

**CANADIAN HUMAN RIGHTS TRIBUNAL**

B E T W E E N:

**First Nations Child and Family Caring Society  
and Assembly of First Nations**

Complainant

- 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

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**Submissions of the Canadian Human Rights Commission**

**(responding to Canada's submissions dated March 4, 2020,  
on documents requested by the Panel)**

(delivered April 9, 2020)

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**I. Introduction**

1. In a letter from the Registry dated February 20, 2020, the Panel asked Canada to provide copies of various documents, including (i) the most recent versions of the Social Programs National Manual, and the Terms and Conditions for the First Nations Child and Family Services Program ("FNCFS Program"), (ii) any documented plan to reform inequalities in the FNCFS Program, (iii) the Capital Directive, and (iv) ISC's plan to eliminate the lack of coordination in

federal programs and services adversely impacting First Nations children. The documents were requested "...in order to assist the Panel in determining issues before it."<sup>1</sup>

2. In its letter, the Panel said that Canada could make submissions on the requested documents, and that if such submissions were made, the other parties could respond, and Canada could reply. On March 4, 2020, Canada provided the documents it considered responsive to the Panel's requests (the "Documents")<sup>2</sup>, along with submissions regarding those Documents ("Canada's Submissions").

3. In its brief responding submissions below, the Commission (i) identifies the issues it understands are currently before the Panel for determination, (ii) notes that while the Documents show positive steps taken by Canada to move towards compliance, they also reveal areas of continuing disagreement, including with respect to issues that are still before the Panel, and (iii) emphasizes the importance of Canada taking a proactive role in developing a concrete plan and timeline for bringing itself into full compliance with the Panel's decisions.

## **II. Issues before the Tribunal**

4. On January 26, 2016, the Tribunal released its decision on liability in this matter.<sup>3</sup> Since that time, there have been a number of additional rulings, dealing with Canada's ongoing efforts to implement remedies that meaningfully address and eliminate its discriminatory practices. For example, major rulings on the implementation of remedies regarding Jordan's Principle and the FNCFS Program, were issued on May 26, 2017, and February 1, 2018, respectively.<sup>4</sup>

5. The Tribunal's 2018 Ruling led to the creation of the Consultation Committee on Child Welfare (the "CCCW"), a forum where Canada consults with the Complainants (the Caring Society and the AFN), the Commission, and two of the Interested Parties (COO and NAN), about its efforts to comply with the Tribunal's decisions.

6. The CCCW is an important forum that has helped Canada make progress in areas relating to both the FNCFS Program and Jordan's Principle. However, it has also become apparent during

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<sup>1</sup> Letter dated February 20, 2020, from Registry Officer Dubois to the parties, p. 1.

<sup>2</sup> The documents are appended to the Affidavit of Lorri Warner, sworn March 4, 2020.

<sup>3</sup> 2016 CHRT 2.

<sup>4</sup> 2017 CHRT 14 (re Jordan's Principle, subsequently varied 2017 CHRT 35), and 2018 CHRT 4 (re FNCFS Program).

the work of the CCCW that the parties will not reach agreement on some key issues. Nothing in the *CHRA* or the Panel's decisions to date requires that Canada obtain the full agreement of the CCCW or its members, before taking steps in response to the remedial orders. However, as the Consultation Protocol for the CCCW acknowledges, where there is disagreement, a party may seek further directions from the Panel.<sup>5</sup>

7. Such steps have already been taken in the course of these proceedings. For example, the Tribunal has already granted interim relief regarding the "First Nations children" who are eligible to receive services under Jordan's Principle.<sup>6</sup> It also made an initial ruling on victims' eligibility to receive financial compensation<sup>7</sup>, and provided some additional directions in that regard<sup>8</sup>, with full reasons to follow. However, the parties continue to await the Tribunal's rulings on other matters. Specifically, the Tribunal has already received evidence and argument on motions dealing with the following:

- a. *"First Nations child"* – The Caring Society brought a motion seeking to clarify who qualifies as a "First Nations child" eligible to receive services pursuant to Jordan's Principle. As noted above, the Tribunal granted interim relief in respect of this motion, which will remain in effect until the merits of the underlying motion are determined. In that regard, the Commission filed written submissions dated March 20, 2019, and the motion was fully argued before the Tribunal on March 27-28, 2019.
- b. *Deadlines for Claims for Band Representative Services* – COO brought a motion dated March 22, 2019, challenging Canada's decision to impose deadlines for Ontario First Nations to submit claims seeking reimbursement at actuals for band representative services. The Commission did not make any submissions in connection with this motion.
- c. *Capital Expenditures* – The Caring Society brought a motion for an order that Canada's revised approach to funding for major capital projects under the FNCFS Program, and for Jordan's Principle and Band Representative Services, does not comply with the Tribunal's

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<sup>5</sup> Consultation Protocol dated March 2, 2018, at clause 13(f) (Joint Record of Documents from January 2019, Volume 1, Tab 2).

