Docket: T1340/7008

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 MARCH 10, 2016 SUBMISSION REGARDING IMMEDIATE RELIEF ITEMS, PURSUANT TO THE PANEL'S FEBRUARY 10 AND MARCH 16, 2016 DIRECTIVES

MARCH 31, 2016

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Overview

1. The Caring Society welcomes the Respondent's willingness to offer some form of immediate relief that, while not fully removing the discrimination identified by the Tribunal, would improve the situation of First Nations children adversely affected by the current FNCFS program.[1] The Caring Society also welcomes the Respondent's willingness to engage in a comprehensive reform of the FNCFS program.[2] The Caring Society submits that the best interest of the child should be the paramount consideration applied to determining which immediate relief measures will be ordered, and the timeframe in which they will be implemented.

2. In particular, the Caring Society welcomes the Respondent's commitment not to reduce or restrict funding to the FNCFS Program,[3] which responds to Item 6(g) of Appendix A to the Caring Society's February 18, 2016 submission. This commitment obviates any concerns the Respondent raises regarding reductions in funding resulting from the Caring Society's proposed formula. Given the Respondent's commitment, it should be expected that in cases where the Respondent alleges that the Caring Society's proposed formula would generate lesser funding, the Respondent would maintain funding at current levels, without additional restrictions, for the purposes of providing immediate relief. The Caring Society also welcomes the Respondent's support of the new iteration of the Canadian Incidence Study,[4] which responds to Item 10 of Appendix A to the Caring Society's February 18, 2016 submission.

3. However, the Caring Society notes, with concern, that the Respondent has not taken any action to date to relieve the discrimination in its FNCFS Program nor is there any evidence that *it* has immediately ceased applying its narrow definition of Jordan's Principle. To the contrary, the definition of Jordan's Principle posted on INAC's website continues to restrict Jordan's Principle to cases of children with multiple disabilities.

4. While the Respondent advised in its March 10, 2016 immediate relief submission that the federal budget might support measures for immediate relief, the funding announced in the budget ($71 million for 2016-2017 and $99 million in 2017-2018) falls short of the investment the evidence before the Tribunal suggests is necessary to provide immediate relief. What is more, despite a request for clarification sent by the Caring Society on March 24, 2016 and an invitation to provide further information sent by the Tribunal on March 24, 2016, the Respondent has not provided further details, such that it is entirely unclear how much, if any, of this funding is directed to providing immediate relief.

5. Moreover, the Respondent states that the eight measures identified in its immediate relief plan *could* respond to a number of items in Appendix A to the Caring Society's February 18, 2016 submission, the Respondent's submissions are bereft of detail or firm commitment. By reserving specifics on immediate relief until after the federal budget's release on March 22, 2016, and subsequently failing to provide any details regarding which, if any, of the eight measures have been supported by the federal budget, the Respondent asserts a power to decide for itself what is needed to comply with the Tribunal's January 26, 2016 decision.

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[1] Respondent's March 10, 2016 submissions at para 2.
[2] Respondent's March 10, 2016 submissions at paras 7-8.
[3] Respondent's March 10, 2016 submissions at para 4.
[4] Respondent's March 10, 2016 submissions at para 5.

6. It is not for the Respondent to unilaterally determine the adequacy of immediate relief. This would amount to treating the Tribunal's decision as non-binding, akin to the findings in a commission of inquiry's report. As the Respondent has itself argued on numerous occasions before this Tribunal, the Caring Society and AFN's complaint is not a commission of inquiry. It is an adjudicative process before an administrative body that is empowered to make legally binding orders against the Respondent, which has been found to be engaging in discriminatory conduct.

7. As such, it is incumbent on the Tribunal, not the Respondent (which has been found to have engaged in discriminatory practices), to determine the appropriate remedy pursuant to section 53(2) of the *Canadian Human Rights Act*, RSC 1985, c H-6. Given its approach to this point, the Respondent ought to be *required* to report on its implementation of immediate relief measures ordered by the Tribunal, within 30 days of the Tribunal's order, and the complainants, Commission, and interested parties ought to have the opportunity to make submissions to the Tribunal as to the adequacy of any such immediate relief measures, in the context of such a reporting order.

8. The Caring Society submits that the Respondent's submissions, which indicate that it wishes to be left to its own devices, reinforces the need for the Tribunal to remain seized of this matter.

The Caring Society's best efforts to interpret the consequences of the March 22, 2016 federal budget announcement

9. Even if the entirety of the $71 million announced in funding for "ensuring the safety and well-being of First Nations" in 2016-2017 is dedicated to the FNCFS Program (which is not clear on the face of the budget announcement), this falls far short of the relief required to begin narrowing the gap between First Nations children and the rest of Canadian society.

