

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT

-and-

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA,
ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS
COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION**

RESPONDENTS

NOTICE OF MOTION

TAKE NOTICE THAT THE RESPONDENT, THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, will make a motion to the Court at Ottawa, Ontario on a date and at a time to be determined by the Court.

THE ESTIMATED DURATION of the hearing of the motion is three hours.

THE MOTION IS FOR:

- a) an Order of the Court holding the within Application in abeyance until the Canadian Human Rights Tribunal has completed its order regarding compensation to victims in file T1340/7008 by making its order regarding the process for paying compensation to victims;
- b) the costs of this motion;
- c) the costs of the Applicant's motion seeking a stay of the Tribunal's decision, in any event of the outcome of this motion and/or the within Application; and

- d) such further and other relief as counsel may advise and this Honourable Court deem just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. On February 27, 2007, the Respondent, the First Nations Child and Family Caring Society of Canada (the “**Caring Society**”) and the Respondent Assembly of First Nations (“**AFN**”) filed a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, regarding the Applicant’s First Nations Child and Family Services Program (“**FNCFS Program**”);
2. The complaint was heard before the Canadian Human Rights Tribunal (“**the Tribunal**”) between February 2013 and October 2014. During the 72-day hearing, the Tribunal heard from 25 witnesses (18 for the Commission and the complainants and 7 for the Attorney General) and approximately 500 documents were filed as evidence.
3. The Tribunal ruled in the complainants’ favour on January 26, 2016 (2016 CHRT 2), finding that Canada’s FNCFS Program and its approach to Jordan’s Principle discriminated against First Nations children and families contrary to the *Canadian Human Rights Act* (“**Decision on the Merits**”). In particular, the Tribunal found that Canada’s child welfare funding formulas caused negative outcomes for First Nations children and families and created incentives to take First Nations children into care.
4. Since the release of the Decision on the Merits, the Tribunal has issued seven subsequent orders relating to Canada’s non-compliance with the Decision on the Merits pursuant to the remedial provisions of the *Canadian Human Rights Act*. On September 6, 2019, the Tribunal issued a Ruling and Order (“Compensation

- Entitlement Order”) that identified the individuals who are entitled to compensation and the quantum of compensation that ought to be conferred to these individuals.
5. The Compensation Entitlement Order is not the Tribunal’s final and definitive order on compensation. In its decision, the Tribunal stressed that it was not making a final determination on the process that was to be followed to identify victims and compensate them. Rather, it ordered the Canada to enter into discussions with the AFN and the Caring Society to discuss an independent process for distributing compensation to victims (the “**Compensation Process**”) and to report back by December 10, 2019.
 6. The only part of the Compensation Entitlement Order that is currently in force is the requirement that Canada consult with the Caring Society and the AFN. All remaining parts of the Compensation Entitlement Order will only find application after the Compensation Process has been agreed to by the parties or ordered by the Tribunal.
 7. The Caring Society and the AFN have already taken many of the steps necessary to comply with the Tribunal’s December 10, 2019 deadline and have incurred significant expenses in doing so.
 8. On this application for judicial review, Canada seeks to quash the Tribunal’s Compensation Entitlement Order before a determination regarding the Compensation Process is made.
 9. Canada also seeks to stay the Tribunal’s Compensation Entitlement Order, such that it would not be required to discuss the Compensation Process with the Caring Society and the AFN, or to make submissions to the Tribunal on this issue on December 10, 2019.

This application for judicial review should be held in abeyance

10. It is in the interests of justice for the within Application to be held in abeyance pending the Tribunal completing its decision with respect to compensation by ordering the Compensation Process. The Compensation Entitlement Order defined the quantum of compensation and the victims to whom such compensation should be paid, but provided that no compensation would be paid until the Tribunal had made its order regarding the Compensation Process (following consultations between Canada, the Caring Society, and the AFN);
11. This Court will not be in a position to fully determine the reasonableness of the Tribunal's Compensation Entitlement Order until the Compensation Process is decided, as the process agreed to by the parties or selected by the Tribunal following submissions will inform the reasonableness of the Compensation Entitlement Order;
12. If the Tribunal's Compensation Entitlement Order is stayed pending the adjudication of the within Application, the ultimate adjudication of compensation under the *Canadian Human Rights Act* for victims of Canada's discrimination will be delayed. In the event this Court upholds the Tribunal's Compensation Entitlement Order as reasonable, there is a risk that the Applicant would seek a second application for judicial review, specifically regarding the Compensation Process;
13. It would be in the interests of justice for all matters with respect to compensation under the *Canadian Human Rights Act* for victims of Canada's discrimination to be decided by this Court at the same time;
14. The Caring Society has already taken many of the steps necessary to comply with the Tribunal's request for submission regarding the Compensation Process and has incurred significant expenses in doing so;

15. The victims of discrimination potentially entitled to compensation will be irreparably harmed by any delay in the distribution of compensation, or by confusion regarding the status of *Canadian Human Rights Act* compensation;
16. The Applicant will not be harmed by time-limited discussions regarding the Compensation Process with the Caring Society and the AFN, or by making submissions to the Tribunal on this issue;
17. The harm to the Respondents and the victims of discrimination potentially entitled to compensation outweigh Canada's interests in proceeding with this Application before the Tribunal issues its decision regarding the Compensation Process;
18. When the Tribunal makes a determination regarding the Compensation Process, the Applicant can bring its application for judicial review before this Court;
19. Dealing with this issue concurrently before two adjudicative bodies is harmful to the victims of discrimination potentially entitled to compensation, and is not cost-effective, expedient or a good use of public resources;
20. Rules 3, 4, 32, 35(2) 36 of the *Federal Courts Rules*;
21. Sections 18.2, 18.3, 18.4.1, 18.5 and 50(1) of the Federal Courts Act;
22. Such further and other grounds as are set out in the evidence and written representatives filed in support of this motion; and
23. Such further other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- a) the Notice of Application herein;
- b) the Affidavit of Sony Perron affirmed on October 3, 2019 filed on behalf of the Attorney General of Canada and any cross-examination thereon;
- c) the Affidavit of Deborah Mayo affirmed on October 1, 2019 filed on behalf of the Attorney General of Canada;
- d) the Affidavit of Cindy Blackstock affirmed on October 24, 2019, filed on behalf of the Caring Society;
- e) the Affidavit of Ry Moran to be affirmed, filed on behalf of the Caring Society;
- f) the Affidavit of Doreen Navarro to be affirmed, filed on behalf of the Caring Society;
- g) The Decision of the Canadian Human Rights Tribunal, dated September 6, 2019; and
- h) Such further and other evidence as counsel may advise and this Honourable Court may permit.



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