

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,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

**NOTICE OF MOTION OF THE COMPLAINANT
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

David P. Taylor

Sarah Clarke *Clarke Child & Family Law*
Anne Levesque *University of Ottawa*
Barbara McIsaac, Q.C. *Barbara McIsaac Law*

CONWAY BAXTER WILSON LLP/S.R.L.
400 -411 Roosevelt Avenue
Ottawa, ON K2A 3X9
T:613-691-0368 | F: 613-688-0271

Counsel for the First Nations Child and Family Caring Society of Canada

NOTICE OF MOTION

TAKE NOTICE THAT THE COMPLAINANT, THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA (the “Caring Society”) will make a motion to the Canadian Human Rights Tribunal located at 160 Elgin Street, 11th floor, Ottawa, Ontario, at a date to be fixed by the Panel. The proposed motion will be heard orally.

AND TAKE NOTICE THAT THIS MOTION IS FOR:

Declaration of non-compliance with the Tribunal’s Orders

1. A declaration that Canada has failed to comply with the Tribunal’s Orders in 2016 CHRT 2, 2016 CHRT 16 and 2018 CHRT 4 by not taking sufficient measures to cease its discrimination under its First Nations Child and Family Services Program (FNCFS Program) with respect to First Nations children and families receiving services from provincial/territorial agencies and/or service providers on-reserve and in the Yukon.

Eradication of discrimination through needs-based funding, regardless of service provider

2. An Order that, within 30 days of the Order, Canada shall develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families living on-reserve and in the Yukon who are served by provincial/territorial agencies and/or service providers on the same basis as ISC’s current funding practices for funding child welfare maintenance costs and for FNCFS Agencies pursuant to paragraphs 410-413 of 2018 CHRT 4, that is, by fully reimbursing actual costs for these services, as determined in consultation with the First Nation involved to be in the best interests of the child.
3. An Order that, within 90 days of the Order, Canada shall provide reimbursement retroactive to January 26, 2016 for all child and family prevention/least disruptive measures, intake and investigation, building repairs, and legal fees for First Nations children and families living on-reserve, on the same terms as referenced in paragraph 4, above.

4. A declaration that, given that those closest to First Nations children are in the best position to remedy discrimination, and in keeping with paragraph 413 of 2018 CHRT 4, Canada may fulfill the requirements of the above Orders through nation-specific funding agreements, rather than through amendments to provincial/territorial agreements.

AND TAKE NOTICE THAT THE GROUNDS FOR THE MOTION ARE:

- (a) In a decision dated January 26, 2016 (“*Decision on the Merits*”), this Tribunal examined Canada’s First Nations child and Family Services Program (the “FNCFS Program), its corresponding funding formulas and other agreements that provide for child and family services to First Nations living on reserve and in the Yukon territory (para. 5). Only the provision of child and family services to First Nations in the Northwest Territories and Nunavut were excluded from the scope of the complaint.
- (b) The Tribunal reviewed extensive evidence related to the provincial/territorial agreements controlled and managed by the federal government and their impact on First Nations children and families served under those agreements. In the result, the Tribunal found that Canada’s provision, on-reserve and in the Yukon, of child welfare services administered under the provincial/territorial agreements was discriminatory, on the basis of race and national or ethnic origin, and contrary to section 5 of the *Canadian Human Rights Act* (“CHRA”).
- (c) In particular, the Tribunal found that Canada’s delivery of child and family services on-reserve and in the Yukon under provincial/territorial agreements resulted in service denials and adverse impacts for First Nations children and their families:

[383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services [...] However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods [emphasis added].

[394] [...] the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people [emphasis added].

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserve.

- (d) The Tribunal also found that Canada's delivery of child and family services on-reserve and in the Yukon, including under provincial/territorial agreements, perpetuated the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system:

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

- (e) The Tribunal ordered Canada to cease its discriminatory practices and reform the entire FNCFS Program.
- (f) To date, Canada has failed to demonstrate that it has taken sufficient steps to redress the discrimination experienced by First Nations children and their families receiving services under the FNCFS Program covered by provincial/territorial agreements and has failed to reform those agreements in a manner that ceases the discrimination per the *Decision on the Merits* and subsequent Decisions.
- (g) Shortly after the *Decision on the Merits*, the Caring Society's Executive Director met with the then-Minister of Indigenous and Northern Affairs Canada and advised that the *Decision on the Merits* must apply to FNCFS Agencies and other mechanisms through which child and family services are provided on-reserve and in the Yukon.
- (h) After receiving additional submissions of the parties and compliance reports filed by Canada, this Tribunal released its September 14, 2016 Order (the "September 2016

Remedial Order”). Expressing concern that Canada’s submissions reflected “much of the same type of statements and reasoning that it has seen from the organization in the past”, the Tribunal made further remedial orders. In the September 2016 Remedial Order, the Tribunal took note of Canada’s undertaking not to decrease or further restrict funding for First Nations child and family services and ordered Canada to do this. The Tribunal also ordered Canada to update its policies, procedures and agreements to comply with the *Decision on the Merits*.

