Tribunal File No: 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 CANADA,
NISHNAWBE ASKI NATION and
B.C. FIRST NATIONS LEADERSHIP COUNCIL

Interested Parties

WRITTEN SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION

dated July 30, 2024
(re Notice of Cross Motion of the Attorney General of Canada dated March 15, 2024)

I. Introduction

1. On May 10, 2024, the Canadian Human Rights Commission (the "Commission") filed written submissions setting out its position on remedies sought by the First Nations Child and Family Caring Society ("Caring Society") in its motion regarding the effective implementation of Jordan's Principle.[1]

[1] Written Submissions of the Canadian Human Rights Commission dated May 10, 2024 (re Caring Society Notice of Motion dated December 12, 2023) ("Commission Submissions").

2. Since that time, the Commission has had an opportunity to see additional written submissions from the other parties – namely, the Assembly of First Nations ("AFN")[2], the Attorney General of Canada ("Canada")[3], and the Caring Society.[4] It has also seen the submissions of the interested party, the B.C. First Nations Leadership Council ("FNLC").[5] The interested parties COO and NAN advised they would not make written submissions on the Caring Society's motion.[6]

3. These written submissions supplement the Commission's submissions dated May 10, 2024. They include the Commission's comments on the remedies that Canada seeks in its cross motion. They also engage at times with positions the AFN, Caring Society, and/or FNLC expressed in the materials delivered after the Commission filed its initial submissions. The Commission does not address every issue raised by the other participants, and instead proceeds to discuss the following topics in sequence:

- Negotiation is the preferred pathway to sustainable long-term solutions.
- CHRT remedial orders bind Canada, as the party found to have committed discriminatory practices.
- Interim guidance may help the parties reach agreement on the identification and prioritization of urgent cases.
- No new orders are appropriate at this time regarding timelines for determinations or referrals to other programs or service providers.

[2] Written Submissions of the Complainant, Assembly of First Nations Re: Non-Compliance Motion filed December 12, 2023, corrected version dated May 21, 2024 ("AFN Submissions").
[3] Factum of the Attorney General of Canada dated May 24, 2024 ("Canada Submissions").
[4] Reply Written Submissions of First Nations Child and Family Caring Society of Canada Re: Non-Compliance Motion filed Dec 12, 2023, dated June 7, 2024 ("Caring Society Reply Submissions").
[5] Written Submission of the Interested Party, the First Nations Leadership Council, dated July 16, 2024 ("FNLC Submissions").
[6] Letter from COO dated May 10, 2024; and email from NAN dated May 10, 2024.

II. Submissions

A. Negotiation Is a Preferred Pathway

(i) Negotiation and Reconciliation Generally

4. All participants on this motion appear to share a common hope – namely, that negotiations can lead to long-term solutions the Tribunal will consider effective and responsive to its findings regarding Jordan's Principle.[7] The Commission agrees this would be an ideal outcome.

5. Enabling agreement on long-term reform would be consistent with past comments from the Panel encouraging parties to resolve issues through negotiation in the spirit of reconciliation.[8] Indeed, the Panel has put this into practice on several occasions, issuing consent orders on specific matters agreed to by the parties.[9] And it has said it will revisit its continuing retention of jurisdiction if the parties file an agreement on long-term reform (whether on full consent or otherwise) that the Panel accepts will eliminate and prevent the systemic discrimination previously found.[10]

6. Enabling discussions would also be consistent with judicial commentary favouring negotiation over litigation. For example, in dismissing Canada's attempts to overturn earlier rulings in this case, Justice Favel of the Federal Court endorsed the Panel's dialogic approach to remedies, saying, "Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged …"[11] The Supreme Court of Canada has made recent comments to similar effect, stating:

---

[7] AFN Submissions at paras 5, 6, 45-50; Caring Society Reply Submissions at para 64; Canada Submissions at paras 3, 41, 54, 57-58, and 78; FNLC Submissions at paras 62 and 66.
[8] For just one recent example, see: 2023 CHRT 44 at para 22.
[9] For examples, see: 2017 CHRT 7 (re Choose Life); 2017 CHRT 35 (re Jordan's Principle procedures); 2020 CHRT 36 (re Jordan's Principle eligibility); 2022 CHRT 8 (various orders including post-majority care, IFSD funding, the ISC expert advisory committee, and prevention funding); and 2023 CHRT 44 (re compensation).
[10] See for example: 2023 CHRT 44 at para 227.
[11] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 300.

- "True reconciliation is rarely, if ever, achieved in courtrooms … As the Court noted in *Haida*, '[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests'…"[12]; and

- "…it is undeniable that negotiation and agreement outside the courts have better potential to renew the treaty relationship, advance reconciliation, and restore the honour of the Crown."[13]

7. Canada has said it would be open to attending mediation with an experienced Tribunal mediator other than the Panel members.[14] The Commission would attend Tribunal mediation alongside other parties if they agreed to the process and thought the Commission's involvement would be helpful.

