Docket: T1340/7008

**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

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

Commission

- and -

**ATTORNEY GENERAL OF CANADA**
**(representing the Minister of Indigenous Services Canada)**

Respondent

- and -

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

---

# FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA REPLY SUBMISSIONS re DEFINITION OF "ALL FIRST NATIONS CHILDREN" UNDER JORDAN'S PRINCIPLE

**March 26, 2019**

---

**David P. Taylor**
**Conway Baxter Wilson LLP/s.r.l.**
**400-411 Roosevelt Avenue**
**Ottawa, ON K2A 3X9**

**Tel: 613-288-0149**
**Email: dtaylor@conway.pro**

**Sarah Clarke** ***Clarke Child & Family Law***
**Barbara McIsaac, Q.C.** ***Barbara McIsaac Law***

INDEX

### *A. Scope of the Caring Society's submissions*

1. The Assembly of First Nations appears to raise concerns that the Caring Society's motion seeks to extend the reach of the Tribunal's orders regarding Jordan's Principle on the sole basis of self-identification.[1] This is incorrect. Consistent with the representations made during the hearing on the interim motion, the Caring Society's position is that self-identification alone and in a vacuum is not sufficient for a child to be identified as a "First Nations child" for the purposes of the Tribunal's orders regarding Jordan's Principle. In keeping with the Supreme Court of Canada's jurisprudence regarding Aboriginal Peoples' constitutional rights, the Caring Society submits that objective markers are necessary. The objective markers proposed are: (i) recognition; (ii) a parent with *Indian Act* status or entitlement to status or a member of a self-governing First Nation and (iii) that a process be developed by the parties to assess eligibility of persons who were separated from their communities due residential schools, the Sixties Scoop or Canada's discriminatory provision of child and family services.

2. The Assembly of First Nations also states that the Caring Society is seeking relief regarding Inuit and Métis individuals,[2] while Canada says that the Caring Society is seeking relief for all non-status Indigenous children living off-reserve.[3] Neither reflect the Caring Society's position. Inuit and Métis individuals are outside of the scope of this complaint. The Caring Society's aim is to ensure First Nations children on and off reserve who meet the conditions in para. 1 receive the help they need under Jordan's Principle. In keeping with the distinctions-based approach supported by principle #10 of Canada's *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, each of these three groups are "distinct, rights-bearing communities with their own histories, including with the Crown."[4]

---

[1] Assembly of First Nations March 20, 2019 written submissions at para 64. Similar concerns are raised in the affidavit of Leila Gillis, sworn March 7, 2019, related to a communication from the Assembly of Manitoba Chiefs attached to that affidavit as Exhibit "A".
[2] Assembly of First Nations March 20, 2019 written submissions at para 113(ii).
[3] Canada's March 25, 2019 reply submissions at para 16.
[4] Joint Record of Documents, Tab 45 "Principles respecting the Government of Canada's relationship with Indigenous Peoples" at p 17.

### *B. The submissions made by Canada, the Assembly of First Nations, and the Chiefs of Ontario focus on the best interests of governments, and not children*

3. At many points in their submissions, Canada, the Assembly of First Nations, and the Chiefs of Ontario raise concerns regarding the impact of the order sought by the Caring Society on First Nations governments.[5] While the Caring Society acknowledges procedural issues may arise when ensuring that First Nations children on- and off-reserve receive services and products that meet their needs and circumstances; these adult-based concerns must not supplant the safety and culturally based best interests of children, or their right under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*") to substantive equality. First Nations children, whether they have *Indian Act* status or not, have no control over the legacy of Canada's colonial practices or Canada's current decisions not to support First Nations governments' capacity to rectify this situation. Canada, however, can and in the Caring Society's view, ought to, consult with affected First Nations to ensure First Nations capacity shortfalls related to Jordan's Principle are remedied. Indeed, First Nations will have views on this matter that are as diverse as they are themselves.

