Tribunal File No. T1340/7008

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

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

Respondent

And

CHIEFS OF ONTARIO AND
AMNESTY INTERNATIONAL CANADA

Interested Parties

CHIEFS OF ONTARIO REPLY

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1 This is in reply to the Respondent's (Attorney General of Canada) Closing Arguments submitted on October 3, 2014 – for the purpose of the final oral submissions to be made from October 20 to October 24, 2014, at the Tribunal in Ottawa.

2 With regard to paragraph 3 and related text of the Respondent's written submission, there were many witnesses who had worked for provincial authorities in the past. Many of the witnesses have almost daily interaction with provincial child welfare officials and systems. Therefore, they are able to speak authoritatively about the provincial service standard. Many documents, including studies involving Canada, also speak to the provincial standard. Even though the federal child welfare program is supposed to adhere to the provincial standard, the Respondent did not offer any direct evidence from provincial officials. If the provincial standard is determined to be applicable and binding, details of each provincial system can be examined during remedy implementation.

3 With regard to paragraph 7 and related text, the direct involvement of the federal government in child welfare programming on reserve is not a mere matter of social policy or government largesse. The longstanding involvement is based on federal jurisdiction under sec. 91(24) of the *Constitution Act, 1867*. While Parliament has not passed First Nation child welfare legislation, it is within its powers to do so. The federal government has relied on provincial standards and legislation as a matter of convenience and choice. The federal government has assumed responsibility for on-reserve child welfare based on established jurisdiction, and not as a mere exercise of its generic spending power.

4 With regard to paragraph 17 and related text in the Respondent's submissions, the shape of the federal on-reserve child welfare program is not subject to the unfettered discretion of Canada. There are limitations and standards that can

be traced to jurisdiction under sec. 91(24) of the *Constitution Act, 1867*, the *Canadian Human Rights Act* (CHRA), the fiduciary duty, the Honour of the Crown, the federal government's own adoption of the provincial standard, and other sources.

5 The basic position of the federal government appears to be that, while it tries to fund a decent program, it is under no legal obligation to do so. The ultimate logic is that Canada can provide funding (or even no funding) at whatever level suits its fancy. The children, the provinces, and others would have to pick up the pieces. This cannot be right.

6 With regard to paragraph 22 and related text, the evidence is clear that the federal government is not a mere bystander that hands out cash when the mood strikes it. The Respondent's submissions make clear that it is intimately involved in the shaping and delivery of the child welfare program on-reserve. The federal government is currently running three program models in the country (Directive 20-1, Enhanced, and 1965 Welfare Agreement). The Department of Aboriginal Affairs and Northern Development Canada (AANDC) controls the program by various means, including funding levels, the imposition of the provincial standard, the intervention of officials, and other controls as set out by the applicable funding authorities. The on-reserve program is what it is because of the decision making of Canada.

7 With regard to paragraph 24, Canada has jurisdiction to pass legislation with regard to child welfare on reserve. Canada has chosen to legislate in relation to on-reserve education, but not child welfare. The result is the same, though: sub-standard service on reserve to the generational harm of First Nation children and their families.

8 With regard to paragraph 27 and related material, the Respondent does indeed have a direct role in determining the cultural component of the on-reserve

program. This is accomplished through funding levels and the restrictive standards set by AANDC. Most First Nations still rely on Canada for the bulk of their local government funding. If there is inadequate funding for the cultural component of the program, Canada knows that the cultural component will suffer, or even not be there at all.

9 In paragraph 36 and elsewhere, the Respondent acknowledges that it has adopted the provincial standard for the delivery of the on-reserve First Nation program. This is clear in the evidence, including policy documents of Canada and the service contracts entered into with local authorities and First Nations. Having adopted the standard, Canada must abide by it. At the very least, adoption of the provincial standard should make it impossible for Canada to argue (which it does) that the standard is not relevant under the *CHRA*. It is inconsistent with the fiduciary position of Canada and the Honour of the Crown for Canada to get away with saying, in effect, "we were just kidding" in relation to the provincial standard. The provincial standard is not just a matter of policy or discretion.

10 Paragraph 44 is another example of AANDC interacting with provincial officials on an intimate basis to shape and deliver the program. There is another acknowledgment of the provincial standard.

11 With regard to paragraphs 61 and 62 (and related text), the full range of prevention services are not made available on-reserve in Ontario. There is a very minimal amount of funds available for prevention services on reserve in Ontario. The federal government plays an active role in the development and implementation of the program. While the program is delivered under provincial legislation, the shape of the program is determined by the actions of the federal government.

