

September 17, 2021

VIA EMAIL

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

RE: *FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL V ATTORNEY GENERAL OF CANADA – T#1340/7008*
OUR MATTER ID: 5204-002

We write in response to the Panel's July 26, 2021, direction to provide an update on the status of measures to ensure Canada ceases its discrimination in First Nations Child and Family Services Program and Jordan's Principle and prevents the recurrence of said discrimination, pursuant to 2016 CHRT 2 and subsequent orders.

This letter provides the Panel with the Caring Society's views on the following key issues:

1. Follow-up on the Panel's August 26, 2021 letter decision;
2. Concerns regarding Canada's implementation of 2021 CHRT 12;
3. Comprehensive and durable reform of Jordan's Principle to cease discrimination and ensure its non-recurrence; and
4. Comprehensive and durable reform of the Child and Family Services to cease discrimination and ensure its non-recurrence

1. August 26, 2021 letter decision

The Caring Society acknowledges receipt of the Panel's letter decision, with reasons to follow, on major capital and other matters, dated August 26, 2021. The Caring Society wishes to advise the Panel that discussions among the parties towards a resolution on the matters of capital or

the implications of the *Financial Administration Act* have run their course. We look forward to receiving the Panel's reasons when they are available.

2. Concerns regarding Canada's compliance with 2021 CHRT 12

The Caring Society has concerns regarding Canada's implementation of 2021 CHRT 12, issued on consent on March 17, 2021. As the Panel is aware, Canada consented to this order and did not seek judicial review. Paragraph 42(3) of that order requires Canada to provide funding to First Nations with existing funding agreements with Indigenous Services Canada within 90 days of that order. This means that the majority of First Nations ought to have received their funding by June 15, 2021.

In response to an inquiry Dr. Blackstock made on July 29, 2021, Canada furnished a chart detailing the status of payments to eligible First Nations on August 4, 2021. While the Caring Society appreciates ISC's prompt delivery of the requested information, it was concerned to learn that Canada had only delivered approximately 2% of the required funding. Moreover, before Dr. Blackstock's inquiry, Canada failed to disclose this concerning information to the parties (at the CCCW or otherwise) or to the Tribunal that it was exceeding the order timelines, or what measures it would undertake to come into compliance.

More recently, Canada has indicated that, for reasons related to its internal financial approval processes, it will disburse the "retroactive" component of the funding associated with 2021 CHRT 12 over the next five years, whilst paying the "in-year" amounts as scheduled. Canada further notes that First Nations can "ask" for more of the retroactive funds if they wish to have them.

The Caring Society has advised Canada that it is concerned that Canada did not disclose its intention to take this approach during the discussions leading to the consent order, nor did it make any submission that such an approach would be taken when joining the Caring Society and the AFN in submissions ultimately leading to the consent order in 2021 CHRT 12. The Caring Society has asked that Canada simply pay the full amount of the retroactive payments directly to First Nations, with a letter indicating that the funds arise from 2021 CHRT 12 and are to be used for prevention services per the Tribunal's orders. At this time, Canada is not prepared to do so and is instead moving forward with its plan to distribute the retroactive amounts over the five-year period, unless a First Nation asks otherwise.

The Caring Society will continue to raise this matter with the other parties at CCCW, however at this stage it would be useful for Canada to be directed to provide monthly reports to the parties and the Tribunal on the receipt of funds by Non-Agency Communities pursuant to 2021 CHRT 12. Further relief may be sought in the event that Canada does not conform with the obligations it agreed to in seeking the consent order in 2021 CHRT 12.

3. Comprehensive and durable reform for Jordan's Principle

The Caring Society sent the attached letter to Canada on August 6, 2021, copied to the CCCW, noting our serious concerns regarding Canada's failure to implement the full and proper meaning of Jordan's Principle. We include this letter for the Tribunal's reference as to the status of discussions on long term reform regarding Jordan's Principle. The Caring Society reserves its right to file the August 6, 2021 letter as evidence in any future proceeding regarding comprehensive and durable reform for Jordan's Principle.

Among the most pressing concerns related to the implementation of Jordan's Principle that impact children's safety and wellbeing are:

- i. ISC's failure to properly identify urgent cases and respond within the 12-hour timeframe.
- ii. Inappropriately high documentation thresholds such as requesting costing of services from the requester or asking for multiple pieces of information at different times and placing the burden on the requester to "prove" substantive equality;
- iii. Abridging the privacy rights of children, youth and families by requiring copies of full mental health and other assessments, as opposed to limiting requests for information to that necessary to identify the child's needs for the purposes of Jordan's Principle;
- iv. Overriding professional recommendations, for instance by seeking multiple professional letters to substantiate a need when a qualified professional with relevant expertise has already provided a letter;
- v. Re-Application for supports, products and services: requiring parents to "renew" requests for services at the end of the fiscal year, even requiring a new assessment of the child when no such assessment was deemed clinically necessary by relevant professionals.