4. The Caring Society agrees with Canada that the Tribunal's orders are only binding on Canada, and are not binding on First Nations governments.[6] As such, despite the Chiefs of Ontario's concerns, the Tribunal's orders in this proceeding cannot impose a procedure on First Nations, nor can they direct First Nations as to when or how to exercise their citizenship jurisdiction (particularly as citizenship is not in issue).[7] Questions of First Nations liability with respect to recognition, or non-recognition, of particular individuals are beyond the scope of this proceeding and would need to be determined in another forum. It remains open to Canada, as a policy choice recognizing the harm wrought by its past colonial practices, to indemnify First Nations as the parties have already suggested.

5. However, it is important to focus on what Canada is seeking in this motion. Canada is asking the Tribunal to validate its current practice – of closing its eyes to the needs and circumstances of First Nations children who lack *Indian Act* status and do not live on-reserve.

[5] Canada's March 25, 2019 reply submissions at para 33; Assembly of First Nations March 20, 2019 written submissions at para 56; Chiefs of Ontario's March 20, 2019 written submissions at paras 24-30.
[6] Canada's March 25, 2019 reply submissions at para 33.
[7] Chiefs of Ontario's March 20, 2019 written submissions at paras 14-23.

First Nations children living off-reserve who do not have *Indian Act* status will all have their claims rejected, not on the basis of any lack of merit, but due to their race and/or national/ethnic origin.

6. If, despite all of the challenges that the Chiefs of Ontario have identified, a First Nations child comes forward with recognition from their First Nation, their case should be considered regardless of their reserve-residency or their *Indian Act* status. If, as the AFN suggests at paragraph 59 of its submission, such children do not have greater needs due to their access to existing service pathways, then that will be considered as the Focal Point considers the child's particular circumstances in view of substantive equality, cultural needs and best interests. The Caring Society is not seeking a guaranteed yes for all such children; it is simply asking that Canada's Focal Points consider the cases before them on their merits, and not based on a categorical exclusion based on racist and colonial concepts.

7. Similarly, the Caring Society agrees with the verification approach put forward by the AFN at paragraphs 66-68 of its submission, which reflects existing and proposed legislation. To the extent that a First Nations child or their family refuses the consent required for this verification to take place, that is a choice that the individuals involved would make, similar to refusing consent to undergo an assessment. The exception should not be used to justify an underinclusive rule.

### *C. Canada and the AFN have failed to provide evidence to support their cost-related concerns*

8. Canada and the AFN appear to be making a late attempt to justify an under-inclusive approach to Jordan's Principle based on cost. The AFN alludes to "strained financial resources in Canada's budget", while Canada says that an inclusive definition of a "First Nations child" would "risk leaving the needs of those children who are properly the subject of the complaint, unmet."[8] With respect, these submissions are not supported by the evidence. There is no evidence that Canada cannot "afford" to provide Jordan's Principle to all First Nations children. Moreover, the evidence suggests that the number of requests from First Nations children without *Indian Act* status has been low and is an exceedingly small percentage when compared to the more than 215,000 service requests that were approved between June 2016 and January 2019. Indeed, on cross-

[8] Canada's March 25, 2019 reply submissions at para 11; Assembly of First Nations March 20, 2019 written submissions at para 56.

examination in May 2018, Mr. Perron's evidence was that there had been roughly 53 cases involving First Nations children without *Indian Act* status, a situation that appears not to have changed by December 2018, given Dr. Gideon's evidence that "[f]ew requests have been submitted for children who do not have nor are eligible for First Nations status registration."[9] The situation appears to have continued following the Tribunal's February 21, 2019 interim ruling, as Ms. Gillis' evidence is that five requests were made by children living off-reserve who between February 1, 2019 and March 6, 2019.[10] Canada and the AFN have failed to demonstrate undue hardship related to cost nor have they balanced any cost considerations with the safety and wellbeing of First Nations children.

