Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and the 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

SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION ON THE MOTIONS FILED BY THE PARTIES with respect to the FNCFCS Program and the 1965 Agreement

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Daniel Poulin, Samar Musallam
CANADIAN HUMAN RIGHTS COMMISSION
Legal Services Division
344 Slater Street, 9th Floor
Ottawa, Ontario K1A 1E1

Tel.: (613) 947-6399/943-9093
Fax.: (613) 993-308
Email: daniel.poulin@chrc-ccdp.gc.ca
samar.musallam@chrc-ccdp.gc.ca

TO: **CANADIAN HUMAN RIGHTS TRIBUNAL**
Attn: Dragisa Adzic, Registry Officer
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

AND TO: **David P. Taylor**
JURISTES POWER | POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Phone: (613) 702-5568
Fax: (888) 404-2227
Email: dtaylor@juristespower.ca
Counsel for the Complainant,
First Nations Child and Family Caring Society of Canada

AND TO: **David C. Nahwegahbow**
NAHWEGAHBOW, CORBIERE
Genoodmagejig/Barristers & Solicitors
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
Phone: (705) 325-0520
Fax: (705) 325-7204
Email: dndaystar@nncfirm.ca

Stuart Wuttke
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Phone: (613) 241-6789
Fax: (613) 241-5808
Email: swuttke@afn.ca
Co-Counsel for the Complainant, Assembly of First Nations

AND TO: **Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Anne Turley**
Atlantic Regional Office
JUSTICE CANADA
Duke Tower, 5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3
Phone: (902) 426-5959
Fax: (902) 426-8796
Email: Jonathan.Tarlton@justice.gc.ca
Melissa.Chan@justice.gc.ca
patricia.macphee@justice.gc.ca
Anne.Turley@justice.gc.ca
Counsel for the Respondent, the Attorney General of Canada

AND TO: **Maggie Wente**
Olthuis, Kleer, Townshend LLP
250 University Avenue, 8th floor
Toronto, ON M5H 3E5
Tel: (416) 981-9330
Fax: (416) 981-9350
Email: MWente@oktlaw.com
Counsel for the Interested Party, the Chiefs of Ontario

AND TO: **Justin Safayeni**
Stockwoods LLP Barristers
TD North Tower
77 King Street West, Suite 4130
PO Box 140
Toronto Dominion Centre
Toronto, ON M5K 1H1
T: (416) 593-3494
F: (416) 593-9345
Email: justins@stockwoods.ca
Counsel for the Interested Party, Amnesty International Canada

AND TO: **Julian Falconer, Anthony Morgan, Akosua Matthews**
Falconers LLP
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9
Phone: (416) 964-0495
Fax: (416) 929-8179
Email: julianf@falconers.ca
AnthonyM@falconers.ca
akosuam@falconers.ca
Counsel for the Interested Party, Nishnawbe Aski Nation

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Overview

1. These are the written submissions of the Commission in response to the motions filed by the Complainants, the First Nations Child and Family Caring Society of Canada ("Caring Society") and the Assembly of First Nations ("AFN"), and the Interested Parties, Chiefs of Ontario ("COO") and the Nishnawbe Aski Nation ("NAN") (all together, the "Moving Parties").

2. The Moving Parties seek various remedies relating to the First Nations Children and Family Services Program (the "Program") of the Respondent ("Canada"), and/or the *Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario* (the "1965 Agreement"). Among other things, they seek (i) findings that Canada has failed to remedy the discriminatory practices identified in the Tribunal's decision, (ii) Orders that Canada provide specific forms of immediate relief, for example by funding the actual costs of certain services, or making specific changes to funding formulas, (iii) Orders requiring that Canada work and consult with some or all of the Moving Parties, and/or the Commission, to eliminate the discriminatory practices, including by funding the design and conduct of various studies or needs assessments, and (iv) Orders requiring that Canada take certain steps to publicize any changes in approach.