- (i) After Canada’s failure to comply with the *Decision on the Merits* and its September 2016 Remedial Order, the Complainants and the Interested Parties filed motions with the Tribunal. Following these motions, the Tribunal issued its February 1, 2018 Non-Compliance Order (“the February 2018 Non-Compliance Order”). The Tribunal found that Canada was not in full compliance with the *Decision on the Merits*, its September 2016 Remedial Order and its other related orders, noting that “[t]he National Program, funding formulas and agreements need a full-scale reform not just support pillars put in place” (para. 228). The Tribunal ordered Canada to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families on-reserve and in the Yukon based on the actual needs of First Nations children.
- (j) While the Tribunal noted that the best interests of the child ought to be determined by FNCFS Agencies it is clear that the Tribunal’s order regarding the development of an alternative system is not restricted to FNCFS Agencies: the Tribunal has previously noted the significant discrimination experienced by First Nations children and families served under provincial/territorial agreements, and there are no agencies in the Yukon.
- (k) The February 2018 Non-Compliance Order also required Canada to enter into a protocol on consultations with the AFN, the Caring Society, Chiefs of Ontario, Nishnawbe Aski Nation and the Canadian Human Rights Commission. That Protocol was signed in March 2018, and the Consultation Committee on Child Welfare was formed in May 2018.
- (l) Since May 2018, during CCCW meetings and in other fora, the Caring Society has repeatedly raised the need for Canada to eradicate the discrimination against First Nations

children and families living on-reserve and in the Yukon who receive child and family services from provincial/territorial agencies and/or service providers under the FNCFS Program. The Caring Society is unaware of any systematic reforms being made to eradicate discrimination for non-FNCFS Agency communities.

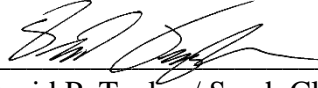
- (m) Despite Canada's repeated assertions that it is in compliance with all CHRT Orders, Canada did not reach out for assistance in complying with the orders regarding First Nations served by provincial/territorial agencies and/or service providers under the FNCFS Program and did not identify any issues with compliance with the orders. Despite repeated requests, Canada did not provide the Caring Society with copies of the agreements and related funding documents until July of 2020.
- (n) Canada has also failed to demonstrate that it has taken sufficient measures to ensure that First Nations children who receive child and family services from a provincial/territorial agency and/or service provider under the FNCFS Program receive those services in keeping with their distinct needs and circumstances, including their cultural, historical and geographical needs and circumstances. In particular, Canada has taken the position that the Tribunal's remedial orders apply only to "agencies".
- (o) Accordingly, the Respondent has failed to apply and implement the Tribunal's orders in a manner that includes First Nations children and families who receive child family services from provincial/territorial agencies and/or service providers under the FNCFS Program;
- (p) As a result, until Canada follows and implements the Tribunal's orders, First Nations children and families served by provincial/territorial agencies and/or service providers under the FNCFS Program will continue to experience discrimination and the adverse impacts as found by the Tribunal.
- (q) Section 53(2) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6;
- (r) Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure; and
- (s) Such further and other grounds as counsel may advise and as the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

(a) Affidavit of Cindy Blackstock, to be affirmed; and

(b) Such further and other materials as counsel may advise and this Tribunal may permit.

Dated: August 7, 2020



David P. Taylor / Sarah Clarke
Anne Levesque / Barbara McIsaac, Q.C.

Counsel for the Caring Society

ORIGINAL TO: Canadian Human Rights Tribunal
c/o Judy Dubois, Registry Officer
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

**COPY TO: Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Kelly Peck,
Max Binnie and Meg Jones**
Department of Justice Canada
50 O'Connor Street, Room 500
Ottawa, ON K1A 0H8

Counsel for the Respondent Attorney General of Canada

AND TO:

David C. Nahwegahbow and Stuart Wuttke
Nahwegahbow Corbiere
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

Brian Smith and Jessica Walsh
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1

**Counsel for the Complainant
Assembly of First Nations**

**Counsel for the Canadian Human Rights
Commission**

Maggie E. Wentz and Judith Rae
Olthuis Kler Townshend LLP
250 University Avenue, 8th Floor
Toronto, ON M5H 3E5

Justin Safayeni
Stockwoods LLP
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

**Counsel for the Interested Party
Chiefs of Ontario**

**Counsel for the Interested Party
Amnesty International**

Julian N. Falconer and Molly Churchill
Falconers LLP
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9

**Counsel for the Interested Party
Nishnawbe Aski Nation**