Canada responded to this correspondence on August 27, 2021. While the Caring Society appreciates that ISC stated in that correspondence that it will adopt some of the Caring Society's suggested remedies to address these issues, most of the responses propose more bureaucratic processes without a clear and convincing remedy for the discrimination experienced by children and families.

For example, ISC is suggesting that the Caring Society and the AFN participate in a "Task Force" that would report to the Jordan's Principle Operations Committee (itself a subcommittee of the National Advisory Committee) and continue "discussions" on these matters.

This is not acceptable to the Caring Society. The issues raised in the August 6, 2021 letter have been cited by the Caring Society for many months, and in many cases- years, with little to no direct action that would remediate the harm at the level of the child. This has led to numerous cases in which, the Caring Society has had to pay for wellness and lifesaving interventions for

children that Canada delays or denies under Jordan's Principle. The Caring Society is a small organization and cannot afford to do this on every occasion and is concerned as to what will happen if there is no other safety net for children that is time sensitive to their needs. Appeals of decisions often take weeks, if not months, and Federal Court judicial reviews are lengthy processes, leaving children and their families with no help in the meantime.

The Caring Society will communicate with Canada in the coming days regarding its August 27, 2021 workplan. While the Caring Society is hopeful that the parties can work towards a clear resolution in the best interests of children, future direction from the Tribunal regarding comprehensive and durable reform in these areas may be required if further progress is not made very soon.

4. Durable and non-discriminatory reform of the Child and Family Services Program

The Institute for Fiscal Studies and Democracy ("IFSD") has completed Phases One and Two of its research and has provided the parties with the framework for a funding approach that will support the needs and well-being of First Nations children, families, and communities in a non-discriminatory manner. The Caring Society is firmly committed to culturally based and evidence informed approaches and therefore supports the IFSD funding methodology to reform the discriminatory First Nations Child and Family Services Program. In particular, the Caring Society says that the following basic principles must frame this new funding approach:

- i. Funding must be culturally appropriate and based on substantive equality, the child's needs and best interests taking full account of the unique circumstances of the child's community.
- ii. Funding will be provided by Canada based on evidence informed well-being indicators for First Nations children, families and communities;
- iii. The well-being indicators will facilitate reliable data collection at a community, regional and national level to inform best practices and improve federal child welfare policies and legislation over time;
- iv. Funding will be based on a "bottom-up" budgeting approach driven by the actual needs of children, families and communities; and
- v. Funding will address the structural drivers of the over-representation of First Nations children in care, as well as the culturally-based child and family services.

As outlined in the September 2020 IFSD Phase Two Report, the focus of a new funding approach will be based on performance, measuring how child and family services funding can meet the actual needs of First Nations children, families and communities. Performance will be assessed by wellbeing outcome measures focused on protection and seventy-five indicators that capture the well-being of children, families and communities. This change will represent a fundamental shift from the bureaucratic top-down "fee for service" model, which is based on non-evidence informed assumptions that fail to measure or consider children's needs *and outcomes*.

The *Measuring to Thrive* framework is a results-based tool to plan, monitor, and assess the performance of policies and programs, against the goal of thriving First Nations children, families, and communities.¹ It is vital that the factors driving the over-representation of First Nations children in care (poverty, poor housing, substance abuse and domestic violence) be measured and addressed to ensure success.

With respect to the funding approach, IFSD recommends a bottom-up approach, backed by block transfer budgets with components addressing gaps in needs, including prevention, poverty, information technology and capital, with supplements. This approach yields a results-focused approach based on the well-being of First Nations children, protect their right to substantive equality, and place the best interests of the child at the forefront.

The Phase Two report appreciates that some recipients are ready for block funding now, while others will require a transition period. Therefore, the report dedicates significant effort in mapping out a transition strategy from the *status quo* to the new approach.

IFSD makes four fundamental recommendations:

- (i) adopt a results framework for the well-being of children, families and communities, such as the *Measuring to Thrive* framework;
- (ii) budget for results with a block funding approach that addresses gaps and is linked to the results framework (including a full assessment and remediation of capital needs and the drivers of the over-representation of children in care);
- (iii) establish a non-political First Nations policy and practice secretariat to do national data analysis and support First Nations and FNCFS Agencies to transition to First Nations governance; and
- (iv) establish a group of FNCFS Agencies and First Nations willing to be early adopters of the new performance and funding approach to model implementation and inform necessary adjustments.