(ii) The Dialogic Approach allows for Guidance and Interim Orders

8. As the Caring Society has observed[15], parties may seek negotiated solutions in good faith and still find themselves unable to agree. Where that happens, the dialogic approach to remedies properly allows parties to return to the Tribunal to seek clarification or guidance that may break an impasse and/or provide interim relief. The hope is that with the benefit of additional direction, the parties will be able to resume their discussions and reach agreements that effectively address and prevent the recurrence of discriminatory practices.

9. Indeed, the parties and Panel have experience with this exercise in this very case. For one example, in 2019 the parties found themselves unable to agree on the eligibility criteria for receiving services pursuant to Jordan's Principle. The Caring Society brought a motion. The Panel granted interim relief[16], provided clarification regarding its initial rulings[17], and directed the parties to work together to co-develop

---

[12] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 24.
[13] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 at para 303.
[14] Canada Submissions at para 41.
[15] Caring Society Reply Submissions at para 65.
[16] 2019 CHRT 7.
[17] 2020 CHRT 20.

criteria consistent with its ruling.[18] The parties then delivered an agreed process which the Panel approved, retaining jurisdiction to revisit the order as needed depending on the ongoing evolution of the case.[19]

10. In the Commission's view, this is what the Caring Society and Canada are seeking to do in their respective motions. Each is asking for orders that will shed additional light on what the Panel considers to be an effective response to its prior rulings on Jordan's Principle. If persuaded it is appropriate on the evidence, the Panel may provide guidance in response that could inform the parties' next steps.

11. Taking all the above into account, the Commission agrees with the AFN that any orders the Panel may make on these motions should be interim in nature.[20] It should remain open to the parties to continue negotiations and later propose alternative approaches that may differ from the interim relief, but nevertheless be effective in addressing the discriminatory practices identified by the Panel.

II. Panel Orders are Binding on Canada

12. Canada has asked for clarification that the Panel's remedial orders only bind Canada, and do not bind First Nations or related organizations that administer Jordan's Principle pursuant to contribution agreements.[21] The Commission generally agrees with this proposition, subject to the additional comments outlined below.

13. As a starting point, the Tribunal's authority to grant public interest remedies comes from s. 53(2) of the *CHRA*. That provision says that where a complaint is substantiated, a panel may, "…make an order against the person found to be engaging or to have engaged in the discriminatory practice…" (emphasis added). The only party found to have engaged in discrimination in this case is Canada. As a result, remedial orders in this case can only bind Canada. First Nations or affiliated organizations have

[18] 2020 CHRT 20 at paras 321-322.
[19] 2020 CHRT 36 at paras 54 and 59.
[20] AFN Submissions at paras 7, 50 and 105.
[21] Canada Submissions at para 82(e).

not been found liable for infringements and therefore cannot be directly subject to remedial orders.

14. However, as the Caring Society and FNLC have pointed out, this is not necessarily the end of the discussion. While the Panel cannot make orders that directly bind First Nations and affiliated organizations, it can make orders that impose obligations on Canada in its dealings with such third parties – and should do so, if satisfied on the evidence that such orders are needed to effectively eliminate and prevent the recurrence of discriminatory practices.

15. In this regard, all parties aim to find long-term solutions that would allow the Panel to relinquish its retained jurisdiction. In the context of Jordan's Principle, the Commission believes this will require Canada to have funding and systems in place to ensure First Nations children can access the products, services, and supports they need, when they need them – consistent with substantive equality, the best interests of the child, and the Panel's rulings identifying discriminatory practices.

16. Indeed, as the Tribunal explained in a ruling released earlier today, its focus on eliminating systemic discrimination, "…will be achieved in the long-term especially if programs and services are prevention-oriented and are designed and delivered by First Nations themselves in respecting their inherent right of self-governance and if the programs and services are sustainably and adequately funded and resourced by Canada who has a legal obligation to cease and desist the systemic discrimination found under the Tribunal's orders … Canada still has an important role to play and legal and positive obligations toward First Nations and First Nations peoples regardless of whether they decide to deliver services or not."[22]

17. The Commission thus agrees with the Caring Society and FNLC that the Panel can properly require Canada to ensure any willing First Nations or affiliated

[22] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2024 CHRT 92 at para. 1 (not yet available online, version shared with parties still subject to editorial revision).

organizations that agree to administer Jordan's Principle are properly resourced and supported to achieve that outcome.[23]

C. Identifying and Prioritizing Urgent Cases

18. In its earlier submissions, the Commission agreed with the Caring Society that the recent or imminent death of a caregiver, and the presence of a state of public emergency, are hallmarks that could properly make a Jordan's Principle request urgent in appropriate cases.[24]

19. In their subsequent submissions, Canada and the AFN have expressed concerns regarding the Back-to-Basics approach of allowing requesters to self-declare urgency. They say the ability to self-declare is creating operational challenges that detract from the effective identification and determination of truly urgent cases.[25]

20. The Commission agrees the effective delivery of products, supports, and services to First Nations children requires an effective means of identifying and prioritizing cases involving imminent risks to health and safety.

