Tribunal File No. T-1340/7008

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

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

RESPONDENT'S REPLY SUBMISSIONS

(Re: the Panel's February 20, 2020 Request for Documents from the Respondent)

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A. Overview

1. These brief reply submissions address the April 9, 2020 submissions of the Parties and the Interested Parties (collectively "the Parties"), filed in response to Canada's March 4, 2020 submissions. Canada's March 4 submissions were filed in answer to the Tribunal's request for additional information.

2. Unless requested to do so, Canada does not intend to provide further information in response to materials filed by the Parties. The Parties' submissions generally demonstrate that discussions on a variety of issues continue in good faith, but that the Parties sometimes disagree, or have not yet reached agreement. As such, the additional material filed by the Parties has limited value in deciding the outstanding issues before the Tribunal.

3. As the respective April 9, 2020 submissions of the Caring Society, the Assembly of First Nations ("AFN"), the Nishnawbe Aski Nation ("NAN") and the Canadian Human Rights Commission (the "Commission") acknowledge, Canada has engaged, and continues to engage, with the Parties and other stakeholders on the implementation of the Tribunal's orders. The issues under discussion include the Terms and Conditions applicable to government programs, and the guidance documents and directives of the First Nations Child and Family Services Program ("FNCFS"). Similarly, Canada engaged with the Parties and other stakeholders prior to the passage of the *Act respecting First Nations, Inuit and Métis children, youth and families* (the "Act").[1] Through such engagement, including in venues such as the Consultation Committee on Child Welfare ("CCCW"), and the National Advisory Committee on First Nations Child and Family Services Program Reform ("NAC"), Canada has continued to work closely with the Parties to seek their feedback on matters of interest to them.[2]

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[1] First Nations Child and Family Caring Society of Canada's responding submissions, filed April 9, 2020 ("Caring Society Submissions"),at paras. 6, 19-25, 26-29; AFN's responding submissions, filed April 9, 2020 ("AFN Submissions"), at paras. 13, 22, 26, 33; NAN's responding submissions, filed April 9, 2020 ("NAN Submissions"), at paras. 9, 15; the Commission's responding submissions, filed April 9, 2020 ("Commission Submissions"), at paras. 5, 6, 11, 12.

[2] Affidavit of Joanne Wilkinson, affirmed April 16, 2019 ("Wilkinson Affidavit"), at paras. 7-8, 16-17, 21, 22, 36, 38, 53-56.

4. As shown in the charts compiling comments received from the Parties, Canada has put in place many of the recommendations put forth through these committees and has provided detailed information to them on the progress of dealing with matters associated with this Tribunal's orders.[3] The Parties assert that Canada has not implemented all of their respective recommendations and advice.[4] In our March 4 submission, we acknowledged that we have not accepted every recommendation.

5. Differing views are inevitably to be encountered as part of any consultative process. Indeed, divergence of opinion has arisen not only between the Parties and Canada, but amongst the Parties themselves in various instances.[5] The Tribunal's intervention is not required simply because the Parties have not always been able to reach a consensus, particularly on operational decisions in implementing the Tribunal's orders. The fact that some Parties may favour alternatives to some of Canada's choices does not mean such choices are discriminatory. Not all matters on which a consensus has not been reached are signify non-compliance with the Tribunal's orders. Even where the Crown has a constitutional duty to consult, consultation means good faith discussion, not agreement on every detail.[6]

6. The Tribunal's retention of jurisdiction is an exceptional exercise of remedial authority that should be used with restraint. It should not amount to "detailed management" of the case.[7] The Tribunal must be careful not to broaden the scope of issues targeted by the remedial order such that the remedial phase of the proceedings becomes a "moving target".[8]

7. Canada agrees with the Commission's submission that "[n]othing in the *CHRA* or the Panel's decisions to date requires that Canada obtain the full agreement of the CCCW or