### *D. Canada's reply submission is a collateral attack on the Tribunal's September 14, 2016 order*

9. Canada argues at paragraphs 8-11 of its reply submission that Canada's response to the Tribunal's orders should be limited to the on-reserve context. These arguments do not reflect the fact that this complaint has had two branches: (1) the FNCFS Program (an on-reserve program); and (2) Jordan's Principle. The Caring Society disagrees with Canada's assessment of the Commission's reading of the Particulars as "selective". There is nothing contradictory about a complaint having multiple aspects, particularly a systemic complaint like this one. Moreover, the two-branch approach is only being questioned now – 12 years after the complaint was filed and over three years since it was decided.

10. In fact, it is Canada who engages in a selective reading of the Caring Society's closing submissions from 2014. The opening paragraph of the Caring Society's section regarding Jordan's Principle was clear:

> Canada's failure to fully implement Jordan's Principle amounts to *prima facie* discrimination under s. 5 of the *CHRA*. Indeed, First Nations children are denied basic public services or experience detrimental delay in receiving such services for no reason other than their status as First Nations peoples [emphasis added].[11]

[9] Affidavit of Valerie Gideon, sworn December 21, 2018 at para 24.
[10] Affidavit of Leila Gillis, sworn March 7, 2019 at para 10.
[11] Caring Society August 2014 submissions at para 392.

11. The Caring Society's reference to Jordan's Principle as a procedural mechanism for First Nations children on-reserve to exercise their rights and vindicate their rights to substantive equality does not exclude First Nations children living off-reserve from making use of this procedural vehicle in a way that is appropriate to their needs and circumstances as individuals living off-reserve.

12. In any event, it is well past the time for Canada to advance such arguments. Noting that House of Commons Motion No. 296 did not limit the application of Jordan's Principle to children on reserve, the Tribunal stated that Canada's on-reserve restriction was the "type of narrow analysis to be discouraged moving forward as it can lead to discrimination as found in the [2016 CHRT 2] *Decision*."[12] Canada did not seek judicial review of this decision, such that these arguments should be rejected as a collateral attack.

### *E. Canada's approach to its jurisdiction under subsection 91(24) of the Constitution Act, 1867 is a reflection of its old mindset*

13. Canada's reply submission appears to be based on a fallacy: that it does not have jurisdiction over First Nations children without *Indian Act* status who live off-reserve.[13] To the contrary, and as was confirmed by the Supreme Court of Canada in *Daniels*, First Nations children who lack *Indian Act* status are "Indians" for the purposes of subsection 91(24) of the *Constitution Act*.

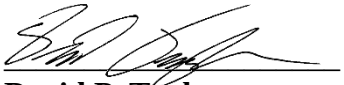
14. The Caring Society is concerned that Canada appears, yet again, to be questioning the Tribunal's jurisdiction over the Government of Canada under the *CHRA*. Canada says that Parliament "is not legally required […] to extend programs to […] ***non-status Indians*** [emphasis added]."[14] However, the Caring Society's submissions regarding First Nations children are directed at Indigenous Services Canada and its antecedents and successors, a department of the federal executive which is bound by the *CHRA*. As the Tribunal held in its February 4, 2018 order

[12] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16 at para 118.
[13] Canada's March 25, 2019 reply submission at paras 15 and 17.
[14] Canada's March 25, 2019 reply submission at para 30.

regarding immediate relief "Canada must accept that liability was found and that remedies flow from this finding. The *Decision* was not a recommendation; it is legally binding."[15]

15. The *CHRA* protects all those who fall within federal authority from discrimination in respect of services. Canada's legal obligations under the *CHRA* prevent it from rectifying discrimination against one group of First Nations children by perpetuating discrimination against another group of First Nations children.

**All of which is respectfully submitted this 26th day of March, 2019.**



**David P. Taylor**
**Sarah Clarke**
**Barbara McIsaac, Q.C.**

**Counsel for the Caring Society**

[15] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2018 CHRT 4 at para 41.