10. Furthermore, it is unclear if the $71 million in announced funding is "new money". For instance, past INAC practice has involved providing annual funding in excess of the FNCFS Program to cover increases to the maintenance budget, so as to avoid reallocation from other parts of the funding envelope. Supplemental funds for maintenance will not contribute to immediate relief from the perverse incentives inherent in the FNCFS Program, and will not "narrow the gap" between First Nations children and the rest of Canadian society.

11. It is unclear how much, if any, of the $71 million in announced funding would be directed to FNCFS Agencies, as opposed to expenditures internal to INAC.

12. In the 2012 *Way Forward* presentation (CHRC Tab 248), INAC recognized that $108.13 million (in 2012 dollars) would be required to implement EPFA in all jurisdictions, with full support for *all* aspects of child welfare including intake, early intervention, and allowing for a developmental phase. The March 22, 2016 federal budget announcement falls well short of this figure, especially when one considers that the amount in question is greater in 2016 dollars, due to inflation.

13. The *Way Forward* presentation identified the cost of implementing the expanded EPFA in the remaining Directive 20-1 jurisdictions as $65.03 million (in 2012 dollars), and of "topping-up" existing EPFA jurisdictions as being $43.1 million (in 2012 dollars). Clearly, even assuming that all of the funds announced are for the FNCFS Program and for FNCFS Agency recipients and assuming that all of the funds announced are "new money" and not previously announced or reallocated from other First Nations programs the Respondent cannot *both* implement EPFA in Directive 20-1 jurisdictions, adjusted for inflation, *and* address lacunae in jurisdictions currently under EPFA. Furthermore, no part of the *Way Forward* presentation would provide immediate relief to Ontario.

14. The Caring Society is unable to identify any part of the March 22, 2016 federal budget announcement targeted to ceasing the federal government's application of the narrow definition of Jordan's Principle, or to the full implementation of Jordan's Principle, as ordered by the Tribunal on January 26, 2016.

15. Given the complete Jack of detail regarding the impact of the March 22, 2016 budget announcement on the FNCFS Program or Jordan's Principle, and given that it lies entirely within the Respondent's power to provide such information, which has not been forthcoming, an adverse inference should be drawn against the Respondent. The Tribunal should presume that none of the funding announced by Canada on March 22, 2016 will address the immediate relief concerns laid out by the Caring Society in its February 18, 2016 submission. Indeed, as the Supreme Court of Canada observed in *R v Jolivet,* there is a stronger basis for drawing an averse inference where the "missing proof' lies in the "peculiar power" of the party against whom the adverse inference is sought to be drawn.[5]

Areas of the Respondent's immediate relief submission that are incomplete

16. In any event, the list of immediate relief items that the Respondent notes *could* be included that the Respondent's immediate relief plan notably omits the following items identified in the Caring Society's February 18, 2016 submission in response to the Panel's questions on immediate relief:

a. Immediate changes to the manner in which the Respondent applies Jordan's Principle (Caring Society February 18, 2016 submission at Schedule A, Item 1), which do not require engagement with provincial and territorial governments;

b. Funding to support the development of a culturally based vision for safe and healthy children and families and culturally based child and family service standards, programs and evaluation mechanisms (Caring Society February 18, 2016 submission at Schedule A, Item 2);

c. Costs of building repairs (Caring Society February 18, 2016 submission at Schedule A, Item 4(c));

[5] *R v Jolivet,* 2000 SCC 29 at para 27.

d. Ceasing the practice of recovering maintenance cost overruns from prevention and operations funding streams (Caring Society February 18, 2016 submission at Schedule A, Item 5);

e. Funding for smaller agencies (Caring Society February 18, 2016 submission at Schedule A, Items 6(c) and 6(d));

f. Reviewing decisions regarding applications for new FNCFS Agencies (Caring Society February 18, 2016 submission at Schedule A, Item 9)

g. Ceasing to reallocate funds budgeted for other First Nations programs to cover shortfalls in the FNCFS Program (Caring Society February 18, 2016 submission at Schedule A, Item 13); and

h. Any adjustments for inflation (Caring Society February 18, 2016 submission at Schedule A, Item 6(t)).

17. The Respondent has not provided reasons for failing to address the above-noted items of the Caring Society's response to the Panel's questions regarding immediate relief, and has not proposed alternative measures in place of those proposed by the Caring Society.

18. Vague promises and delays in implementation related to federal budget cycles and government convenience, made in the absence of any supporting evidence, do not constitute a valid reason for the Tribunal to refrain from making orders with respect to immediate relief to address the numerous findings of discrimination made by this Tribunal. In fact, the Respondent has made such promises for more than a decade without taking the necessary action required to end its discriminatory conduct towards First Nations children. As the Tribunal noted in its January 26, 2016 reasons "Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric."[6]

The Respondent's submission regarding training is not supported by the evidence, and in any event is not responsive to the Caring Society's submission

19. There is no evidence before the Tribunal concerning the training programs made available to the Respondent's staff. The Respondent had ample opportunity to present such evidence during the hearing. It did not.