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[3] Affidavit of Lorri Warner, affirmed March 4, 2020 ("Warner Affidavit"), at Exhibits 4, 4A, 6C, 7B.
[4] Caring Society Submissions at paras. 7, 16-17, 20-24, 31, 37-38, 40, 42, 46-48; AFN Submissions, at paras 13, 22-23, 26-28, 31-32; NAN Submissions, at paras. 8-10, 15, 20.
[5] For example, in its motion of October 4, 2019, NAN favoured an alternative to the Ontario First Nations Limited Partnership formula for distributing remoteness funds, whereas COO endorsed the Ontario First Nations Limited Partnership formula for such a purpose with Chiefs of Ontario Resolution 12/19.
[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at paras. 42 and 48.
[7] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, at para. 74.
[8] *Entrop v Imperial Oil Ltd.*, 2000 CarswellOnt 2525, [2000] O.J. No. 2689, at para. 58.

its members, before taking steps in response to the remedial orders".[9] A respondent can be required to consult a complainant during the remedial phase; indeed the very existence of the CCCW ensures that this will happen. The Tribunal's adjudicative role is not meant to extend to every facet of the implementation of orders by a respondent.[10] While the CCCW Consultation Protocol contemplates a party seeking further directions from the Tribunal where there is disagreement, disagreements on such operational decisions, occurring in "without prejudice" discussions, do not rise to the level of requiring the Tribunal's intervention.

8. The Tribunal cannot require that complainants approve the implementation of remedial orders. Any such order would exceed the bounds of remedial jurisdiction conferred on the Tribunal.[11] As the legislative and executive branch of government, Canada must make these decisions.

9. Canada has demonstrated its commitment to working with the Parties.[12] Indeed the Tribunal has previously stated that it believes the way forward is through collaboration, not litigation,[13] and acknowledged that the Parties have achieved successes through discussion.[14] Canada will continue to consult with the Parties to refine and revise items such as the Capital Directive, the Prevention Directive, the FNCFS Program Terms and Conditions, the National Recipient Guide, and the Ontario Region Recipient Guide for Band Representative Services Canada will continue to respond to comments and implement changes wherever feasible at the request of Parties.

10. Canada also agrees with the submission of the AFN that there are many challenges facing First Nations people, not all of which come within the scope of this complaint.[15] Canada works with the parties both on issues within the complaint, and outside the complaint

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[9] Commission Submissions, at para. 6.
[10] *Hughes v. Elections Canada*, 2010 CHRT 4, at para. 51.
[11] *Johnstone v. Canada (Border Services Agency)*, 2013 FC 113, at paras. 167-169.
[12] Affidavit of Valerie Gideon, sworn April, at para. 4; Wilkinson Affidavit, at para. 64.
[13] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2016 CHRT 16, at para. 12.
[14] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2017 CHRT 35, at para. 8.
[15] AFN Submissions, at paras. 36 and 37.

B. Engagement is a necessary part of plan for long-term reform

11. In its April 9, 2020 submissions, the Caring Society states that Canada's multi-faceted approach to addressing the inequalities in the First Nations Child and Family Services Program amounts to "a process, not a plan". With respect, a vigorous engagement process is the essential foundation for planning and achieving essential long-term reform. The vision for long-term reform, as firmly established through the passage of the Act, is of a system where First Nations and other Indigenous peoples are in charge of their own child and family services. The Act is a legislated plan to effect change.

12. As noted, Canada has been engaging, and continues to engage, with the CCCW, the NAC, FNCFS agencies, front-line service providers, communities, leaders, organizations, provincial governments and the Yukon government, to reform the federal approach to First Nations child and family services delivery.[16] All of these voices and perspectives are crucial for reforms that will best serve the needs of First Nations children and families. Fundamental change is never instantaneous, but the commitment shown by Canada to engage broadly shows that it is pursuing the processes necessary to inform such long-term planning so that change is meaningful and effective. And, as the AFN rightly points out,[17] long-term reform must of necessity be continuously evolving to reflect changing circumstances.

13. Moreover, as the AFN notes, the work of the Institute for Fiscal Studies and Democracy (IFSD) is considered essential by the Parties in the development of options for a new funding methodology.[18] Canada has provided $3.7 million to fund two IFSD studies. Were Canada to have produced a long-term plan in advance of receiving the IFSD work, it may be seen as pre-empting this important work.

