Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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 Aboriginal Affairs and Northern Development Canada)

Respondent

and

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

CLOSING SUBMISSIONS OF THE CHIEFS OF ONTARIO

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General Position

1 The Chiefs of Ontario endorses the magisterial Closing Submissions of the Canadian Human Rights Commission, including the facts and law. This applies in particular to those parts of the Submissions that deal with the First Nations child welfare situation in Ontario and the impact of the 1965 Welfare Agreement (the Memorandum of Agreement Respecting Welfare Programs for Indians)..

2 Based on the applicable test of substantive equality, the First Nations child welfare program administered by the federal department of Aboriginal Affairs and Northern Development Canada ("AANDC") is discriminatory under sec. 5 of the *Canadian Human Rights Act* (*CHRA*), RSC 1985, c. H-6.. It is assumed that the respondent has abandoned its previous position on a strict mirror comparator test, based on the Federal Court rulings in this case and the decision of the respondent not to seek leave to appeal to the Supreme Court of Canada: *First Nation Child and Family Caring Society v Canada (Attorney General)*, 2012 FC 445..

Jordan's Principle and the *Pictou Landing* Decision

3 The Federal Court considered the application of Jordan's Principle in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 (April 4, 2013).

4 The Federal Court noted that in the case of the Pictou Landing First Nation, AANDC had assumed responsibility for funding delivery of a social care program at levels reasonably comparable to those offered in the province of residence (paras. 78 and 79).

5 While Jordan's Principle was not enacted by legislation, it was adopted by a unanimous vote in the House of Commons. According to the Federal Court in *Pictou Landing*, this vote was not legally binding on the federal government (para. 82). Still, Parliament has undertaken to implement this important principle (para. 106).

6 Nevertheless, Jordan's Principle became legally binding on AANDC in the jurisdiction of the Pictou Landing First Nation because the Principle was formally adopted by AANDC (para. 84). In the same way, AANDC adopted the standard of reasonable comparability with the provincial program. By contract, the First Nation was required to administer the applicable social programs according to the provincial legislation and standards (para. 107).

7 The federal government, as represented by AANDC, assumed the obligation to follow Jordan's Principle (para. 111).

8 The Federal Court emphasized that the elements of Jordan's Principle should not be read narrowly (para. 86).

9 Because the federal government adopted Jordan's Principle, AANDC was legally required to pay for the full cost of the disabled child's care in the *Pictou Landing* decision (para. 113).

10 *Pictou Landing* holds that Jordan's Principle is binding on the federal government (notably AANDC) when the federal government specifically adopts the Principle as part of its program policy. Effectively, the federal government is held to its word. This is consistent with the requirements of the Honour of the Crown, in particular in dealings between the Crown and First Nations.

11 The *Pictou Landing* decision applies in the First Nations child welfare case before the Canadian Human Rights Tribunal. Jordan's Principle has been adopted by AANDC in relation to the national child welfare program. Therefore, based on *Pictou Landing*, the Principle is legally binding on AANDC.

12 The logic of *Pictou Landing* also applies to the application of the provincial program standard, as a minimum standard. This standard has been officially

adopted by AANC in relation to the child welfare program, notably through the terms of the 1965 Welfare Agreement in Ontario and through national policy. Therefore, the standard is legally binding. The federal government is required to provide funding to meet that service standard.

13 The federal government has appealed the *Pictou Landing* decision. Ironically, the very fact of the appeal is a denial of the spirit and letter of Jordan's Principle. Nevertheless, the decision of the Federal Court of Appeal will have to be taken into account later on.

Fiduciary Duty and Honour of the Crown

14 The law on fiduciary duty and the Honour of the Crown was dealt with comprehensively by the Supreme Court of Canada in *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14. Even though the decision focuses on Metis people, as opposed to First Nations, the parts of the decision dealing with fiduciary duty and the Honour of the Crown appear to have general application in terms of Aboriginal law. All references to the *Manitoba Metis* case that follow relate to the majority decision.

15 According to the Court, the general relationship between Aboriginal people and the Crown should be viewed as being fiduciary in nature. However, not all dealings between such parties in a general fiduciary relationship are necessarily governed by fiduciary obligations (para. 48).

16 In the Aboriginal context, a fiduciary duty may arise because the Crown assumes discretionary control over specific Aboriginal interests: para. 49 of *Manitoba Metis* and *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 18. The focus is on the particular First Nation interest in question: *Wewaykum Indian Band v Canada*, 2002 SCC 79, at para. 83. The content of the Crown's fiduciary duty depends on the nature and importance of the interest that is being protected. An "interest" is sufficient, as opposed to a right, whether under sec. 35 of the *Constitution Act, 1982* or otherwise.

