Information Sheet

# Canadian Human Rights Tribunal T1340/7008

# Key Points from Cross-Examination of Federal Officials on Motions of Non-Compliance

*February 18, 2017*

## Introduction

In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint pursuant to the Canadian Human Rights Act alleging that INAC's provision of First Nations child and family services was discriminatory. On January 26, 2016 the Canadian Human Rights Tribunal substantiated the claim and ordered Canada to immediately cease its discriminatory conduct (2016 CHRT 2). Unsatisfied with Canada's compliance, the Canadian Human Rights Tribunal issued two further non-compliance orders in April of 2016 (2016 CHRT 10) and September of 2016 (2016 CHRT 16). In November of 2016, the Complainants (Assembly of First Nations, the First Nations Child and Family Caring Society of Canada) and the interested parties (Chiefs of Ontario and Nishnawbe Aski Nation) filed formal motions of non-compliance. Canada takes the position that it has complied with the orders.

The parties and the Attorney General (on behalf of Canada) then filed affidavits to support their positions in preparation for the hearings to be held on March 22-24, 2017 at the Canadian Human Rights Tribunal (available at **www.fnwitness.ca**).

The Attorney General chose not to cross-examine the affiants for the Complainants and Interested Parties. This information sheet summarizes the key points arising from the cross-examination of two high level federal officials from INAC and Health Canada headquarters on Canada's compliance with the Jordan's Principle and First Nations child and family services program elements of the Tribunal's decisions. It also reflects the testimony of a high level official from Ontario's northern zone regarding mental health and Jordan's Principle. Please note these are summaries only and readers are encouraged to read the full transcripts and factums filed by the parties at the Tribunal.

## Jordan's Principle

- There have been various definitions used by INAC and Health Canada regarding Jordan's Principle since January of 2016 ranging from First Nations children resident on reserve with disabilities and short term illnesses that affect daily living to all First Nations children with a focus on the foregoing. All definitions were unilaterally developed by Canada and little effort was made to educate First Nations and the public on these evolving definitions and how to apply to the Jordan's Principle fund.

- Canada announced "up to" 382 million over three years for Jordan's Principle cases. As of January 17, 2016 just over 5 million was spent with an additional 6 million approved. Ninety one percent of children receiving services from the fund are from Manitoba and Saskatchewan. All funds that are unused by the end of the fiscal year will be removed from the fund and transferred to Canada's consolidated revenue.

- Canada claims it is having difficulty finding cases but admits that it has been sharing the restrictive definition of Jordan's Principle in its correspondence, stakeholder presentations and on its website as recently as February of 2017.

- Canada is aware that parents have filed complaints with the Canadian Human Rights Commission alleging Canada's non-compliance with Jordan's Principle. Canada has not followed up on these complaints in light of the decisions.

- Canada is aware of the Jordan's Principle cases cited in affiant Raymond Shingoose's affidavit but has taken no steps to contact Mr. Shingoose.

- Canada has not undertaken any internal reform to prevent the erroneous refusal of mental health funds for children from Wapekeka First Nation in Ontario that contributed to two young girls dying of suicide.

- Canada is aware that Ontario's child welfare act requires the provision of mental health services to children at risk and that the Tribunal specifically mentions the need for these services in 2016 CHRT 2. However, Canada is not funding these services and cannot provide any date as to when child and youth mental health services will be funded for all First Nations children in Ontario.

- Canada advises that any funds allocated for Jordan's Principle that remain unspent at the end of the fiscal year will not be returned Jordan's Principle fund. The funding will be allocated to Canada's consolidated revenue.

- The Government of Canada has not provided formal training to staff on the CHRT decisions regarding Jordan's Principle.

## First Nations Child and Family Services

- Canada has no system in place to ensure INAC administrators and staff responsible for the First Nations Child and Family Services program have read the Tribunal's decisions and understand them.

- Canada relies on the First Nations child and family service amounts in Budget 2016 and projections for the next five years as evidence of its compliance with the orders.

- Canada admits that Budget 2016 was prepared in the fall of 2015 and was not adjusted after any of the Tribunal's decisions.

- Canada is rolling out the Budget 2016 funds for child and family services over five years with the largest amounts (over 50%) coming the year of the next federal election and the year after. The Federal Official overseeing the child welfare file says agencies need time to hire staff and build capacity and cites three reports in support of its claim. However, none of the cited reports recommend a slow roll out of prevention funds due to agency capacity. Several raise concerns about agencies being able to recruit staff due to low wages/benefits associated with federal under-funding. The only recommendation relating to capacity concerns focuses on Indigenous Affairs.

- Canada admits that no consideration was given to child development or the best interests of children in the preparation of Budget 2016 as it relates to First Nations child and family services.

- Canada agrees that it would provide full funding at actual costs for First Nations children if they are brought into care but refuses to do so if they are in their family homes.

- In November 2016, a House of Commons motion passed unanimously called on Canada to immediately invest an additional 155 million in First Nations child and family services. Canada has not provided any new funding for First Nations child and family services since the motion passed.

- Canada has not renewed its treasury board authorities on First Nations Child and Family Services since approximately 2012-2013 and has no plans to do so.

- Canada agrees that children's mental health services and band representatives are required under the Ontario Child and Family Services Act and that those services are not currently funded. Nonetheless, Canada refuses to fund these services until its "engagement" process is finished.

- There are no barriers to Canada funding to funding items like children's mental health, child welfare prevention programs, legal and band representatives at actual cost to reflect community need until a longer term solution is in place but Canada has chosen not to do this citing its need for further "engagement."

- Funding amounts for cultural planning and needs assessment as well as additional allocations to relieve cost pressures announced post- CHRT decision are reallocations from other First Nations programs contrary to the recommendation of the Auditor General of Canada (2008).

## Canada's Engagement with First Nations

- Canada admits it will take no further action to implement the orders citing a need to "engage" with First Nations to better understand how to reform the First Nations Child and Family Services Program and Jordan's Principle.

- Canada is holding up the CHRT order implementation in light of the engagement process but has no idea what information it needs in order to "better understand the program" and plan for reform. Canada is thus unable to provide a definitive date as to when "the engagement" will be over.

- Canada has no formal definition for "engagement" and thus it is not possible to compare what this means against the "free, prior and informed" consent required in the United Nations Declaration on the Rights of Indigenous Peoples adopted without reservation by Canada in 2016.

- Canada suggests it will not take action unilaterally on First Nations child and family services but admits it acted unilaterally on Budget 2016 and Jordan's Principle announcement in July as well as the appointment of the Ministerial Special Representative. Canada suggests it acted unilaterally because it was ordered to act but this does not explain the unilateral development of Budget 2016 developed prior to the Tribunal orders and the Tribunal did not order the appointment of the Ministerial Special Representative.

- The Ministerial Special Representative (MSR) has stated she is looking for best practices in child welfare, however, her statement of work focuses on resolving political issues. There is no mention of child welfare best practices in the Special Representative's Statement of Work.

- Canada is aware of the unanimous Assembly of First Nations resolution expressing concern about the lack of terms of reference and accountability for the MSR. The resolution suggests she should focus on internal INAC reform not child welfare reform and First Nations engagement. Despite knowing about the resolution, Canada has made no changes in the MSR's work plan.

- The MSR and Canada's witnesses were not academically trained as social workers and are not registered with a social work licensing body. It is unclear how they are identifying best practices and why they would undertake such an activity given INAC's mandate.

**For more information on the case go to**
**www.fnwitness.ca or contact info@fncaringsociety.com**

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