<sup>6</sup> 2019 CHRT 7.

<sup>7</sup> 2019 CHRT 39.

<sup>8</sup> Letter from the Tribunal to the parties dated March 16, 2020.

decisions. The Commission filed written submissions dated April 3, 2019, in connection with this motion.<sup>9</sup>

- d. *Downward Adjustments for Small Agencies* – The Caring Society brought a motion seeking restitution for small agencies that had previously been subjected to downward adjustments. The Commission filed written submissions dated April 3, 2019, in connection with this motion.<sup>10</sup>
- e. *Reallocation Policy* – The Caring Society brought a motion for an order that Canada’s revised approach to the reallocation of funds across programs does not comply with the Tribunal’s decisions. The Commission filed written submissions dated April 17, 2019, in connection with this motion.<sup>11</sup>
- f. *Funding Agreements* – The Caring Society brought a motion for an order requiring that Canada change certain aspects of its template funding agreements. The Commission filed written submissions dated April 17, 2019, in connection with this motion.<sup>12</sup>

### **III. Canada’s Documents and Submissions**

8. The Panel requested additional documents to assist in the determination of matters currently before it. In some cases, the requested documents clearly relate to one of the pending motions described above. For example, the most recent version of the Capital Directive clearly relates to the pending motion about funding for major capital projects. Other requested documents could be relevant as background context for one or more of the pending motions (such as the Terms and Conditions for the FNCFCs Program, or any documented plans for addressing inequalities within that Program).

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<sup>9</sup> “Written Submissions of the Canadian Human Rights Commission (regarding the motions to be heard April 23-26, 2019, regarding major capital funding, downward adjustments for small agencies, and financial compensation)”, dated April 3, 2019, at paras. 10-25.

<sup>10</sup> “Written Submissions of the Canadian Human Rights Commission (regarding the motions to be heard April 23-26, 2019, regarding major capital funding, downward adjustments for small agencies, and financial compensation)”, dated April 3, 2019, at paras. 26-35.

<sup>11</sup> “Written Submissions of the Canadian Human Rights Commission (in response to the Caring Society motions on Reallocation, and Funding Agreements)”, dated April 17, 2019, at paras. 5-9.

<sup>12</sup> “Written Submissions of the Canadian Human Rights Commission (in response to the Caring Society motions on Reallocation, and Funding Agreements)”, dated April 17, 2019, at paras. 10-14.

9. In the pending motions, the Commission generally did not take positions on the specific remedies sought. Instead, the Commission largely left it to the moving parties – as the First Nations advocacy organizations and/or political bodies having the greater expertise in day-to-day operation of the programs at issue – to address such matters. Rather than seek specific remedies, the Commission generally made submissions about key legal principles or public interest considerations that it asked the Panel to take into account, in determining the issues put before it by the Complainants and/or Interested Parties.

10. In light of that history, the Commission does not make detailed submissions at this time about the Documents, or in response to Canada’s Submissions. The Commission is content to have the Tribunal rule on the pending motions, based on the evidence and arguments already filed, Canada’s Documents and Submissions, these Submissions, and the materials still to come from the other parties.

11. That said, the Commission does have one point it would like to emphasize, in response to Canada’s Documents and Submissions. At various times, Canada notes that policies, directives, guidelines or other documents were created or updated in consultation with the parties.<sup>13</sup> The Commission agrees that these documents were shared and discussed at the CCCW, as part of Canada’s important work in complying with the Panel’s directions. Many of the steps that Canada has taken in that regard are positive and ought to be acknowledged. However, while it is accurate to say that the parties were consulted, it is also important to note this does not necessarily mean that all CCCW participants agreed on all aspects of the resulting documents.

12. To its credit, Canada has acknowledged this up front in its Submissions, noting for example that the Caring Society has raised concerns about the Terms and Conditions for the FNCFS Program that have yet to be resolved.<sup>14</sup> Indeed, one of the Documents that Canada has provided is a record of outstanding comments that parties made about the Terms and Conditions – including fundamental concerns about the propriety of the declared objectives for the FNCFS Program.<sup>15</sup>

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<sup>13</sup> For example, see Canada’s Submissions at paras. 7-8 (re Recipient Guides, draft Capital and Prevention Directives; and CWJI Guidelines), 22 (re Terms and Conditions of the FNCFS Program), and 26 (re draft Capital Directive).