17 The duty or obligation arises where there is a "specific or cognizable" Aboriginal interest and a Crown "undertaking of discretionary control over that interest" (para. 51 of *Manitoba Metis*).

18 Note that some of this language from *Manitoba Metis* is reminiscent of the *Pictou Landing* decision, even though the latter did not delve into fiduciary law. In *Pictou Landing*, it all turned on the federal government's assumption of control over the social program and its adoption of Jordan's Principle and the provincial program standard. The federal government was then held to its word.

19 In *Manitoba Metis* (para. 50), the Supreme Court held that a fiduciary duty can also arise from an undertaking if the following conditions are met: "(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control." These private law type conditions were derived from *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36.

20 The first question is whether an undertaking by the Crown has been established. The power retained by the Crown must be coupled with an undertaking to act in the best interests of the beneficiaries: para. 61 of *Manitoba Metis* and *Guerin v The Queen*, [1984] 2 SCR 335, at pages 383-84.

21 In addition to fiduciary obligations, there is the principle of the Honour of the Crown: para. 66 of *Manitoba Metis* and para. 32 of *Haida Nation*.

22 The basic purpose of the Honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty: para. 66 of *Manitoba Metis* and para 24 of *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74. The Honour of the Crown characterizes the special relationship between First Nations and the

Crown that started in colonial times and that is epitomized by the *Royal Proclamation of 1763*: para. 67 of *Manitoba Metis*.

23 The Honour of the Crown imposes a heavy obligation. The principle is engaged in the case of rights under sec. 35 of the *Constitution Act, 1982* and in the case of significant First Nation interests. According to the *Haida* decision (para. 17): "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably." The principle gives rise to different duties in different circumstances: *Haida Nation* at paras. 79 and 81.

24 The Honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest: *Manitoba Metis* at para. 73 and *Wewaykum* at paras. 79 and 81.Note that an interest is sufficient, as opposed to a constitutional right.

25 The Honour of the Crown requires the Crown to act in a way that accomplishes the intended purpose of a grant to First Nations: *Manitoba Metis* at para. 73 and *R. v Badger*, [1996] 1 SCR 771, at para. 47. This is parallel to the ruling of the Federal Court in *Pictou Landing*. When the Crown makes a solemn commitment to First Nations in relation to Jordan's Principle and a social program standard, the Crown is legally obliged to implement that commitment. The same applies in relation to the First Nation child welfare program under consideration in this case.

26 Based on the Honour of the Crown, the Crown must take a broad purposive approach to the interpretation of its promise, and must act diligently to fulfil it: *Manitoba Metis* at para. 75. The Crown must act diligently in pursuit of its solemn obligations. The Crown must "endeavour to ensure its obligations are fulfilled": *Manitoba Metis* at paras. 78 and 79. Boiled down to an obligation on the Crown do what it promises to do, the obligation seems eminently reasonable, even modest.

27 It is submitted that, in connection with the First Nation child welfare program, the respondent is subject to both fiduciary obligations and the principle of the Honour of the Crown.

28 The First Nation child welfare program was undertaken by the Crown and is controlled by the Crown. The undertaking is explicitly intended to be in the best interests of the First Nation beneficiaries; the "best interests" test for child care is a hallmark of the program. The Crown has discretionary control over the program through policy changes and other administrative directives. The program has a direct impact on an extremely vulnerable category of First Nation people, children in need of protection on reserve. The legal and substantial practical interests of First Nation children, families, and communities stand to be adversely affected by the respondent's discretion and control over the program. There is an overwhelming inequality in bargaining power between the Crown and the First Nation parties involved.

29 The program was undertaken in the context of the special relationship between First Nations and the federal Crown, linked to sec. 91(24) of the *Constitution Act, 1867*. The federal government has chosen to deliver a child welfare program only for First Nation children on reserve. That is not a coincidence. This is not a mere random exercise of the federal government spending power. This is about the Crown fulfilling historic obligations for First Nation people. Similarly, the federal government only delivers education to First Nation children on reserve: secs. 114 to 122 of the *Indian Act*.

30 The fundamentally important and unique relationship between First Nations and the Crown is a key contextual factor for the fiduciary duty and the Honour of the Crown. The *Royal Proclamation of 1763* is codified in sec. 25 of the *Constitution Act, 1982*. Aboriginal and Treaty rights are protected by sec. 35 of the *Constitution Act, 1982*. In *Reference re Secession of Quebec*, [1998] 2 SCR 217, the Supreme Court held that the protection of minorities is one of the underlying or architectural principles of the Canadian Constitution (paras. 49, 50, and 79). The Court pointed to sec. 35 and the "special commitments" made to Aboriginal people by successive governments (at para. 82).

31 The special obligations of the respondent are also confirmed by the provisions of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, which was adopted by the federal government..

