

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and the ASSEMBLY OF FIRST NATIONS**

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)**

Respondent

- and -

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

**REPLY of the ASSEMBLY OF FIRST NATIONS to the RESPONDENT'S SUBMISSIONS ON REMEDY
REGARDING IMMEDIATE RELIEF ITEMS PURSUANT TO THE PANEL'S FEBRUARY 10, 2016 DIRECTIVE**

David C. Nahwegahbow, IPC, LSM
NAHWEGAHBOW, CORBIERE
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
T: (705) 325-0520
F: (705) 325-7204
dndaystar@nncfirm.ca
**Co-Counsel for Complainant
Assembly of First Nations**

Stuart Wuttke
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
T: (613) 241-6789 Ext. 228
F: (613) 241-5808
swuttke@afn.ca
**Co-Counsel for Complainant
Assembly of First Nations**

TO: The Registry Office
CANADIAN HUMAN RIGHTS TRIBUNAL
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

AND TO: **Jonathan Tarlton, Melissa Chan & Patricia MacPhee**
JUSTICE CANADA
Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street,
Halifax, NS B3J 1P3

Terry McCormick & Ainslie Harvey
JUSTICE CANADA
Aboriginal Law Section
Department of Justice BC Region
900-840 Howe Street
Vancouver, BC V6Z 2S9

Counsel for the Respondent
The Attorney General of Canada

AND TO: **Anne Levesque, Sébastien Grammond,
David P. Taylor, & Sarah Clarke**
JURISTES POWER | POWER LAW
Suite 1103 – 130 Albert Street
Ottawa, ON K1P 5G4

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

AND TO: **Daniel Poulin & Samar Musallam**
CANADIAN HUMAN RIGHTS COMMISSION
Canada Place
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1

Counsel for the Canadian Human Rights Commission

AND TO: **Maggie Wente**
OLTHUIS, KLEER & TOWNSHEND LLP
250 University Ave, 8th Floor
Toronto, ON M5H 3E5

Counsel for the Interested Party
Chiefs of Ontario

AND TO: **Justin Safayeni**
STOCKWOODS LLP BARRISTERS
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Counsel for the Interested Party
Amnesty International

Overview

1. The Assembly of First Nations (AFN) submits the Respondent's submissions on remedy dated March 10, 2016 are vague and lack the clarification that was required of them pursuant to the Panel's order of February 10, 2016.

Immediate Relief

2. The Respondent committed to providing additional details on the immediate relief items following the release of the Federal Budget on March 22, 2016. The AFN submits that the Federal Budget contains insufficient detail with respect to immediate relief directed towards ceasing discriminatory practices against First Nations children and families on-reserve.
3. The Federal Budget commits \$71 million in the fiscal year 2016-2017, an additional \$99 million in the fiscal year 2017-2018, and a total of \$634.8 million over five years to "support both the immediate needs of First Nations children and to begin a process of reform to strengthen the First Nations Child and Family Services Program...".
4. Focussing only on the issue of immediate relief, the AFN submits that the Respondent provided no details on which specific remedies this amount would address, whether this amount will be directed to First Nations child and family service agencies, whether this amount will be used to fund initiatives by provincial governments or non-aboriginal agencies, and when additional details on immediate relief investments could be expected.
5. The AFN submits that the \$71 million is insufficient to meet the Orders issued by the Canadian Human Rights Tribunal and that the Respondent has yet to meet its immediate legal obligations under the Tribunal's decision, 2016 CHRT 2, which states at paragraph 481:

"AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle."

National Advisory Committee

6. The AFN received the invitation to meet with the Respondent and the Co-complainant, the Caring Society, for initial discussions surrounding a newly re-established National Advisory Committee. Although this is a positive step toward implementing the changes pursuant to the Tribunal's decision (2016 CHRT 2), it is an opportunity that falls outside the realm of immediate relief.
7. Negotiations continue on this front however these initial steps have not provided further clarification as to how the Respondent can best implement the immediate reforms on a practical, meaningful and effective basis.
8. The AFN notes that the Tribunal's decision calls for fundamental change of the FNCFS Program, which the National Advisory Committee and another iteration of the Canadian Incidence Study will greatly inform and assist in the required reforms. The AFN is interested in pursuing medium and long-term solutions through a negotiated process that builds upon recommendations of the National Advisory Committee.

Changes to the FNCFS Program

9. The Respondent asserts that the changes to the funding formula proposed by the Complainants are based on dated studies and information which no longer accurately reflect the current needs of First Nations children and families.
10. The Respondent refused to provide the AFN with its updated costing analysis for proposed new investments based on the current data available by jurisdiction. Rather, the Respondent indicated it would only share a copy at an in-person meeting with the AFN and Caring Society. The AFN submits that should the Respondent possess documents and information upon which the Respondent is basing its proposed changes to the FNCFS Program, that we, along with the Caring Society, have access to it in order to perform our own costing analysis of any proposed new investments.

11. The Respondent states at paragraph 19 of their submissions that changes to the FNCFS Program are already occurring. This paragraph also says “[t]he updated amounts, currently under consideration, more accurately reflect the needs and requirement of the FNCFS Program and are still expected to be finalized and adjusted during tripartite discussions.”
12. The AFN submits that changes to the FNCFS Program, as suggested by the Respondent, should not be subject to finalization of tripartite discussions. The Respondent can cure many of the deficiencies and discriminatory elements of the FNCFS Program by working with the First Nations and First Nation organizations directly.

Jordan’s Principle

13. The Respondent did not provide submissions on Jordan’s Principle despite being ordered to cease applying its narrow definition and to take measures to immediately implement the full meaning and scope of Jordan’s Principle. This is concerning for the AFN considering the Panel has identified Jordan’s Principle as an important immediate relief item. It is also concerning because the Order is dated January 26, 2016 and remains to be meaningfully acted upon by the Respondent.

Federal Spending Power Principles

14. The Respondent has been found to be in violation of the *CHRA*. The *CHRA* is an important piece of human rights legislation in Canada and is applicable to the Respondent, the Ministry it represents, and the Federal Government. The Tribunal’s decision (2016 CHRT 2) and the Orders contained therein are binding upon the Respondent and the Federal Government.
15. It is the Respondent’s and the Federal Government’s responsibility to find the means to abide by the *CHRA* and the decision of the Tribunal. The Respondent cannot run afoul of the law or evade the reach of legislation by pleading that Parliament failed to appropriate sufficient funds. Parliament is presumed to know the law and to abide by the law, including the *CHRA* and the decision of the Tribunal.

16. The nature of the discrimination concerns inequitable funding levels and requires that certain budgetary decisions be made immediately to stop and prevent the discrimination. The Respondent has demonstrated it is afforded a certain degree of flexibility when it comes to the allocation of financial resources. These financial decisions must be in compliance with the Tribunal's decision and Orders

Conclusion

17. In the case at hand, the evidence has demonstrated the Respondent's delivery of the FNCFS Program has resulted in discrimination. The AFN is requesting robust and creative remedies that will promote and support substantive equality for First Nations children and families, and that will address the Respondent's previous failures to mobilize resources in a practical, meaningful and effective basis. The AFN urges the Panel to issue an Order pursuant to s. 53(2) that the Respondent comply with its Orders regarding immediate relief, and that the terms be worked out in consultation with the Commission and in consultation with the co-complainants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 31, 2016



David C. Nahwegahbow & Stuart Wuttke
Co-Counsel for the Complainant
Assembly of First Nations