12 Starting at paragraph 70 there is an extensive review of other social programs delivered by Canada on-reserve. The relevance of this material is limited.

Presumably it is designed to draw attention away from the child welfare program and to create the false impression that Canada is a comprehensive provider across the board. Nothing could be further truth, as confirmed by the well-known dismal statistics on First Nation education, employment, health, etc. The list is endless. The focus here has to be on the on-reserve child welfare program.

13 The reference to the on-reserve education program at paragraph 79 is noteworthy. The federal government is in the midst of an overhaul of the education provisions of the *Indian Act*, based in part on the shocking sub-standard state of education on-reserve that was brought to the public eye through various media mechanisms. The education provisions of the *Indian Act* implicitly adopt the provincial program. With a legislative base (education) or without (child welfare), the bottom-line seems to be the same: a sub-standard program apparently motivated by a desire by Canada not to spend the same amount of money for First Nations children on-reserve that is spent on other Canadian children.

14 Paragraph 80 starts another list of semi-related federal social and health programs. All have well documented deficiencies, notably the Non-Insured Health Benefits Program, discussed at paragraph 81 of the Respondent's submissions. They do not remedy the fact that the child welfare program is sub-standard and discriminatory under the *CHRA*.

15 With regard to paragraph 106 and related material, it is submitted that the strict mirror comparison approach and rejection of the comparison to the provincial standard have been foreclosed by the Federal Court of Appeal decision in this case (and the decision of Canada not to seek leave to appeal to the Supreme Court of Canada). Taken to its logical conclusion, the federal position seems to be that the child welfare program on-reserve is immune from review under the *CHRA* because there is no acceptable comparison out there. The law is clear that comparison is only one tool in the box, albeit an important one. It is

necessary to look at the entire substantive context to determine if there has been discrimination.

16 With regard to paragraph 108 and related material, it is submitted that the proposed interpretation of the reference to "legislative authority" in the *CHRA* is too narrow, and not consistent with the ameliorative purpose and quasi-constitutional status of the *CHRA*. The fact is that Canada has multiple pieces of legislation that apply on-reserve, most notably the *Indian Act*. Parliament has the jurisdiction to pass on-reserve child welfare legislation, but has chosen not to, relying instead on provincial legislation as a matter of convenience.

17 Paragraph 111 seems to suggest that the highest value that applies here is the freedom of Canada to only spend money in its comfort zone. This belies the fact that Canada has adopted the provincial standard in relation to the child welfare program. The position is also inconsistent with binding legal standards based the *CHRA*, fiduciary obligation, the Honour of the Crown, and other sources.

18 With regard to paragraph 113, it is submitted that there is no bar to a cross-jurisdictional comparison. The provincial standard is the obvious and common sense measuring stick. It is the standard adopted by the Respondent. The logic of the federal position is that it is like a private sector philanthropist that makes donations to on-reserve child welfare when it feels like it. It can reduce the flow or even shut off the tap on a whim, without legal consequence. Having chosen to deliver the program for decades, and knowing the well being of tens of thousands of children depend on it, the federal government is compelled to abide by the *CHRA* in the delivery of the program.

19 With regard to paragraph 125 and related material, it is clear that the distinguishing feature is the identity of the First Nation recipients on-reserve.

They are being discriminated against because they are First Nation people living on-reserve. The motivation of the federal government appears to be to spend as little money as possible on First Nations children on-reserve because they place lesser value on the life of a First Nation child on reserve. The federal government is not able to mount serious defence of the non-discriminatory nature of the program, but instead relies on technicalities, such as the argument based on cross-jurisdictional comparison.

20 Again, in paragraph 127, the federal position seems to be reducible to the proposition that it is like a bystander in the world of child welfare programming on reserve. It has chosen for whatever reason to help out, but it cannot be held to any legally binding standard. This suits Canada's acknowledged primary objective of controlling expenditures based on macro federal fiscal policy.

21 In response to paragraph 129 and related material, it is submitted that the AANDC program is indeed a "service" under sec. 5 of the *CHRA*. The interpretation proposed by the Respondent is excessively narrow, very much in the spirit of the suggested approach to cross-jurisdictional comparison. The suggested interpretation is not consistent with the principles of liberal interpretation that apply to the statute. The services are customarily available to the public, First Nation people being part of the public. Practically all federal programs target one sector of the public or another. That does make them immune from scrutiny under the *CHRA*.