3. In exercising its remedial jurisdiction on these motions, the Tribunal should craft meaningful, effective and unambiguous remedies, with realistic deadlines, that flow from the discriminatory practices identified in its decisions. In doing so, it should have due regard for the separation of powers – which generally indicates that where multiple methods for remedying a discriminatory practice may exist, policy-making respondents are at liberty to choose the precise method to be implemented.

4. On the critical question of mental health services for First Nations children in Ontario, the Tribunal should make a binding order that requires Canada to have measures in place, effective immediately, to ensure that (i) funding is available to fill existing gaps (whether through Jordan's Principle or otherwise), and (ii) the related procedures have been communicated to all necessary employees of Canada, to Agencies and other stakeholders, and to the general public.

5. With respect to the other subjects at issue on these motions, the Commission generally asks the Tribunal to (i) find that Canada has yet to fully eliminate the discriminatory practices identified in the Tribunal's initial decision, (ii) order that Canada take all steps needed to eliminate those practices on or before specified deadlines, in consultation with the Caring Society, AFN and the Commission, and also with COO and NAN on the

issues that affect their interests, and (iii) require that Canada report to the Tribunal about the steps taken by the specified deadlines.

Related Submissions

6. These submissions should be read together with the separate submissions to be filed by the Commission in response to the Caring Society's motion seeking various orders with respect to Jordan's Principle.

PART I – Background

7. The Moving Parties have already provided detailed submissions that canvas the factual background relevant to their requests for relief. In the circumstances, the Commission does not propose to provide another detailed statement of background facts. Instead, the Commission generally adopts and endorses the statements of facts provided by the Moving Parties, and proceeds in the next few paragraphs to provide a general and high-level overview of its understanding of the current state of affairs.

8. On January 26, 2016, the Tribunal released its initial Decision with respect to this matter. In that Decision, the Tribunal generally ordered that Canada (i) cease and desist from continuing a number of discriminatory practices, and (ii) make all changes to the Program and the 1965 Agreement that are needed to enable the delivery of services that respect the principle of substantive equality, and comply with the *CHRA*.[1] In essence, the Tribunal's Decision sets targets for Canada to meet. The Tribunal remained seized to oversee the immediate, medium and long-term implementation of the necessary remedies.

9. After the Decision, Canada announced Budget 2016, which increased funding for child and family services, based on decisions that had already been made before the Tribunal's ruling was released. Budget 2016 plans to deliver this funding using a 5-year phased approach, ostensibly based on concerns that FNCFS Agencies need time to grow their organizations before full funding begins to flow. Also since the Decision, Canada (i) began certain forms of direct regional and Agency consultation (through the Ministerial Special Representative (MSR) and Agency survey), without consulting the Caring

[1] See, for example, 2016 CHRT 16 at para. 2.

Society, AFN or the Commission on those measures, and (ii) proceeded with the establishment of the National Advisory Committee (NAC), which is intended as a vehicle for national-level consultations on all aspects of program reform.

10. Canada has taken some additional interim steps intended to increase compliance with the Tribunal's Decisions, for example by (i) increasing child service purchase amounts, (ii) modifying population thresholds for formulaic reductions for small agencies, (iii) expressing openness to case-by-case funding requests for minor capital projects, and (iv) taking certain steps to broaden its approach to Jordan's Principle – for example, by advising that Jordan's Principle funding may be available to fill gaps for mental health services in Ontario. However, Canada generally believes that any more substantial reforms will have to wait for the completion of the Agency survey, and other forms of stakeholder consultation.

11. With respect to the Agency survey, Canada has asked Agencies to provide statements of their needs by June 30, 2017, and provided them with some funding to undertake that work. It is unknown how long it will take after that for data to be analyzed and actioned. As for the NAC, its approved Terms of Reference anticipate the delivery of its final recommendations by January 31, 2018, although the possibility of extensions is contemplated.

