 311, 314-315, 383-394 and 456-467). The Panel understands this is no easy task and that the FNCFS Program cannot be reformed in an instant. However, this does not mean that effective measures cannot be implemented in the meantime. The Panel also agrees with the parties that a one-size-fits-all type of approach is not to be used; this was also addressed in the *Decision* (see para. 315).” (Panel emphasis)

Constitutional, Statutory and Procedural Grounds

15. *The Constitution Act, 1982*, section 35.
16. *The Canadian Human Rights Act*, sections 48, 49, 50 and 53.
17. *The Canadian Human Rights Tribunal Rules of Procedure*, Rule 3.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the Complainant's motion:

18. Affidavit of Jonathon Thompson to be affirmed;
19. The Respondent's Submissions dated May 10, 2016 and May 24, 2016 and Compliance Reports to the Tribunal dated September 30, 2016 and October 31, 2016;
20. Such further and other material as counsel may advise and the Panel may permit.

Dated at Ottawa this 22nd day of November, 2016.

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