

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 Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

RESPONDENT'S SUBMISSIONS ON REMEDY

Jonathan Tarlton, Melissa Chan & Patricia MacPhee
JUSTICE CANADA
Atlantic Regional Office
5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3

The Attorney General of Canada, on behalf of the Respondent, the Minister of Indian and Northern Affairs Canada ("Canada"), makes the following submissions on the issue of remedy:

1. Canada accepts the Tribunal's decision and looks forward to working with the parties to make immediate and long-term changes to the funding of child welfare on reserve.

IMMEDIATE RELIEF

2. As a first step and before full-scale reform, Canada will consider certain immediate relief measures to support services for First Nations children and families living on reserve while long-term reform is being implemented. Such immediate relief measures could include:
 - adjustments to inadequacies in the Operations and Prevention streams of the formulas through additional investments to update existing funding agreements in support of program integrity;
 - increases per child service purchase amount (including for prevention services);
 - further roll out of prevention funding across jurisdictions;
 - additional maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements;
 - funding for intake and investigation services;
 - upward adjustments for agencies with more than 6% of children in care;
 - beginning an engagement process going forward in conjunction with a National Advisory Committee and Regional Tables to work on medium and long-term transition; and

- beginning broader discussions around Jordan's Principle.
3. Canada will provide additional details on immediate relief investments following the Federal Budget announcement on March 22, 2016. Should the federal budget include measures pertaining to immediate relief investments, Canada will advise the parties and the panel.
 4. The Complainants have requested a commitment that Canada not reduce or restrict funding to the FNCFS Program. Canada agrees to make this commitment.
 5. Canada also supports the new iteration of the Canadian Incidence Study and has already taken part in preliminary discussions with the Public Health Agency of Canada.
 6. Department and program staff currently receive cultural awareness training, including Blanket Exercise, Aboriginal Awareness Workshops and Indigenous Community Development. Canada also remains open to future discussions on improving cultural sensitivity of its employees by building upon these existing initiatives.

NATIONAL ADVISORY COMMITTEE

7. In order to begin the necessary and critical reform of the FNCFS Program, Canada commits to the immediate re-establishment of the National Advisory Committee. The joint AFN/INAC National Advisory Committee met regularly from 2001-2008, and its main objective was to oversee the implementation of the National Policy Review Recommendations.
8. Regional Tri-partite Tables and Agency Director Tables will be established within six months of the Tribunal's decision on remedies.
9. Canada has already approached the parties to initiate discussions and to begin configuring the Committee to include provincial and territorial representation and to add new members as needed.

10. Canada proposes the Committee be co-chaired by AFN and INAC, as proposed by the Complainants. This was also the structure of the previous version of the Committee. The initial meeting of the Committee will include discussions on membership and the proposed way forward. Subsequent process and timelines for longer-term activities will be guided by the Committee, subject to seeking necessary policy and funding authorities.
11. Establishment of the Committee is the crucial first step in addressing the medium to long-term changes to the FNCFS Program.

CHANGES TO THE FNCFS PROGRAM

12. Canada is committed to a full-scale reform of the child welfare program. In the interim, Canada proposes to use existing policy and funding authorities for current services to minimize disruption and facilitate the provision of the immediate relief measures until long-term reform can be implemented.
13. Canada commits to working closely with key partners to reform the child welfare program, including First Nations Child and Family Service Agencies, front-line service providers, communities, leadership and organizations, as well as provincial and Yukon governments. All of these partners have important voices and perspectives that must be heard and considered in order to make changes that will best serve the needs of First Nations children and families on reserve.
14. Canada suggests that two to three months would be an appropriate timeframe for the parties to develop a fully-resourced engagement plan for the broader reform. Canada further suggests that the resulting program reform options could be developed within the subsequent twelve months.
15. Canada endeavors to seek the necessary support for program reform from provincial/territorial governments, as well as from First Nations and other interested and affected parties. Substantive reform may also require approval of necessary policy and funding authorities prior to implementation. The timeframe to

secure such approvals is not within the exclusive control of either Canada or the Complainants.

16. Some of the specific changes proposed by the Complainants to the funding formula are based on dated studies and information. Canada is concerned this approach will not accurately reflect the current day needs of First Nations children and families.
17. For example, the formula proposed by the Caring Society is an updated version of the 2005 National Program Manual Directive 20-1 Operations funding formula. A preliminary analysis applying this formula for all FNCFS service providers indicates that operations funding amounts would decrease for a significant proportion of current funding recipients when compared to 2015-16 funding amounts, a reduction which Canada cannot support.
18. Further, the proposed formula also does not take into account regional differences, such as in British Columbia where all agencies would receive the same funding, regardless of their delegation and services that they provide; or the cost-sharing arrangement in Manitoba (60%/40%); or agency agreements with other provinces for child welfare services.
19. The FNCFS Program has undertaken costing analysis for proposed new investments through a comprehensive cost-driver study and trend analysis, based on the most current data available by jurisdiction. The updated amounts, currently under consideration, more accurately reflect the needs and requirements of the FNCFS Program and are still expected to be finalized and adjusted during tripartite discussions.