20. In any event, the Respondent does not assert that the training it identifies at para 6 of its March 10, 2016 submission on immediate relief deals with the report of the Truth and Reconciliation Commission, the FNCFS program, the Tribunal's January 26, 2016 decision, or Jordan's Principle as requested by the Caring Society. As a result, nothing in the Respondent's submissions detracts from the necessity of making an order with terms similar to those in Item 3 of Appendix A to the Caring Society's February 18, 2016 submission.

[6] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 454.

The Respondent has not provided up-to-date information regarding its current funding practices

21. The Respondent provides no supporting information to buttress its claim that the adjustments proposed by the Caring Society to this formula, which would maintain existing funding levels as a "floor" in some circumstances and are intended to reflect inflation and the need to provide increased base funding, would actuaJly result in a decrease in the funding received by "a significant proportion of current funding recipients."[7]

22. If the Respondent is in possession of information to support its assertion, it is incumbent on the Respondent to share this information with the parties and the Tribunal.

23. Throughout the adjudication of this complaint, the Respondent had an obligation to disclose to the parties all arguably relevant documents relating to the allegations made in complaint, including up-to-date information on its current funding practices. No documents suggesting that the Caring Society's proposed reforms to the existing formula would result in funding decreases were disclosed or relied upon by the Respondent during the hearing. Likewise, if the Respondent was of the view that there was foformation that was more up-to-date than the studies and information presented to the Tribunal, such evidence ought to have been presented during its cross-examinations or during the Respondent's own evidence in response. No such evidence was provided.

24. Furthermore, the Respondent has opted not to seek a judicial review of the decision of the Tribunal. By claiming that the evidence on which the Tribunal's findings of discrimination are based cannot be relied upon when determining appropriate remedies, the Respondent is essentially mounting a collateral attack on the Tribunal's decision.

25. In order to avoid any further delay, the Caring Society submits that the Tribunal should make orders for immediate relief, as appears justified to the Tribunal, based on the wording proposed by the Caring Society. In addition, the Respondent should be ordered to provide the Tribunal and the parties forthwith with detailed calculations of the amounts received by each FNCFS Agency in 2015-16 and data relied upon to make such calculations, the amounts that each would receive in 2016-17 in the absence of any adjustment, as well as the monetary results of each measure of immediate relief ordered by the Tribunal for each agency and the total amount received by each in 2016-17 as a result of those adjustments. Upon receipt of that information, the parties will be in a position to make submissions as to any unintended effects of the Tribunal's immediate relief orders, and to propose variations of those orders to correct those effects, if necessary.

26. In any event, as noted above, the Respondent's commitment not to restrict or reduce the funding of the FNCFS program would provide a guarantee against any unintended decrease in the funding of any FNCFS Agency.

The Respondent's submission misunderstands the role of parliamentary appropriations

[7] Respondent's March 10, 2016 submission at para 17.

27. Throughout its submissions, the Respondent asserts that various aspects of the reform of the FNCFS Program may "require approval of necessary policy and funding authorities." Moreover, the Respondent asserts that funds must be appropriated by Parliament and that the Respondent is constrained by internal government policies. The Caring Society observes that such arguments continue to focus on the federal government's interests and convenience, and not on the best interests of children or the importance of "narrowing the gap" between First Nations children and other members of Canadian society.

28. Canada, like any respondent that is found to have engaged in discriminatory practices contrary to the *Canadian Human Rights Act,* must comply with orders made by this Tribunal. Indeed, the *Canadian Human Rights Act* is quasi-constitutional legislation and is expressly noted to bind Her Majesty the Queen in right of Canada (at s 66). As explained by the Supreme Court of Canada in *Kelso:*

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act,* S.C. 1976-77, c. 33, or a regulation such as the *Exclusion Order.*[8]

29. What is more, Parliament has recently expressed its specific intention that the *Canadian Human Rights Act* apply to complaints brought by First Nations against the federal government. In the context of the consideration of Bill C-44, *An Act to amend the Canadian Human Rights Act,* which repealed section 67 of the *Canadian Human Rights Act,* then-Minister Prentice observed:

> It's not simply the band council that is responsible, if section 67 is repealed; it is the government authorities generally, in particular the federal government. I appreciate there are complications, and I appreciate that this will change the circumstances for many people, but that surely is the reason to do it [emphasis added].[9]

30. It is the government's responsibility to ensure that budgets are allocated in a manner that allows it to fulfill its statutory duties and legally binding orders made against it. There is no exception in the *Canadian Human Rights Act* that allows Canada to avoid human rights scrutiny or disregard or defer orders of this Tribunal because of conflicting budgetary priorities, political popularity or internal rules or processes relating to the allocations of funds, particularly where, as here, Canada has not led any evidence with regard to the existence of a *bona fide* justification based on cost.[10]

31. Moreover, the Respondent had the opportunity to present evidence and make submissions relating to remedies and, more specifically, the appropriate timeline to implement any remedial

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[8] *Kelso v the Queen* / 1981] 1 SCR 199 at 207.

