

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 (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent (Responding Party)

- and -

**CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA
and NISHNAWBE ASKI NATION**

Interested Parties

**REPLY to RESPONDENT'S FACTUM
ASSEMBLY OF FIRST NATIONS
TO ENFORCE RESPONDENT'S FULL COMPLIANCE WITH THE DECISION OF THE CANADIAN
HUMAN RIGHTS TRIBUNAL, 2016 CHRT 2, AND THE PANEL'S REMEDIAL ORDERS**

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Reply

1. The Respondent has improperly coloured the Assembly of First Nations (“AFN”) and the other Moving Parties’ arguments as being a disagreement with the Respondent’s “policy choices”, which it argues cannot sustain a finding of ongoing discrimination.
2. The AFN submits that the Respondent’s re-framing of the issues mischaracterizes the nature and scope of the motions before the Tribunal in an attempt to escape the Tribunal’s broad remedial jurisdiction.
3. The AFN further submits the Respondent’s mischaracterization is an attempt by the Respondent to escape its burden of proving compliance with the Panel’s remedial orders, which is a burden properly upon with the Respondent according to the Panel’s decisions and findings.¹
4. By describing its actions as “policy choices”, the Respondent is attempting to evade having to eliminate the discrimination as it was ordered to do according to the Panel’s findings.
5. It is the Respondent’s actions, or lack thereof, that are in issue, not the Respondent’s

¹ 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16.

policy choices. However, in either case, the AFN submits both must be compliant with the Panel's remedial orders in consideration of the rule of law. The AFN submits the attempt to mischaracterize the issues is reminiscent of the Respondents old mindset and practices, that the Panel had previously criticized the Respondent for,² and is a further indication that the Respondent is not faithfully changing its discriminatory ways by reforming the FNCFS Program and related agreements according to the Panel's findings.

Prevention requires that Funding be provided for Actual Needs

6. The Respondent has submitted that it has provided "needed support" to agencies³ and that "information gaps regarding the specific needs of agencies" prevents the Respondent from funding immediate relief based on actual need.⁴ The Respondent argues that it is addressing these information gaps by providing funding to agencies to provide information on their specific needs.
7. In reply, the AFN submits that what is required from the Respondent is support based on actual need, not "needed support".
8. The Respondent's submissions downplay and treat immediate relief in this matter as if it could be overstepped while choosing to focus on engaging in medium and longer-term reform. Consequently, the AFN submits the immediate relief touted in the Respondent's submissions are incidental to the focus on medium, long-term reform, and that immediate relief has never truly been the focus of the Respondent's efforts.

Consultation requires Good Faith, and Deference ought to be Carefully Controlled

9. The Respondent's submissions show that "it does what it wants to" and is making

² 2016 CHRT 16, para 29.

³ Respondent's Factum, para. 28.

⁴ Respondent's Factum, para. 32.

decisions with little regard to the Panel's findings as it should be doing. The AFN submits the information the Respondent is seeking is available in previous reports such as the Wen:de series of reports. Considering this, it would appear the Respondent's efforts to address "information gaps" are not in good faith considering they were not ordered by the Panel and are of questionable value in its advancing toward full compliance of immediate relief.

10. The AFN submits that immediate relief will fail and the Panel's remedial orders left unaddressed and unanswered if the Respondent's efforts to fill the "information gaps" continues in the manner they have chosen, which we must add does not include the complainants in this matter as it should. The AFN submits that immediate relief will suffer a death by the Respondent's bad faith efforts if it is permitted to continue.
11. Further, the AFN submits that the Respondent in its submissions downplays and avoids the systemic discrimination aspects of this case, and fails to appreciate the historical patterns of discrimination that continue to be perpetuated so long as the FNCFS Program and related agreements continues in its discriminatory ways. The systemic and historical aspects of this case were important considerations of the Panel in its decisions regarding section 53(2)(a) of the CHRA.⁵ The AFN submits these considerations raise the importance of immediate relief in this matter.
12. The AFN submits that deference toward the Respondent's effort should only be afforded when the Respondent can show that it can be trusted to implement reform. It is the AFN's position that this is not the case in this matter, and that deference must be carefully controlled given the Respondent's poor history of failing to provide reform when and where it was needed. There is evidence in the recent past, not long before the complaint was filed, that shows the Respondent has failed to implement reform,

⁵ 2016 CHRT 10, para 18.

and the Respondent's actions since January 2016 is further evidence.

Tribunal is the Master of its own Process

13. The Tribunal is the "master of its own process". The parties have submitted, and the AFN agrees, that although the Tribunal may not be in the position to enforce its orders, it can certainly make a declaration of non-compliance of its remedial orders in this matter. The Tribunal has this discretionary power under its enabling statute.⁶
14. The AFN submits that a finding of non-compliance is not akin to ordering the Respondent to spend or fund in a particular way, or how to make its so-called policy choices. The Tribunal has an obligation to ensure its orders are followed as they were intended. Additionally, the Tribunal ought to correct a party where it may have misinterpreted a clear order. The AFN's position is that the Tribunal has considerable latitude in this regard under its enabling statute.

Conclusion

15. As previously submitted, the rule of law is directly dependent on the ability of the Tribunal to enforce its process and maintain respect for its remedial orders. It is within the power of the Tribunal and this Panel to uphold its process by ensuring its remedial orders are carried out by the Respondent.
16. Also, as previously submitted, the Tribunal has an obligation to protect the efficacy and integrity of the CHRA. The entire purpose of the Act is to provide a meaningful remedy for those who have suffered discrimination, and in this case who continue to suffer discrimination in spite of order that the discrimination be eliminated. To eliminate d, the

⁶ *Warman v. Western Canada for US*, 2006 CHRT 23, para 7; *O'Connor v. Canadian National Railway*, 2006 CHRT 5, para 19; *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 27, para 15; *Basudde v. Health Canada*, 2005 CHRT 21, para 4; *Anderson v. Canada (Royal Canadian Mounted Police)* 2003 CHRT 42, para 8; *Day v. Canada (Department of National Defence)*, 2002 CanLII 45923 (CHRT), para 17; and, *Day v. Canada (Department of National Defence)*, 2002 CanLII 45921 (CHRT), para 3.

remedy ordered must be effective and consistent with the nature of the rights protected. This is not possible if the Panel's orders are not carried through by the Respondent according to the Panel's findings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 17, 2017

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Table of Authorities

Primary Sources

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Day v. Canada (Department of National Defence), 2002 CanLII 45921 (CHRT)

**First Nations Child and
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Reply to Respondent's Factum

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