<sup>14</sup> Canada’s Submissions at para. 22.

<sup>15</sup> Affidavit of Lorri Warner, sworn March 4, 2020, Exhibit 6C – “Canada’s Response to outstanding comments/concerns received from the Consultation Committee on Child Welfare regarding the FNCFS Terms and Conditions.”

Concerns and objections can also be seen in other Documents delivered by Canada, for example in the margins of the draft Prevention Guideline<sup>16</sup>, an Input Tracker noting feedback received about the Prevention Guideline<sup>17</sup>, and a Feedback Crosswalk showing that some of the parties' comments regarding the draft Capital Directive were rejected, or only partially accepted.<sup>18</sup>

13. In the circumstances, the fact that Canada consulted before creating draft or final versions of some of the Documents cannot be taken to indicate full agreement on their content. Areas of disagreement remain, and the Tribunal's guidance is still needed with respect to the pending motions, described above.

#### **IV. Proactive Plans for Long-Term Compliance**

14. In its letter, the Panel requested, among other things, any "documented plan" to reform inequalities in the FNCFCFS Program, and "a copy of ISC's plan" to eliminate the lack of coordination in federal services for First Nations children. Notably, the Documents disclosed by Canada in response to the request do not include specific documents along these lines. Nothing in Canada's Documents or Submissions maps out next steps with projected timelines for Canada to finally bring itself into long-term compliance with the Tribunal's decisions. Instead, Canada generally:

- provides copies of the interim guidelines and other documents that were needed to comply with the Panel's immediate and medium-term relief measures;
- identifies substantial increases in funding for the FNCFCFS Program, with little or no related documents showing whether the funding has resulted in outcomes that comply with the Panel's decisions<sup>19</sup>;
- describes studies that it has funded or continues to fund, without saying anything about its intentions regarding the recommendations made in those studies to date<sup>20</sup>;

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<sup>16</sup> Affidavit of Lorri Warner, sworn March 4, 2020, Exhibit 4 – "January 2020 draft Prevention Directive."

<sup>17</sup> Affidavit of Lorri Warner, sworn March 4, 2020, Exhibit 4A – "draft Directive on Prevention input tracker."

<sup>18</sup> Affidavit of Lorri Warner, sworn March 4, 2020, Exhibit 7B – "Crosswalk Document including feedback from the CCCW regarding the Draft Capital Directive."

<sup>19</sup> Canada's Submissions, at para. 12.

<sup>20</sup> See the references to the Ontario Special Study, the Remoteness Study, and the IFSD Studies, at paras. 15-18 of Canada's Submissions.

- lists a number of different actions and consultation mechanisms that are together said to show that Canada is taking a comprehensive approach to meeting the needs of First Nations children and families<sup>21</sup>; and
- states that it is “committed to achieving funding reform” through active engagement with Indigenous partners on the development of options.<sup>22</sup>

15. In the circumstances, the Commission wishes to state its view that the obligation is on Canada – as the party found to have infringed the *Canadian Human Rights Act* – to be proactive and take all necessary steps to develop and implement the necessary long-term reforms, within a reasonable period of time. It has always been acknowledged that this would require consultation and research, which could not happen overnight. However, it has now been more than four years since the Panel released its initial decision on liability, and there are still no indications that Canada has a documented plan and timeline for bringing this matter to a resolution. The Commission therefore invites the Tribunal to ensure that any eventual orders that may be made with respect to the pending motions include enforceable deadlines for compliance.

## V. Conclusion

16. We hope these submissions will be of some assistance. If the Tribunal has any questions, the Commission would be pleased to answer them, in accordance with any additional procedures the Tribunal may direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Brian Smith / Jessica Walsh  
Counsel  
Canadian Human Rights Commission  
344 Slater Street, 9th Floor  
Ottawa, Ontario K1A 1E1

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<sup>21</sup> For example, see Canada’s Submissions at paras. 27-28, which make reference to (among other things) the restructuring of government departments, the existence of consultation forums, and the adoption of new legislation respecting First Nations, Inuit and Métis children, youth and families.

<sup>22</sup> Canada’s Submissions, at para. 3.

Tel: (613) 943-9205 / (613) 943-9134

Fax: (613) 993-3089

[brian.smith@chrc-ccdp.gc.ca](mailto:brian.smith@chrc-ccdp.gc.ca)

[jessica.walsh@chrc-ccdp.gc.ca](mailto:jessica.walsh@chrc-ccdp.gc.ca)