[9] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development,* 39th Parliament, 1st Session, No 042 at 1134, March 22, 2007 online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocID=2786776&Language=E&Mode=>

[10] *FNCFCSC et al v AGC,* 2016 CHRT 2 at para 27.

orders made by the Tribunal. Now that the Respondent has been found to be engaging in discriminatory conduct and that a remedial order is imminent, the Respondent cannot boldly assert that it is unable to comply with orders made by the Tribunal aiming to put an end to this discrimination.

32. Finally, section 30 of the *Crown Liability and Proceedings Act,* RSC 1985, c C-50 provides for the payment of any financial judgment against the Crown out of the Consolidated Revenue Fund, without the need of any additional appropriation by Parliament. Given the government's commitment to the rule of law, the Tribunal is entitled to expect that the Respondent will comply with any orders regarding immediate relief that the Tribunal might make, that the Respondent will seek the necessary budgetary appropriations, and that it will not be necessary to consider the application of section 30.

The Respondent's proposed approach to long-term reform makes the need for immediate relief even more pressing

33. The Respondent describes in some detail the steps it intends to take towards a fulJ reform of the FNCFS program. The Caring Society welcomes the opportunity to negotiate reforms to the FNCFS program with the Respondent, with the aim of ensuring the program's compliance with the *Canadian Human Rights Act.* However, the Caring Society rejects the Respondent's assertion that, as the party responsible for the discrimination, it should be entitled to co-chair the process, as well as its insistence that such a process should include a large array of stakeholders, including provincial and territorial governments, such that the timing of such a process would be beyond its control.

34. The Caring Society will provide its submissions with respect to those issues in response to the Tribunal's questions regarding medium-term and Jong-term relief. In particular, given the Tribunal's finding that First Nations child and family services fall under federal jurisdiction, [11] there is no reason for the Respondent to assert that support from the provinces is necessary to the reform of the program. Indeed, the Respondent has had more than 9 years since this Complaint was filed to engage with the provinces, and has opted not to do so. For the present purposes, it suffices to say that the open-ended nature of the processes the Respondent proposes, the lack of a precise time limit for a reform of the FNCFS Program, and the absence of any firm commitment to eradicating discrimination, make the Caring Society's requests for immediate relief all the more urgent.

The Respondent is not precluded from acting immediately with respect to Ontario

35. With respect to Ontario, the Respondent asserts that the 1965 agreement with Ontario cannot be changed unilateralJy. However, there is no evidence that Ontario would refuse to receive additional funding, to be transferred to FNCFS Agencies or otherwise spent for First Nations child welfare. In the unlikely event of Ontario refusing to collaborate, nothing precludes the Respondent from finding other ways to distribute the funding required by the immediate relief orders requested by the Caring Society.

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[11] Decision of the Tribunal at para. 83.

The Respondent must provide adequate funding for legal costs

36. With respect to funding for legal costs, the Respondent proposes to use provincial legal aid rates. The Caring Society notes that those rates are often inadequate and inferior to the rates paid by provincial governments for outside counsel.

37. Given the cultural competence required by lawyers dealing with the specialized nature of child welfare proceedings involving First Nations families, who have long been disadvantaged by the multi-generational impacts of residential schools and the discriminatory conduct of the Respondent, and the serious, often life altering, consequences of child welfare decisions, the Caring Society submits that, as a minimum, provincial rates for outside counsel should be applied.

Performance measures for civil servants

38. At paragraph 12(b) of its March 3, 2016 submission on immediate relief, the AFN seeks an order requiring annual performance evaluations and assessments of civil servants (up to and including Deputy Ministers) involved in providing services to Aboriginal Peoples (including, but not limited to, INAC and the Department of Justice) that include clear and specific metrics specifically designed to demonstrate how each individual has contributed "narrowing the gap" between Aboriginal Peoples and other members of Canadian society, as contemplated in the Tribunal's January 26, 2016 decision.

39. The Caring Society supports the AFN's submission in this regard, and submits that the Commission, the Complainants, and the interested parties must also be involved in setting the clear and specific metrics in question.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 31, 2016

Sébastien Grammond / Anne Levesque
Sarah Clarke / David P. Taylor

Counsel for the Caring Society