22 Paragraph 134 seems to take the position that the program is immune from scrutiny because some of the funding is transferred on a government-to-government basis, as opposed to direct service delivery to individuals. There is no wording in the *CHRA* that supports this kind of technical distinction. A similar critique applies to the emphasis in paragraph 138 on funds going to agencies, as opposed to real people. It is impossible to hide the fact that the

program engineered by AANDC has a direct and dramatic impact on actual children and families.

23 With regard to paragraph 141 and related material, there is evidence that some services available off-reserve are not available at all on-reserve. The overall picture is on-reserve programming that is sub-standard and therefore discriminatory.

24 With regard to paragraph 143 and related material, there is extensive evidence that the on-reserve program is discriminatory. In part, this came through witnesses intimately familiar with the provincial program, and through studies and other documents. The federal government did not generate direct evidence from the provincial system to try to establish that the federal system on-reserve is comparable. Instead, it relies mostly on technicalities, such as the argument against the use of cross-jurisdictional comparison, none of which are supported by the wording of the *CHRA*.

25 Paragraph 160 contains yet another acknowledgement of the standard of reasonable comparability to the provincial program. It is all over the federal program.

26 Contrary to the assertion in paragraph 164, documents prepared by responsible officials should be attributable to Canada. Also, with regard to paragraph 166 and related material, the relevant Auditor General reports and cited studies are authoritative documents that can be relied on. The real complaint put forth by the Respondent may be that all these independent type documents tend to support the position of the Commission and the Complainants.

27 Contrary to the assertion in paragraph 171, the on-reserve child welfare program is not only a matter of policy discretion. The fundamental and legally binding values at stake here are the ones stated in the *CHRA*, and not the apparent desire of Canada to control expenditures with impunity. It is not sufficient to

repeat the word "policy" over and over again, like a mantra, to escape the application of human rights legislation. The federal government does have policy discretion in many sectors, but when it chooses to act, as in the case of child welfare on reserve, it must comply with its own legislation, notably the *CHRA*.

28 With regard to paragraph 172 and related material, some form of comparison is often an important component of analysis under human rights legislation. However, contextual analysis is the essential feature, and comparison is only one tool in the box. In any event, it has been determined authoritatively that a strict mirror comparison test is not required. There is nothing in the text of the *CHRA* that obviates cross-jurisdictional comparison.

29 Contrary to the assertion in paragraph 176 and related material, this is not an open-ended policy exercise to design a better program. This is about the federal on-reserve child welfare program not conforming with the *CHRA*. With regard to paragraph 178, the Tribunal is not being asked to engage in a rudderless policy review.

30 Paragraph 179 acknowledges that a very high number of children on reserve are in care. This is caused in part by the discriminatory nature of the program. Eliminating that discrimination through remedies ordered by the Tribunal will start to address the high in-care numbers. That is the focus here. At the same time, other things have to be done in areas like health and education. The fact that there are problems in other areas and the situation is complex does not mean that the discrimination at the heart of the child welfare program should be ignored. There is no legal basis to throw up one's hands because the problems are complex and intertwined.

31 Contrary to the analysis starting at paragraphs 185, it is submitted that fiduciary obligation is a relevant part of the contextual analysis of discrimination in this case. The fact/law that there is a fiduciary relationship here is one of the

reasons why Canada cannot act with impunity in order to count pennies. It is not consistent with the fiduciary relationship and the Honour of the Crown for Canada to promise to deliver a program comparable to the provincial one, and then walk away from the promise in a most brazen fashion.

32 All of the core elements for finding a fiduciary obligation are present here. Canada has chosen to create and administer the child welfare program on reserve. It solemnly promised in writing, over and over again, to deliver that program according to the applicable provincial standard. The Respondent's own submissions make the point repeatedly that Canada exercises significant discretion over the program. First Nation children and families rely on the program. Contrary to the assertion in paragraph 195, Canada did undertake to act in the best interests of on-reserve children; the best interest standard is a key part of the federal program and is universally accepted in modern child care practice. The relevant children are among the most vulnerable people in Canada. The program is based on federal jurisdiction under sec. 91(24) of the *Constitution Act, 1867*. This is all in the context of on-reserve life that it strictly controlled by Canada through the *Indian Act* and numerous other pieces of related legislation. It is also in the overall context of the intimate historical relationship between Canada and First Nations. As noted, all the requirements for a fiduciary obligation are present. The same applies to the Honour of the Crown.