C. *The* Act *sets a framework for reform*

[16] Affidavit of Paula Isaak, sworn May 24, 2018, at para. 11; Wilkinson Affidavit, at paras. 7-8, 36, 38, and 53-56.
[17] AFN Submissions, at para. 8.
[18] AFN Submissions, at para. 16.

14. Indisputably, the Act provides a foundation for comprehensive reform. As it rolls out, it will be a powerful tool to support community-based prevention and the well-being of Indigenous children and families.

15. The Act represents an historic opportunity to break from the past and focus on the safety and well-being of Indigenous children and youth.[19] The Act establishes national minimal standards and three important principles applicable to the delivery of child and family services: the best interests of the child, cultural continuity, and substantive equality.[20]

16. The Act also affirms the inherent right to self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*, which includes jurisdiction in relation to child and family services.[21] The Act establishes a framework that Indigenous governing bodies can use to exercise their jurisdiction.[22]

17. The long-term reform envisioned by the Act represents a Nation-to-Nation, government-to-government, and Inuit-Crown approach that will result in Indigenous groups exercising their right of self-government with regards to child and family services.[23]

18. With respect to the implementation of the Act, ISC is engaging with Indigenous partners, provinces, and territories. These discussions will help identify tools and processes to increase the capacity of communities as they assume responsibility over child and family services. These processes will also help identify gaps and recommend mechanisms to guide future funding methodologies.[24]

19. The active engagement and commitment of Indigenous partners at all levels was central to the development of this legislation. This engagement included 65 sessions with nearly 2000 participants, including many CCCW and NAC members. In-person engagement sessions were also conducted with Indigenous partners, provincial and territorial

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[19] Wilkinson Affidavit, at para. 57.
[20] *An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019, c.24, ss. 9-11.
[21] *An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019, c.24, s.18.
[22] *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c.24, s. 20.
[23] Wilkinson Affidavit, at para. 59; *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c.24.
[24] Wilkinson Affidavit, at para. 58.

representatives on the proposed content of the Bill in January 2019. This included sessions with the CCCW and the NAC.[25]

20. The input from these various First Nations, Inuit and Métis national, regional, and community organizations, provinces and territories, experts and those with lived experience, was considered in the drafting of the legislation. The final version of the legislation reflected this diverse and valuable input. And, as the Minister responsible for implementation of the Act has noted, engagement will continue.[26]

21. While the Act certainly responds to the Tribunal's concern for long-term reform, it is clearly not an end but a beginning. Its implementation will require extensive further engagement with a great many stakeholders. But neither the contents of the Act nor its implementation are matters for adjudication as part of this complaint.

D. Canada is compliant with the Order to pay actual costs

22. In their respective April 9, 2020 submissions, the Caring Society and NAN take issue with various operational aspects related to Canada's implementation of the Tribunal's February 2018 Order requiring Canada to pay the actual costs of various items.[27] Canada relies on evidence already before the Tribunal that shows Canada is in compliance with these orders, has established a process for paying actuals, and has indeed been paying actuals in accordance with the orders.[28]

23. As of February 14, 2020, Canada had paid the following amounts pursuant to the Tribunal's February 2018 Order, with additional amounts in the process of being paid:

    - $146,908,452.14 in retroactive reimbursements for actual costs of expenses from Jan. 26, 2016 to Mar. 31, 2018;

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[25] Wilkinson Affidavit, at paras. 54-56. Warner Affidavit, at Exhibit 12.
[26] Statement by the Honourable Marc Miller, Minister of Indigenous Services, January 2, 2020 (https://www.canada.ca/en/indigenous-services-canada/news/2019/12/statement-by-the-minister-of-indigenous-services-on-the-coming-into-force-of-an-act-respecting-first-nations-inuit-and-metis-children-youth-and-fam.html).
[27] Caring Society Submissions, at para. 14; NAN submissions, at paras. 12-14; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2018 CHRT 4, at paras. 411, 417, 420, 426 and 427.
[28] Wilkinson Affidavit, at paras. 24-29, 39-47, 48-50; Affidavit of Anne Scotton, sworn February 12, 2020, at paras. 60-69.