32 In summary, the First Nation child welfare program undertaken by the respondent fits all the criteria set by the Supreme Court for a fiduciary obligation, as well as the principle of the Honour of the Crown.

33 The fiduciary obligation and the Honour of the Crown mean in this instance that the Crown must fund the First Nation child welfare program in the way the program was promised and intended. At the very least, the program must be delivered according to the provincial standard. In addition, it is submitted that the program must take into account the special cultural and other needs of First Nations, including remote First Nations.

34 The fiduciary obligation of the Crown supports its duty to deliver the program on an equal basis in accordance with the *CHRA*.

Implications

32 The fiduciary duty, the Honour of the Crown, and sec. 5 of the *CHRA* all come together to support a simple ethical and legal conclusion. The respondent undertook to deliver a First Nation child welfare program on reserve in accordance with the provincial standard (at minimum), and it is obliged to keep that promise.

33 It is submitted that the federal government has not made a serious attempt to prove that the program meets the required standard. Many independent studies and reports show the opposite. Rather, the respondent has placed heavy reliance on alleged technicalities and loopholes, notably the mirror comparator test and the service definition issue under sec. 5 of the *CHRA*. As mentioned earlier, the comparator issue was dismissed by the Federal Court in this case: *First Nation Child and Family Caring Society v Canada (Attorney General)*. It is submitted that these kinds of positions, while technically possible, are not consistent with the Honour of the Crown, taking into consideration the vulnerable class of children who are ultimately prejudiced. Such arguments are also questionable in view of the intent behind the deletion of sec. 67 of the *CHRA* (the Indian exception), which was to expose First Nation programs to the full sunshine of the *CHRA*.

35 The federal government has not attempted to justify the alleged discrimination under the *CHRA* based on cost. Meeting the full program standard would almost certainly cost more money. The benefits for First Nation children and families over the years would be immense and life-changing. In the larger scheme of things, the financial impact on the federal government would be negligible and immaterial.

36 Eliminating the discriminatory practices at the heart of the First Nation child welfare program on reserve will have a significant positive effect on the

quality of life for generations of First Nation children and families. There will be a ripple or multiplier effect on communities and regions as a whole. The life chances of thousands and thousands of individuals will be improved, at immense benefit to society in general.

37 While the certain benefits of eliminating discriminatory practices in relation to the child welfare program will be very significant, the program is still only one piece of the puzzle. There are several other federal programs (health, education, and policing, for example) that require scrutiny. However, reform of the child welfare program based on sec. 5 of the *CHRA* is an excellent place to start. Where better to start making things right than with the children?

38 This case about the federal child welfare program on reserve is a critical precedent. If the respondent gets away with it here, whether based on the service technicality or some other point, the practical and legal effect may be that most, if not all other, federal First Nation programs on reserve will be immunized from sec. 5 and much of the rest of the *CHRA*. This is because of the broad similarities among the programs delivered by the federal government. The deeply troubling result would be that First Nation governments would be exposed to liability for program shortfalls under the *CHRA*, even though all funding comes from the federal government and the programs are designed by the federal government. It is submitted that this

result simply cannot be right, given the broad and progressive purposes of the *CHRA*.

39 It is critically important to hold the respondent accountable for its First Nation program under the *CHRA*. This is also the right result based on the fiduciary obligations of the Crown and the Honour of the Crown.

Remedies

40 The Remedies requested by the Human Rights Commission are supported and adopted. In addition, it is submitted that the steps to remedy the alleged discrimination should include an independent study of funding and service levels for First Nation child welfare in Ontario based on the 1965 Welfare Agreement, along the lines of the studies conducted in relation to the program

outside of Ontario. Any such study should not impede or delay immediate active measures.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 29, 2014

Michael Sherry

Chiefs of Ontario

LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, RSC 1985, c. H-6

Constitution Act, 1867

Constitution Act, 1982

Indian Act, RSC 1985, c. I-5

Royal Proclamation of 1763

Case Law

Alberta v Elder Advocates of Alberta, 2011 SCC 24

First Nation Child and Family Caring Society v Canada (AG), 2012 FC 445

Guerin v The Queen, [1984] 2 SCR 335

Haida Nation v British Columbia, 2004 SCC 73

Manitoba Metis Federation Inc. v Canada (AG), 2013 SCC 14

Pictou Landing Band Council v Canada (AG), 2013 FC 342

R v Badger, [1996] 1 SCR 771

Reference re Secession of Quebec, [1998] 2 SCR 217

Taku River Tlingit First Nation v British Columbia, 2004 SCC 74

Wewaykum Indian Band v Canada, 2002 SCC 79

International Documents

General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 61st Session, UN Doc. A/RES/61/295 (2007)