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

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Overview

1. The Complainants and Interested parties are proposing a wide array of extensions to the definition of "First Nations child" for the purposes of Jordan's Principle. The lack of consensus among their positions highlights that what they are seeking is not compliance with an existing order, but an order extending Jordan's Principle far beyond what the complaint, the particulars, and the evidence would justify. The Tribunal must respect the limits of this litigation and its own remedial jurisdiction.

2. The remedies sought demonstrate the need for additional clarity on what the Tribunal intended in ordering Canada to extend Jordan's Principle to "all First Nations children on or off reserve". Rather than seeking compliance with the Tribunal's existing orders, the First Nations Child and Family Caring Society of Canada ("Caring Society"), and the Nishnawbe Aski Nation ("NAN"), seek a three-pronged order that directs further consultation among the parties to extend Jordan's Principle to the following groups:

> (1) Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;
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> (2) First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and
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> (3) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.[1]

3. While there is some agreement among the Complainants and Interested Parties with respect to the expansion of Jordan's Principle to the first proposed group, there is little consensus as to how one might establish that a child is recognized by his/her community, who is

[1] Caring Society's submissions on the eligibility criteria for Jordan's Principle, at para 31. See also NAN's submissions on the eligibility criteria for Jordan's Principle, at para. 27.

responsible for verifying this fact and the significance of this recognition at large. The submissions from the Chiefs of Ontario ("COO") highlight the inherent difficulties in this task.[2] Not only is the proposed expansion unjustified based on the nature of the complaint, but the burden of establishing membership of a First Nation child should not reside with Canada.

4. Canada acknowledges that First Nations have consistently maintained that they alone should determine citizenship through their own laws, traditions and customs. The ability of First Nations to do so is an issue that transcends the scope of this complaint. COO's submissions amplify the difficulties with the requested remedies, even with respect to non-status Indigenous children living off reserve who would be recognized by their First Nation.

5. With respect to the expansion of Jordan's Principle to the other two proposed groups, there is not even agreement among the parties that it should be extended that far.

6. The definition of who is a First Nations child is acknowledged by all to be an issue of great importance to First Nations. It is also of great significance to Canada, because Canada has to be able to respond to requests under Jordan's Principle within strict timelines (12 or 48 hours), and Canada wishes to do so in a manner that respects the importance that First Nations attach to membership issues.

7. However, this Tribunal is not the proper forum for determining difficult issues of Indigenous identity. Its jurisdiction is limited by its statutory role in considering complaints, its remedial powers, and most importantly, the nature of the complaint before it. The expansions suggested, however well-motivated, would take the Tribunal far beyond its proper adjudicative role.

[2] Chiefs of Ontario submissions on eligibility criteria for Jordan's Principle, dated March 20, 2019.

Canada's interpretation is compliant

8. Canada does not dispute that Jordan's Principle is an issue in the complaint.[3] The focus of the complaint from its inception has been very specifically on the discrimination experienced by First Nations children living on reserve. Those children were the ones subject to Canada's funding policies, and those were the children who experienced delays or denials in the provision of services. Canada's interpretation is not based solely on the wording of the original complaint, but on the totality of evidence and arguments adduced throughout this proceeding, including over the course of the 72 day hearing. The interpretation also reflects the fact that the key sections of this Tribunal's reasons repeatedly use the term "on reserve."

9. The "on reserve" limitation is also reflected in the wording of the initial Complaint. While the Commission properly points out that the Complaint can be better understood by referring to the Particulars, it engages in a selective reading of those same Particulars, and ignores its own, which are inconsistent with its present position on the scope of the complaint. In its Amended Statement of Particulars, the Commission defines the claim of discrimination as being the underfunding of child welfare services to First Nations children on reserve and that this under-funding also contravenes Jordan's Principle.[4] This position is consistent with that outlined in the Caring Society's Statement of Particulars.[5]

10. In closing submissions, the Caring Society's position remained that Canada's failing to fully implement Jordan's Principle resulted in First Nations children on reserve being denied basic public services or subject to inordinate delays in receiving such services.[6] The Caring Society elaborated as follows:

> Jordan's Principle was conceived of as a means to prevent First Nations children from being denied essential public services, or experiencing delays in receiving them, as a result of jurisdictional disputes, and is a procedural mechanism by which First Nations children living on reserve

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[3] Canada's submissions on the motion for interim relief, dated January 29, 2019, at para 6.
[4] See Appendix "A" to this Reply, the Commission's Amended Statement of Particulars dated January 29, 2013.
[5] Affidavit of Doreen Navarro, dated January 28, 2019, at Exhibit "B", the Caring Society's Statement of Particulars, dated June 5, 2009,
[6] Closing Submission of the Caring Society, para 392.