- $137,081,256.20 in actual costs claims for 2018-2019; and
- $87,878,334.69 in actual costs claims for 2019-2020.[29]

These expenditures are current to February 14, 2020 but they will continue to increase, as the year progresses, which is consistent with the trend in the previous fiscal years' expenditures. It should be noted that the deadline for submission of retroactive claims was December 31, 2019, which resulted in a major increase in the number of claims submitted at the end of the year, which is why there is also a large amount of claims in process for that period.

E. Canada relies on its previous submissions regarding capital funding

24. The April 9, 2020 submissions of the Chiefs of Ontario ("COO") in relation to its request that Canada provide capital funding for Band Representative Services essentially repeat COO's submissions filed in March of 2019.[30] COO argues that Band Representative Service capital expenses are a necessary "actual cost", pursuant to the Tribunal's February 2018 Order.[31]

25. Canada has complied with the Tribunal's order to reimburse the actual costs of building maintenance and repairs.[32] This order does not include new capital purchases and construction. As Canada argued in its submissions of May 30, 2019 on this issue, other programs are available to fund major capital or infrastructure initiatives. Such programs ensure community consultation takes place to make sure funding responds to needs. Canada continues to rely on its submissions dated May 30, 2019.[33]

26. As the materials provided to the Tribunal demonstrate, Canada is continuing to work with the Parties to find ways to support agencies' capital requirements. Canada is working with

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[29] Report on agency claims submitted to Canada for reimbursement to February 14, 2020, Affidavit of Cindy Blackstock, affirmed April 8, 2020, Exhibit 4.
[30] COO's responding submissions, filed April 9, 2020, at paras. 11-12, 31-34.
[31] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2018 CHRT 4, at para. 427.
[32] Wilkinson Affidavit, at paras. 48-50; Record of Documents on Consent of the Chiefs of Ontario & the Attorney General of Canada, filed April 9, 2020, at Tab, p. 4.
[33] See in particular at paras. 1-6, 7-21, and 30.

the Parties through the CCCW to refine the Program Directive on Capital Expenditures.[34] Even where the issues discussed go beyond what the Tribunal's order requires, Canada has worked to find solutions to problems.

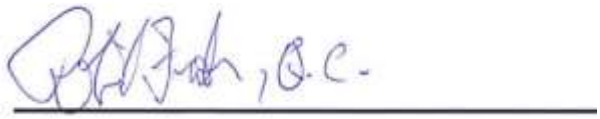
F. The previous evidence and submissions are a sufficient basis to decide the issues

27. As noted by the Commission, there are numerous outstanding matters before the Tribunal for which the Parties have already submitted evidence and argument.[35] The Commission states that it "is content to have the Tribunal rule on the pending motions, based on the evidence and arguments already filed, Canada's Documents and Submissions", the submissions of the Parties dated April 9, 2020, and Canada's reply submissions.[36] Canada is similarly content.

28. One further matter on which the Tribunal has not yet entertained submissions is the Tribunal's continued retention of jurisdiction. The rulings on the outstanding issues may well inform such submissions. While recognizing that the Tribunal faces additional challenges in these difficult times, Canada respectfully submits that it would be helpful to all Parties for the Tribunal to issue those rulings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, Province of Ontario, this 24th day of April, 2020.



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[34] Warner Affidavit at Exhibit 7B.
[35] Commission Submissions, at para. 7.
[36] Commission Submissions, at para. 10.

TABLE OF AUTHORITIES

Case Law		**Referred to at Paragraph(s)**
1.	*Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3	74
2.	*Entrop v Imperial Oil Ltd.*, 2000 CarswellOnt 2525, [2000] O.J. No. 2689	58
3.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada,* 2016 CHRT 16	12
4.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2017 CHRT 35	8
5.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2018 CHRT 4	411, 417, 420, 426, and 427
6.	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73	42 and 48
7.	*Hughes v. Elections Canada*, 2010 CHRT 4	51
8.	*Johnstone v. Canada (Border Services Agency),* 2013 FC 113	167-169

	Statutes	**Loi**
7.	An Act respecting First Nations, Inuit and Métis children, youth and families (S.C. 2019, c. 24)	Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis (L.C. 2019, ch. 24)