To be clear, the Caring Society is not simply recommending the implementation of the IFSD Phase Two Report as a matter of policy. Instead, the Caring Society sees the framework set out in the IFSD Phase Two as a compliance mechanism with the Tribunal's findings and orders in relation to child and family services, to ensure that the discriminatory nature and components of the FNCFS Program do not recur. Canada must eliminate the discrimination imposed on First Nations children and families by its FNCFS Program. To date, the Caring Society is not aware of any other funding approaches that have been proposed, much less any that will meet the requirements of this regard.

¹ Importantly, IFSD directly considered the Treasury Board Secretariat's *Policy on Results and Guide to Departments on the Management and Reporting of Horizontal Initiatives* in developing this framework.

The Caring Society is pleased that Canada has agreed to fund IFSD to complete a third phase of the IFSD research to model the proposed outcomes-based funding approach. This will provide First Nations communities and agencies with more clarity on how this evidence-based funding approach would affect their communities. These funding simulations will also inform any changes needed to optimize the positive impacts for First Nations children, youth, and families.

We are very concerned, however, that Canada wants to exclude First Nations who wish to affirm their jurisdiction using the tools provided by the *Act Respecting First Nations, Metis and Inuit children, youth and families* (“Bill C-92”) from the protection of the Tribunal’s orders.

The consequences of excluding First Nations pursuing jurisdiction pursuant to Bill C-92 are evident in the initial steps Canada is taking to implement Bill C-92. Indeed, in a Bill C-92 funding agreement received by the Caring Society in September of 2021, the federal government chose to import an untested funding approach developed by Crown-Indigenous Relations and Northern Affairs Canada that includes an inflation adjustment that was discredited in the Wen:De reports for use in child and family services. This funding approach does not reflect the significant amount of First Nations-led research regarding Canada’s funding for First Nations child and family services over the past two decades, or the Tribunal’s findings.

As has been addressed at the technical level between the Caring Society and ISC officials, the Caring Society is very concerned that Canada is striking these funding agreements in an effort to shield itself from its obligations pursuant to the Tribunal’s orders to fund child and family services in a non-discriminatory manner that is evidence informed. The Caring Society’s position is that Canada cannot enter into funding agreements with First Nations that perpetuate the discrimination found by the Tribunal in this case particularly as the *Canadian Human Rights Act* is cited as a minimum standard in Bill C-92. Given the Tribunal’s orders that Canada take measures to ensure the discrimination does not recur, Canada has a positive obligation to ensure any agreements it signs per Bill C-92 do not further this discrimination.

The Caring Society respectfully requests that the Tribunal retain jurisdiction until such time that Canada implements a comprehensive and durable non-discriminatory funding approach. This continued jurisdiction is required given Canada’s long record of not implementing evidence informed funding solutions to remedy harms to First Nations children, youth and families (i.e.: Canada’s choice to not implement the Joint National Policy Review (2000) or the Wen:De (2005) series of reports).

In conclusion, the Caring Society is very concerned that, nearly six years after the Tribunal ordered Canada to cease its discriminatory conduct, that Canada continues to replicate many of the discriminatory practices of the past. While the Caring Society will continue with its long-held process of advising Canada of our concerns and suggesting constructive remedies, we are not in a position to rule out the need to seek further specific relief from the Tribunal at this point and it is clear to us that ongoing supervision by the Panel is still required.

Please do not hesitate advise us if the Tribunal requires further information or submissions on any of the points above.

Yours truly and respectfully submitted,



David P. Taylor

DPT/dn

Copy to: **Robert Frater, Q.C., Anne McConville, Jonathan Tarlton, Paul Vickery,
Patricia MacPhee, Kelly Peck, Max Binnie and Meg Jones**
Co-counsel for the respondent Attorney General of Canada

David Nahwegahbow, Stuart Wuttke and Adam Williamson
Co-counsel for the complainant Assembly of First Nations

Jessica Walsh and Anshumala Juyal
Co-counsel for the Canadian Human Rights Commission

Maggie Wente and Sinéad Dearman
Co-counsel for the interested party Chiefs of Ontario

Justin Safayeni
Co-counsel for the interested party Amnesty International

Julian Falconer, Akosua Matthews and Molly Churchill
Co-counsel for the interested party Nishnawbe Aski Nation

Sarah Clarke, Anne Levesque and David Wilson
***Co-counsel for the complainant First Nations Child and Family Caring Society
of Canada***