

Michel Bastarache, C.C., Q.C. (of counsel)

November 22, 2016

BY EMAIL (Dragisa.Adzic@tribunal.gc.ca)

Dragisa Adzic
Registry Operations
Canadian Human Rights Tribunal
11th Floor, 160 Elgin Street
Ottawa, ON K1A 1J4

Dear Mr. Adzic:

Re: FNCFCSC et al. v. Attorney General of Canada (Tribunal File T1340/7008)

We write further to your letter of November 14, 2016. Further to the agreement reached by the parties at the November 8, 2016 Case Management Meeting, please find attached the Caring Society's Notice of Motion regarding immediate relief in the above-noted matter.

Yours truly,

JURISTES POWER | POWER LAW



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cc Jonathan Tarlton, Ainslie Harvey, Melissa Chan, Terry McCormick, and Patricia MacPhee **Counsel for the respondent Attorney General of Canada**

Daniel Poulin and Samar Musallam
Counsel for the Canadian Human Rights Commission

David Nahwegahbow and Stuart Wuttke
Counsel for the complainant Assembly of First Nations

Maggie Wente and Judith Rae, **Counsel for the interested party Chiefs of Ontario**

Justin Safayeni, **Counsel for the interested party Amnesty International**

Julian N. Falconer and Akosua Matthews
Counsel for the proposed interested party Nishnawbe Aski Nation

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
Anne Levesque

Sébastien Grammond, Ad.E. *University of Ottawa*
Sarah Clarke *Clarke Child & Family Law*

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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, on Wednesday March 22, 2016 at 9:30 a.m. or as soon thereafter as it may be heard.

The motion is part of a series of motions being brought by the Complainants and Interested Parties in this matter and is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure*, and is for orders under Rules 1(6), 3(1), and 3(2)(d) and pursuant to the Canadian Human Rights Tribunal’s continuing jurisdiction in this matter. The proposed motion will be heard orally.

AND TAKE NOTICE THAT THIS MOTION IS FOR:

Declarations of non-compliance

1. A declaration that the Respondent has failed to comply with the Tribunal’s Orders in 2016 CHRT 2, 2016 CHRT 10, and CHRT 16 by:
 - a. continuing to decrease or further restrict the funding of First Nations Child and Family Services Agencies (“FNCFS Agencies) (2016 CHRT 16, para 122);
 - b. Failing to immediately remedy the adverse effects of its failure to appropriately fund the legal costs of FNCFS Agencies (2016 CHRT 2, para. 389, CHRT 16, para. 36); and
 - c. Continuing to scale the core funding of FNCFS Agencies based on population (2016 CHRT 16 at para 40).

Immediate relief

2. An Order that, until such time as the Respondent and the Complainants have agreed upon and implemented the appropriate measures necessary to end the discriminatory practice in question or until further order of the Tribunal, the Respondent:
 - a. Immediately cease decreasing or further restricting its funding to FNCFS Agencies;
 - b. Immediately and retroactively remedy any funding decreases imposed since January 26, 2016;

- c. Immediately replace the population thresholds for core FNCFS Agency funding with the recommended funding increments per every 25 children on reserve as recommended in *Wen:de*, adjusted for inflation, retroactive to January 26, 2016;
- d. Immediately fund all building repair costs of FNCFS Agencies at actual cost, retroactive to January 26, 2016, where required by applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations;
- e. Immediately fund the actual cost of FNCFS Agencies related to the receipt, assessment and investigation of child protection reports retroactive to January 26, 2016; and
- f. Immediately fund the child service purchase amount at \$200 with an adjustment to the consumer price index for fiscal years 2016-2017 and each fiscal year going forward, retroactive to January 26, 2016.

Orders to Disseminate Information

3. An Order that the Respondent:

- a. Advise all FNCFS Agencies by phone, email and mail and publicly post a notice on the INAC website, with 30 days of the order, that it will not require FNCFS Agencies to recover cost overruns related to maintenance from the prevention and/or operation funding streams and will restore any losses sustained by agencies, retroactive to January 26, 2016, within 30 days of the order; and
- b. Advise all FNCFS Agencies by phone, email and mail and publicly post a notice on the INAC website, within 30 days of the order, that it will immediately fund all necessary and immediately required building repair costs, retroactive to January 26, 2016, where required by applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations.

Preventing further discrimination

4. An Order requiring the Respondent to provide, within 30 days of the Order, a reliable data collection, analysis and reporting methodology, as well as ethical research guidelines

respecting Indigenous peoples that include protection of Indigenous intellectual property that will be applied to said research, for approval by the Tribunal upon further submissions by the parties, to guide the data collection process launched following its October 28, 2016 email to FNCFS Agencies; and

5. An Order requiring the Respondent to provide FNCFS Agencies with funding a minimum amount of \$25,000 for small agencies, which amount shall be scaled proportionately upward for large agencies and multi-site agencies where required for an FNCFS Agency to prepare for costing exercises.