21. In this regard, Canada has asked for an order directing the Caring Society, AFN, COO, and NAN to work with it to co-develop objective criteria for urgency within 60 days.[26] The AFN has said that responses to urgency are properly the subject of negotiations.[27] The FNLC appears to be open to the co-development of an effective triage process for urgent Jordan's Principle requests[28], as does the Caring Society (subject to its observation that ISC's own audit of self-declarations has only identified likely misclassification in 18.5% of urgent cases at most).[29]

22. Against this backdrop, the Commission supports an order directing renewed efforts to co-develop an effective triage process that includes criteria for urgency.

---

[23] Caring Society Reply Submissions at paras 73-75; FNLC Submissions at paras 57-61.
[24] Commission Submissions at para 16.
[25] Canada Submissions at paras 28-29, 32-35, and 62-65; AFN Submissions at paras 65-72.
[26] Canada Submissions at paras 57 and 84(2)(a).
[27] AFN Submissions at paras 74 and 80.
[28] FNLC Submissions at para 28.
[29] Caring Society Reply Submissions at paras 16-19.

Canada did not ask for an order directing the Commission's participation in that process, and the Commission does not believe its participation would be necessary. The other parties are the experts. However, if an order of this kind is made and the parties believe it would be helpful, the Commission would be pleased to join the discussions.

23. While the Commission is broadly supportive of an order directing further consultation, it also encourages the Panel to provide some additional guidance on an interim basis. Based on a review of the materials exchanged to date, it may otherwise be difficult for the parties to move past the apparent impasses that led to the filing of this motion and cross-motion in the first place.

24. For just one example, and as noted above, there is a disagreement about allowing requesters to self-identify situations of urgency. While that is undoubtedly a feature of the Back-to-Basics model, it does not appear to be expressly required by any of the Panel's previous orders regarding Jordan's Principle – and there appears to be a wide divergence of views about the value of the approach. The Commission therefore expects it would be helpful for the parties to receive the Panel's views on whether respecting self-declarations is a necessary component of an effective response to its Jordan's Principle rulings. With interim clarification on this and other matters at issue on these motions (not all of which are discussed in these Submissions), the parties may be able to co-develop approaches that effectively eliminate and prevent the recurrence of discriminatory practices.

D. No New Orders Needed regarding Timelines and Referrals

25. Canada asks that the determination timelines to which it previously agreed either be extended (to 48 hours for urgent individual requests and one week for urgent group requests) or effectively lifted altogether (all non-urgent requests to be determined "without unreasonable delay").[30]

[30] Canada Submissions at para 82(c).

26. In its first major ruling on implementation of remedies relating to Jordan's Principle in 2017, the Tribunal took note of evidence suggesting Canada had been more focused on its administrative concerns than the best interests of children and the need to act expeditiously.[31] It noted a lack of clarity about how long intake and evaluations could take, cited evidence showing delays can have tragic consequences, and found it appropriate to order reasonable timelines for the initial evaluation and determination of requests[32] – which were subsequently adjusted on the consent of all parties, including Canada.[33]

27. Circumstances have undoubtedly changed greatly and for the better since 2017. Guided by the Panel's rulings, the Federal Court's dismissal of its application for judicial review, and negotiations with the parties, Canada has vastly increased the delivery of much-needed products, services, and supports to First Nations children. At the same time, the evidence on these motions shows that concerns remain about administrative delays in the processing and payment of requests. In all the circumstances, considering the history and development of Jordan's Principle, the Commission believes existing timelines should remain in place at least for now. However, as mentioned in its earlier submissions, the Commission believes it would be helpful for the Panel to provide interim clarification about when the determination clock should start to run under its past rulings.[34]

28. The Commission agrees with Canada it would not make sense to leave in place mandatory timelines that are unrealistic and impossible to meet. However, the Commission also understands that Canada attributes many of its current operational challenges to the concerns it and the AFN have expressed around the over-identification of self-declared urgent cases. If the Panel provides guidance that allows the parties to co-develop an effective process for identifying and triaging truly urgent cases, some of the operational pressures cited by Canada may be alleviated. As a

---

[31] 2017 CHRT 14 at para 93.
[32] 2017 CHRT 14 at paras 88-99 and 135(2)(A)(ii).
[33] 2017 CHRT 35 at paras 7-8 and 10.
[34] Commission Submissions at paras 26-27.

result, the Commission believes it would be premature to make changes to the previous consent order on timelines at this time.

29. Canada has also asked for an order clarifying it can refer Jordan's Principle requesters to existing and applicable group requests, or to relevant programs that First Nations or affiliated organizations are already administering under contribution agreements.[35]

30. The Commission agrees with the Caring Society that nothing in the Panel's existing orders would prohibit Canada from taking this approach – as long as Canada is satisfied the receiving program or entity is adequately funded and supported, and properly considers the potential effects on the timeliness of delivering the requested product, service, or support (if the request is to be granted).[36]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 30, 2024

Brian Smith
Canadian Human Rights Commission
Legal Services Division
344 Slater Street, 9th Floor
Ottawa, Ontario K1A 1E1
Tel: 613-656-5612
Fax: 613-993-3089
brian.smith@chrc-ccdp.gc.ca

[35] Canada Submissions at para 82(d).
[36] Caring Society Reply Submissions at paras 23-25.