

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Ottawa, Canada K1A 1J4

February 10, 2016

By e-mail

(See Distribution List)

Dear Counsel,

**Re: First Nations Child and Family Caring Society et al. v. Attorney General of Canada
Tribunal File: T1340/7008**

Please see below directions from the Panel Chair with regard to next steps in this matter.

Pursuant to its letter of February 5, 2016, the following are the immediate relief items for which the Panel requests further clarification from the parties.

General

The Panel's general order in 2016 CHRT 2 was for AANDC to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in the decision. The Panel also ordered that AANDC cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope. To implement these orders in the immediate and long term, the Complainants, Commission and Interested Parties have made a series of remedial requests. In the immediate term, the Panel understands those requests to include making immediate changes to the FNCFS Program, 1965 Agreement and Jordan's Principle; increasing funding to the FNCFS Program; and, transitioning those provinces still under Directive 20-1 to the EPFA.

The Panel requires clarification on each of these items as indicated below. If there are other immediate relief items that the Panel has not addressed in this letter, the parties are asked to provide details thereon in their submissions in response to this letter.

Changes to the FNCFS Program

At paragraph 478 of its final submissions, the Caring Society submits:

“The orders sought by the Caring Society are based on the evidence before the Tribunal and relate to the flawed assumptions, perverse incentives and shortcomings that most obviously contribute to the presence of systemic discrimination. Those factors have been specifically identified in part III.C.ii.b of the Commission’s written submissions, which the Caring society adopts. The Caring Society submits that Respondent should be ordered to eliminate the flawed assumptions and perverse incentives in its FNCFS system, and to rectify the shortcomings in this system. This measure of relief would significantly contribute to the elimination of discrimination.”

In this regard, pages 206-207 of the Caring Society’s submissions contain a series of specific requests for changes to the FNCFS Program. There is also a specific request related to the EPFA at page 208. The Panel notes that the specific requests at pages 206-208 do not address all the factors identified in Part III.C.ii.b of the Commission’s written submissions. The Panel requests clarification on the above.

With specific regard to the request for changes to the funding of legal costs, the Caring Society asks that legal costs related to child welfare statutes and inquiries be fully reimbursable as maintenance expenditures. In addition, it requests corporate legal costs be fully reimbursable and no longer capped at \$5000. If legal costs are reimbursable, and given rates among lawyers vary, the Panel requests clarification on the practical implications of implementing this order. That is, would legal costs be reimbursable no matter the rate and overall cost? Or, for example, would legal costs be based on the average hourly rate a lawyer may receive in a given province and in accordance with his/her experience and expertise?

FNCFS Program budget adjustment

Paragraph 480 of the Caring Society’s submissions state:

“[i]t is expected that the elimination of the flawed assumptions, perverse incentives and shortcomings in Canada’s FNCFS system will require an immediate increase of approximately \$108.13 million in annual funds provided to FNCFSA’s, plus a 3% escalator as adjusted from 2012 values to the date of the order”.

The Panel requires clarification on the parameters of this requested budget adjustment and how it fits in to the larger requests for mid and long term orders. As the Panel understands it, the requested budgetary adjustment would only address immediate needs and, following other requested reforms to the FNCFS Program, may need to be adjusted again over time. Therefore, do the Complainants and Commission have a specific time period surrounding the

request for the budgetary adjustment? And, to prevent perpetuating discrimination and to achieve substantive equality in the delivery of culturally appropriate child and family services to First Nations on reserve, how will any future budgetary adjustments be addressed?

Transition from Directive 20-1 to the EPFA

The Caring Society seeks to transition those jurisdictions currently regulated by Directive 20-1 to the EPFA within six months, subject to the other orders requested in its submissions.

How will effective consultation with First Nations' communities at tripartite tables, to ensure services are adequate and culturally appropriate, be achieved within six months? Furthermore, the Caring Society requested that the value and structure of this initial transition from Directive 20-1 to EPFA be subject to recommendations from the National Advisory Committee and regional tables.

The Panel would also like additional detail about how this requested transition fits into the requests for mid and long term reforms to the FNCFS Program. In other words, the Panel wishes to eradicate discrimination and achieve substantive equality in the best interest of the children in the most efficient and effective way possible. It does not want any immediate orders to affect any future reforms to the FNCFS Program. Therefore, the parties are asked to elaborate on this issue and the implementation of this requested transition should it be awarded by the Panel.

Jordan's principle

The Panel has ordered AANDC 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.

In addition, the Caring Society's submissions make another request for an order that Canada be compelled to enter into negotiations with the Complainants and Commission to fund a new Jordan's Principle definition, dispute resolution process, appeal mechanism and related public education campaign.

The Panel understands the above request to be mid to long term relief, namely in order to ensure proper consultation with First Nations peoples and groups of interest. Given there is an order to implement the full scope and meaning of Jordan's Principle as an immediate relief, the Panel asks the Complainants, Commission and Interested Parties to provide an outline and timeline of how they see the above request unfolding if awarded by the Panel.

1965 Agreement

The Complainants and the COO request an order that AANDC provide full reimbursement of activities that are mandated by the Ontario Child and Family Services Act (the CFSA). They also request a study of the 1965 Agreement in order to identify potential reforms to the manner in which AANDC funds child and family services on reserves in Ontario.

Studies of the FNCFS Program and 1965 Agreement may best inform how both funding methods can effectively be reformed; however, such studies will take some time. Given these considerations, if the Panel was to order the relief above, what would be a reasonable process and timeline to ensure efficient and effective implementation of the remedy requested?

Response

The Panel requests a response to the above items from the Complainants, Commission and Interested Parties by February 18, 2016. Thereafter, AANDC's submissions are requested by February 25, 2016. Three days after AANDC provides its submissions, the Complainants, Commission and Interested Parties may provide a reply, by March 2, 2016.

As indicated in its February 5, 2016 letter, the Panel continues to encourage the parties to discuss and attempt to resolve the outstanding remedies flowing from its decision in this matter and to keep the Panel informed of any ongoing negotiations.

Regards,

Sophie Marchildon,
Panel Chairperson

If you have any questions or concerns further to the above, please do not hesitate to contact the undersigned by email at registry.office@chrt-tcdp.gc.ca.

Yours truly,



Dragiša Adžić
Registry Officer

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