Reporting compliance

6. An Order requiring the Respondent to serve and file affidavit material detailing its compliance with this Order within 30 days of the Order.

AND TAKE NOTICE THAT THE GROUNDS FOR THE MOTION ARE:

- (a) In a decision dated January 26, 2016 (“*Decision re: discrimination*”), this Tribunal found that the Respondent’s FNCFS Program, and its related funding models and federal-provincial agreements, is discriminatory contrary to section 5 of the *Canadian Human Rights Act* (“CHRA”). The Tribunal also found that the Respondent’s failure to properly implement Jordan’s Principle was discriminatory on the basis of race and national ethnic origin contrary to the CHRA;
- (b) In the *Decision re: discrimination*, this Tribunal ordered Canada to immediately cease its discriminatory practices in First Nations child and family services and to immediately fully and properly implement Jordan’s Principle;
- (c) This Tribunal ordered that remedies would be addressed in three stages: immediate, medium and long-term. This motion only addresses immediate relief;
- (d) Upon review of the parties submissions in response to the Tribunal’s February 10, 2016 questions regarding immediate relief, the Tribunal issued its April 26, 2016 Remedial Order (“the April Remedial Order”). The Tribunal reiterated and emphasized certain findings and

adverse impacts identified the *Decision re: discrimination* and ordered INAC to take measures to address those findings and adverse impacts immediately. The Tribunal directed the Respondent to provide a compliance report by May 10, 2016 regarding the implementation of its Order regarding Jordan's Principle, and a second compliance report by May 24, 2016 indicating how the Tribunal's findings were being addressed in the short-term in order to provide immediate relief for First Nations children;

(e) Upon review of the Respondent's May 10, 2016 and May 24, 2016 compliance reports and further submissions from the parties, this Tribunal released its September 14, 2016 Order (the "September Remedial Order"). Expressing concern that "INAC's submissions much of the same type of statements and reasoning that it has seen from the organization in the past", the Tribunal ordered, amongst other things:

- a. INAC will not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle;
- b. in determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level; and
- c. INAC is to immediately apply Jordan's Principle to all First Nations children on and off reserve.

(f) The Tribunal also ordered the Respondent to "clearly demonstrate" how it had addressed the funding flaws relating to other issues including:

- a. legal fees of FNCFS Agencies;
- b. building repairs where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations;
- c. the child service purchase amount; and
- d. and the receipt, assessment and investigation of child protection reports.

- (g) The Respondent has continued to decrease the funding of certain FNCFS Agencies;
- (h) The Respondent has continued to subject FNCFS Agencies to core funding scaling based on arbitrary population thresholds;
- (i) The Respondent has failed to apply and implement Jordan's Principle in a manner that applies to all First Nations children on and off reserve, including children with and without disabilities and short term critical illnesses;
- (j) The Respondent has failed to clearly demonstrate that it has addressed the funding flaws in its FNCFS Program relating to:
 - a. legal fees of FNCFS Agencies;
 - b. building repairs of FNCFS Agencies where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations;
 - c. the child service purchase amount; and
 - d. the receipt, assessment and investigation of child protection reports.
- (k) The Respondent has failed to appropriately advise all FNCFS Agencies that it has ceased its practice of recovering cost overruns relating to maintenance from their prevention and/or operations funding streams;
- (l) The Respondent has failed to appropriately inform all FNCFS Agencies of whether it will fund building repair costs and how this determination will be made;
- (m) On October 28, 2016, Margaret Buist, acting on behalf of the Respondent, communicated with FNCFS Agencies offering them \$25,000 to provide information relating to their "distinct needs and circumstances" ("the Respondent's October 28, 2016 data collection initiative"). None of the Complainants or the Interested Parties were consulted regarding this communication, or advised of the communication prior to it being sent;

- (n) The Respondent has no known expertise in social science research or First Nations child welfare. The Respondent's October 28, 2016 data collection initiative does not have a reliable data collection, analysis and reporting methodology, and is not subject to ethical research guidelines respecting Indigenous peoples that include protection of Indigenous intellectual property;
- (o) Given the Respondent's lack of expertise in social science research or First Nations child welfare, and given the lack of a reliable data collection, analysis and reporting methodology, the Respondent's October 28, 2016 data collection initiative, will generate flawed, incomplete and inconsistent data regarding the distinct needs and circumstances of FNCFS Agencies;
- (p) Section 53(2) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6;
- (q) Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure; and
- (r) Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavit of Dr. Cindy Blackstock to be affirmed;
- (b) The affidavit of Dr. John Loxley to be affirmed;
- (c) The affidavit of Dr. Marie Wilson to be affirmed;
- (d) The Respondent's Compliance reports dated May 10, 2016, May 24, 2016, September 30, 2016, and October 31, 2016; and
- (e) Such further and other materials as counsel may advise and this Tribunal may permit.

Dated: November 22, 2016



Sébastien Grammond / Sarah Clarke
David P. Taylor / Anne Levesque

Counsel for the Caring Society

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