> can exercise and vindicate their rights to substantive equality. Jordan's Principle is built upon the fundamental premise that all children, including First Nations children living on reserve, are entitled to be equal before and under the law and are fully entitled to the protections and benefits of the rights and freedoms afforded in our democratic society.[7]

11. The allegation with respect to Jordan's Principle was always centered on First Nations children living on reserve. No evidence or argument was presented that Canada was discriminating against non-status, off-reserve Indigenous children at large in respect of its interpretation of Jordan's Principle or that these children were experiencing delays and denials of services based on their lack of status. In the absence of a complaint, particulars and evidence to support such a broad expansion of Jordan's Principle, this Tribunal ought not entertain the suggestion. To do so would, as the AFN rightly points out, risk leaving the needs of those children who are properly the subject of the complaint, unmet.[8]

12. According to the Supreme Court judgment in *Moore*, a remedy must flow from the claim.[9] In this case, the claim was made on behalf of the registered First Nations children and families living on reserve and the evidence giving concrete support to the claim all centered on them.

13. The issue is not, as alleged by the Caring Society, whether non-status, off-reserve children have greater needs such that the principles of substantive equality demand that they be eligible for Jordan's Principle.[10] Whether the needs of non-status off reserve Indigenous children are as great or greater, and whether they are being met in their provinces/territories of residence, are significant issues, but they fall outside the parameters of the present complaint. Consideration of their particular situation would necessitate a separate complaint, perhaps requiring evidence from provinces and territories, before this Tribunal would be in a position to provide a remedy responsive to their needs.

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[7] Closing Submission of the Caring Society, para 394.
[8] AFN Submissions, paras. 56 and 60.
[9] *Moore v. British Columbia (Education)*, 2012 SCC 61, para. 64.
[10] Caring Society's submissions on the eligibility criteria for Jordan's Principle, paras. 27 and 40.

14. Even if the Tribunal were to accept the Commission's suggested two-part test for determining compliance, it is clear that Canada's eligibility criteria for Jordan's Principle complies with the Tribunal's past orders.[11] The purpose of Canada's eligibility criteria is to target those First Nations children that are subject to federal funding in the provision of child welfare and social programming. These were the children Canada was found to have discriminated against in respect of both its funding for child welfare and its interpretation of Jordan's Principle. Canada's implementation of the Tribunal's orders on Jordan's Principle serves to avoid jurisdictional disputes that could lead to delay or denial of services to children subject to Canada's funding regime. It also ensure substantive equality by providing funding for services not normally available to other Canadian children.

15. Contrary to Amnesty International's submissions, Canada's implementation of Jordan's Principle is primarily informed by the children who were at the center of this complaint, those that fall under its jurisdiction with respect to federal funding. This is the discrimination Canada was ordered to redress. The issue before the Tribunal on this motion is a narrow question of interpretation, with the Tribunal's jurisdiction on this motion necessarily derived from the complaint before it and the provisions of its enacting legislation, and which is not altered by resort to more general provisions of international human rights law.

16. There is no foundation in the record to ground an expansion of the Tribunal's order that Canada extend Jordan's Principle to "all First Nations children" to include all non-status Indigenous children living off-reserve. Canada's implementation of the Tribunal's orders addresses the discrimination identified by the Tribunal's orders and offers redress to the First Nations children who were at the heart of this complaint.

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[11] Commission's submissions on the eligibility criteria for Jordan's Principle at paras. 35, 36.

No fiduciary duty engaged to expand eligibility criteria

17. Neither the Tribunal's previous decisions in this case, nor the jurisprudence, supports an argument that Canada has a fiduciary duty to extend Jordan's Principle to Indigenous children who do not fall under its jurisdiction.

18. In 2016 CHRT 2, the Tribunal held that the relationship between Canada and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary duty based on the three criteria set out in the *Elder Advocates* case.[12] The Tribunal found that the FNCFS Program and other related provincial/territorial agreements were undertaken and controlled by the Crown for the benefit of First Nations beneficiaries, being those residing on reserve.[13] There was no analysis of whether Canada owes a fiduciary duty to Indigenous children who do not fall under federal jurisdiction with respect to the provision of child welfare or other federal programming.

19. Moreover, applying the test set out in *Elder Advocates* demonstrates that Canada does not owe a fiduciary duty in respect of Jordan's Principle to the three groups of non-status, off-reserve First Nations children that the Caring Society and NAN seek to include. The test requires that: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise the power or discretion so as to affect the beneficiary's legal and practical interests; and (3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [14] None of these three criteria are satisfied.

20. The degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise. The type of legal control over an interest that arises from the ordinary exercise of statutory powers does not suffice. Otherwise, fiduciary obligations

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[12] See 2016 CHRT 2, at para 104.
[13] See 2016 CHRT 2, at para 105.
[14] *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, at para. 27.

would arise in most government functions, making general action for the public good difficult or almost impossible.[15]

21. Canada does not exercise any discretion or power over non-status Indigenous children living off reserve with respect to the provision of funding for the services at issue. They receive services from the provinces or territories in which they reside. Canada does not provide direct funding for child welfare or social services to these children, and thus has no power or discretion to affect their legal and practical interests.