ONTARIO AND THE 1965 WELFARE AGREEMENT

20. Review of the 1965 Ontario Welfare Agreement requires medium to long-term engagement and consultation. The Agreement is between the federal government and the province of Ontario; therefore changes cannot be made to the Agreement unilaterally. Canada will actively work with Ontario and stakeholders, such as First

Nations organizations, leadership, communities, agencies and front-line service providers to achieve the necessary reforms. Changes may also require new policy and funding authorities for the Government of Canada.

21. Canada will also consider the request for band representative funding, subject to the availability of departmental or additional funds.
22. Canada will be approaching the appropriate parties over the coming weeks to request participation in planning sessions, including how to best address the review of the 1965 Agreement.

FUNDING FOR LEGAL COSTS

23. The Tribunal has requested further details with respect to the funding of legal costs related to child welfare.
24. The FNCFS Program provides an initial allocation of \$5000 in funding for legal fees and costs as an eligible expense as part of agency operations funding. This funding is not capped. Given the scope and range of legal costs that service providers incur, Canada recognizes the need to address the issue and arrive at more comprehensive criteria for legal cost coverage. This work will require thorough jurisdiction-by-jurisdiction analysis of how best to align federal funding support with current provincial practices that vary across the country.
25. Canada has considered the proposal to use the schedule of rates for outside counsel, as published on the Justice website. However, these are not necessarily a useful substitution for legal services related to child welfare. An alternate approach is to use the provincial legal aid rates for child welfare proceedings. Given that child welfare proceedings are governed by provincial legislation, Canada is of the view they are a more appropriate guideline. Generally, such provincial rates take into

account such factors as: geographic location, the nature of the proceeding (child welfare) and counsel experience.¹

JORDAN'S PRINCIPLE

26. Changes to Jordan's Principle will have an impact beyond the parties and require engagement with a wide range of partners. Canada proposes to establish a process and begin engagement with these key partners within the next three months. This will include a review of the definition of Jordan's Principle, with a view to expanding it and improving the way in which it is implemented.
27. Without pre-determining the work that will be undertaken by Canada and its partners in developing an approach and timelines, Canada suggests that options for changes to Jordan's Principle could be developed within twelve months.
28. In order to make progress in the short term, Canada will convene discussions among federal partners to improve existing approaches to addressing Jordan's Principle. Initial discussions around modifications to existing internal processes have already begun. In addition, Canada proposes to put in place dedicated resources to undertake the necessary activities to support next steps.
29. Canada agrees with the AFN that discussions concerning the full implementation of Jordan's Principle should be part of the engagement on long-term remedies. Substantive and long-term change may also require approval of necessary policy and funding authorities prior to implementation.
30. Canada remains open to support future academic scholarship and recurring conferences on child welfare issues, including on Jordan's Principle and culturally-

¹ In some instances, they also set out the number of expected hours for certain proceedings – routine case management conferences versus trials. For example, in Manitoba, the Civil Legal Services rate is \$171 per hour; in Alberta, legal services and related costs are \$125 per hour for up to a maximum of 30 hours of non-court time; in Saskatchewan, general preparation fees are set at \$88 per hour for up to 10 hours, court proceedings – at \$88 per hour, case resolution processes at \$88 per hour for up to 10 hours, and hearings at \$88 per hour or \$540 for provincial court trial, \$860 for Queen's Bench trial.

based child welfare vision, as well as other related research on issues that were not captured within the scope of the January 26, 2016 decision.

FEDERAL SPENDING POWER PRINCIPLES

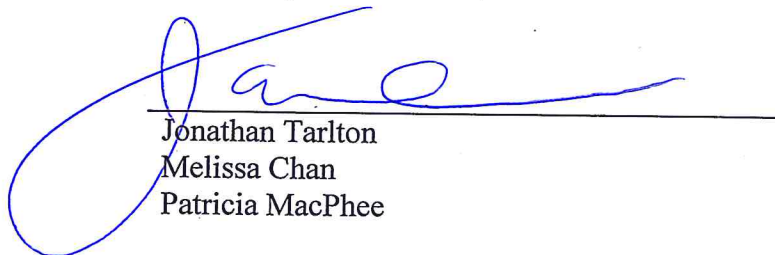
31. In ordering remedies, the Tribunal must be sensitive to the separation of functions between the executive and legislative branches of government. This means giving due consideration to the process by which Canada can disburse public funds for child welfare on reserve.
32. The authority to spend is derived from the annual *Appropriation Acts*. The Minister can only provide funding for child welfare programs on reserves to the extent that funds have been authorized for that purpose. The Minister is constrained by the rules and restrictions put into place by the Treasury Board, the statutory committee designated by Parliament to oversee financial management in government.
33. Canada is committed to reform in a manner that respects the authority of Parliament to allocate public funds.

CONCLUSION

34. Canada is committed to the reform of the Indigenous child welfare system. Immediate relief will include increased funding and cooperation with the parties and key partners with the aim of achieving long-term substantive reform.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 10, 2016

A handwritten signature in blue ink, appearing to be 'Jonathan Tarlton', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Jonathan Tarlton
Melissa Chan
Patricia MacPhee