33 The Crown has breached its fiduciary obligation by breaking its solemn program commitment to the vulnerable people who relied on it to their detriment. This breach is a key part of the substantive contextual analysis required under the human rights legislation.

34 Contrary to the assertion in paragraph 189, a fiduciary obligation is not restricted to situations where reserve land is at stake. That is far too narrow an approach. It is enough for First Nation rights and interests to be affected.

35 Contrary to the assertion in paragraph 193, this is not a case of some free-floating general obligation to the public. This is a specific program engineered by Canada for the benefit of First Nation children and their families. These most vulnerable people have relied on the commitment of Canada to deliver a program that conforms to the provincial standard. This has to be understood in the context of the historical bilateral relationship (First Nations and the Crown) and the direct federal control of on-reserve life through the *Indian Act* and multiple pieces of related legislation.

36 Contrary to the assertion in paragraph 194, it is submitted that a fiduciary obligation in the case of First Nations does not require a finding that the fiduciary (i.e. Canada) has agreed or intends to forsake all other interests in favour of those of the beneficiary. That is an impossible standard for a public government like Canada to meet. The jurisprudence is clear that the federal government can be subject to a binding fiduciary obligation in the right circumstances. In this case, Canada is under a binding legal obligation to deliver a non-discriminatory child welfare program on-reserve, based in part on the *CHRA* and based in part on its fiduciary duty. In these circumstances, Canada does not have the discretion to walk away from its commitment regardless of the impact on First Nation children. Federal fiscal policy at the macro level is a consideration, but the remedies under consideration here do not threaten any fundamental federal fiscal interests, not by a long shot. Not wanting to spend a bit more money is not a defence.

37 With regard to paragraph 218 and related material, it is submitted that Jordan's Principle is an important part of the context here. The Principle applies to child care situations. It is part of the fabric of solemn commitment that First Nation children and their families have relied on.

38 The various criticisms of the sought after remedies, starting at paragraph 229, are rejected. The remedies sought by the Commission, the AFN, and in particular the Caring Society are fully and wholeheartedly supported. The

remedies are all designed to deal with a specific alleged breach of sec. 5 of the *CHRA*. It all comes down to that. It is not a fishing expedition designed to recast the federal program from top to bottom. Having said that, the program is complex and some thinking outside the box is required to ensure that appropriate remedies are structured and, most importantly, implemented and further enforced. As proposed by the Caring Society, some form of supervision for remedy enforcement is required, given the history of the program and the overall history between First Nations and Canada.

39 With regard to paragraph 242, it is true that the program's funding level has not been static over the years. It has increased, at least in absolute dollar terms, without adjusting for inflation. However, reluctant upward creep is not sufficient to meet the standard of non-discrimination. The federal government must cover the cost to protect First Nation children on reserve. Canada has not even whispered the suggestion this cost will cripple the fiscal position of the country. That would be nonsense. It just seems to prefer to spend more on things other than on-reserve children in need of care.

40 The absolute dollar numbers mentioned in paragraph 243 are meaningless with regard to the core discrimination issue under the *CHRA*. There is no provision the *CHRA* that says that a given federal service is immune from review if the federal government thinks that it is already spending a lot of money on it. In any event, there are many references in the submissions that make it clear that the overriding interest of the federal government is to restrict growth of the program in its unfettered discretion.

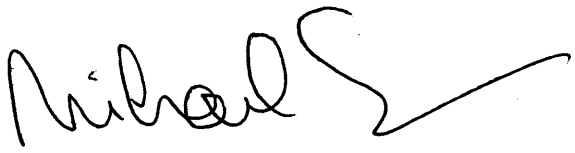
41 Contrary to the assertion in paragraph 246, while some prevention services are made available on reserve, the array of programs is below the standard of the provincial system

42 Finally, with regard to paragraph 251, it is submitted that capital costs are part of the equation in terms a discrimination finding and remedy. Capital costs were

originally part of the 1965 Welfare Agreement in Ontario. Sufficient capital is absolutely necessary for a modern quality child care system, whether on-reserve or off.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED in Toronto, Ontario, this ~~14th~~ 15th day of October, 2014.



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List of Authorities

Legislation

Constitution Act, 1867

Canadian Human Rights Act, RSC 1985, c. H-6

Indian Act, RSC 1985, c. I-5