22. Finally, these children are vulnerable not to Canada's funding decisions and policies in the realm of child welfare and social programming, but to those offered by their provinces/territories of residence. Canada does not owe a fiduciary duty to extend its eligibility criteria for Jordan's Principle to include all First Nations children without status who live off reserve.

Honour of the Crown

23. Several parties have raised the principle of the honour of the Crown. Unquestionably, the Crown must act honourably in its dealings with Indigenous peoples. As the Supreme Court has noted, the ultimate purpose of the principle of the honour of the Crown is the reconciliation of pre-existing Indigenous societies with the assertion of Canadian sovereignty. However, the honour of the Crown principle is not capable of shedding much if any light on the narrow interpretive issue surrounding the Tribunal's use of the term "First Nations child".

24. The Supreme Court has also said that the honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. This means that the honour of the Crown gives rise to different duties in different circumstances. For example, in the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the

[15] *Supra*, para. 53.

Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. No such constitutional obligation forms the subject matter of the present complaint.[16]

25. The Court has also recognized that the honour of the Crown may give rise to fiduciary duties where the Crown has assumed discretionary control over specific Indigenous interests. In such cases, the Crown's duty requires that it act with reference to the Indigenous group's best interest in exercising its discretionary control over the Indigenous interest at stake.[17] In the present, Canada has not assumed discretionary control over the funding of child welfare for other social services for non-status off reserve Indigenous children.

26. Further, the Court has held that the honour of the Crown "infuses the processes of treaty making and treaty interpretation" and "where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims". No treaty right or process is engaged by this complaint.

27. Finally, the honour of the Crown gives rise to a duty to consult and, if appropriate, to accommodate, where claims remain to be resolved and the Crown is contemplating conduct that might adversely affect potential Aboriginal rights or title. The Supreme Court has found the honour of the Crown is engaged and may give rise to a duty to consult not only in the context of established or proven section 35 rights, but also where such rights have been claimed. Here the complaint does not assert a claimed but unproven section 35 right.

28. The complaint does not fit within any of the previously recognized categories where courts have examined the actions of the Crown. In this case, the Crown has repeatedly met with the parties and considered their concerns about the definition. Canada adopted a more expansive definition after considering how expansive a definition it should adopt. But the honour of the Crown does not demand any particular content to that definition. As

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[16] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.
[17] *Haida Nation* v. *British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, paras 16-20, 25.

important as the principle of the honour of the Crown is, it does not serve to inform the issue before the Tribunal on this motion.

***Daniels* does not inform the issue before the Tribunal**

29. *Daniels v. Canada* is a seminal case in Indigenous jurisprudence;[18] like the principle of the honour of the Crown, it simply does not help the Tribunal on the definitional issue before it.
30. *Daniels* is a division of powers case in which the Supreme Court found that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*. The consequence of this finding is that the federal Parliament can enact legislation with respect to the Métis and non-status Indians under s. 91(24). However, Parliament is not legally required to pass or amend any legislation, or to extend programs to Métis or non-status Indians.

31. There were unique circumstances in the *Daniels* case: unlike many cases where the division of powers are at issue, the claimants did not bring this claim as a challenge to existing legislation, or even because they have any stated desire for federal Parliament to pass legislation. Instead, they sought the declaration as a means of addressing what they viewed as the federal Crown's failure to accept responsibility for Métis and non-status Indians, which, they asserted, resulted in those groups being deprived of the programs, benefits, and treaty negotiation opportunities available to status Indians.

32. While a significant legal development, the findings in *Daniels* do not inform the interpretive issue presently before the Tribunal on this motion.

Remedy

33. The Caring Society has asked for an Order that directs Canada to consult with the parties and generate a definition of "First Nations child" that complies with 2017 CHRT 14 within 30 days. While Canada agrees that consultation is ordinarily the best means for resolving

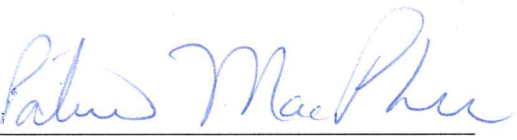
[18] 2016 SCC 12.

issues concerning implementation of the Tribunal's orders, consultation is not an appropriate remedy here. Even if the Tribunal were to accept that Canada's definition is too narrow, further consultation would not resolve the issue, because the Tribunal is faced with an unresolvable jurisdictional impediment: the Tribunal cannot make an order against the First Nations who would have to participate in any procedure to recognize community members. Thus, if the Tribunal were inclined to find, as it did in its Interim Order, that the definition of "First Nations child" should include children "recognized by their community", consultation would not lead to an order that required the participation of First Nations who are not a party to these proceedings.

34. In the result, the Interim Order should be vacated, and the motion dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Nova Scotia this 25th day of March, 2019.



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List of Authorities

Jurisprudence

1. *Daniels v. Canada,* 2016 SCC 12
2. *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24
3. *Haida Nation* v. *British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511
4. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14
5. *Moore v. British Columbia (Education)*, 2012 SCC 61