12. In light of perceived delays on the part of Canada in enabling concrete improvements to front-line service delivery, the Moving Parties have brought the current motions, seeking orders for immediate relief, pending the outcome of ongoing or proposed consultations and studies.

PART II – Questions at Issue

13. The Commission submits the Moving Parties' motions generally give rise to the following questions:

    a. What authority does the Tribunal have to consider motions relating to the implementation of its previous decisions?

b. Should the Tribunal find that Canada has not yet fully remedied the discriminatory practices identified in its initial ruling?

c. Should the Tribunal make any additional orders to help ensure that effective remedies are forthcoming?

PART III – Arguments

A.) Authority of the Tribunal

(i) Remaining Seized to Oversee Implementation

14. The *CHRA* is remedial legislation that aims to eradicate discrimination. It is to be given a broad and liberal interpretation that best facilitates this objective. With this in mind, the Federal Court has held that the Tribunal can properly use the wide powers in s. 53(2) of the *CHRA* to award effective remedies, and to retain a broad jurisdiction to return to specified matters to ensure that the ordered remedies are forthcoming. Underlying this conclusion is a recognition that it will often be desirable for a Tribunal decision to simply set guidelines, and leave it to the parties to work out the details of a remedy, in accordance with those guidelines. In such circumstances, to deny the Tribunal's power to reserve jurisdiction and oversee implementation would be overly formalistic, and would defeat the remedial purpose of the legislation.[2]

15. Where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In such circumstances, the Tribunal does not change its initial decision, nor does it implement a different remedy than was originally provided. Indeed, the Tribunal would overstep its jurisdiction if it

[2] *Grover v. Canada (National Research Council – NRC)*, [1994] F.C.J. No. 1000 at paras. 31-33 (T.D.); *Canada (Attorney General) v. Moore*, [1998] F.C.J. No. 1128 at paras. 48-50 (T.D.). For more recent Tribunal decisions confirming the power to retain jurisdiction to oversee implementation, see: *Warman v. Beaumont*, [2009] C.H.R.D. No. 32 at paras. 5-6; and *Berberi* v. *Canada (Attorney General)*, 2011 CHRT 23 at paras. 12-16 (result upheld 2013 FC 921).

were to extend the scope of a reconvened inquiry to include matters that were not raised or dealt with at the original hearing.[3]

16. Based on the foregoing, the Commission submits that the Tribunal in this case has validly retained the authority to (i) make a finding about whether Canada has complied with its previous rulings with respect to reform of the FNCFS program, (ii) clarify or supplement the original Decisions, if necessary or appropriate to provide additional guidance to the parties on how to implement the original remedies, and (iii) extend the period for which it will remain seized of issues concerning implementation, if considered appropriate.

17. It bears emphasizing that the Tribunal does not have the statutory authority to enforce its own Orders. That power is assigned to the Federal Court, pursuant to s. 57 of the *CHRA*. Instead, the ultimate task of the Tribunal is to arrive at an Order that is clear and unambiguous, in terms of content and timeline.

18. In considering whether to make additional orders regarding implementation, the Tribunal should bear in mind general principles regarding the appropriate separation of powers between quasi-judicial decision-makers and policy-making bodies. As the B.C. Human Rights Tribunal has stated, a key proposition in this regard is that where there could be multiple ways of remedying a discriminatory practice, decision-makers should generally leave the precise method of remedying the breach to the body charged with responsibility for implementing the Order.[4]

(ii) Burden of Proof on a Motion Alleging Non-Compliance

19. Some of the Moving Parties have raised issues regarding who properly bears the burden of proof in proceedings relating to the implementation of a Tribunal decision.[5]

20. The Commission submits the initial burden to demonstrate the motions should be granted rests with the Moving Parties. This would be consistent with the approach taken by the Human Rights Tribunal of Ontario in *McKinnon v. Ministry of Correctional Services*. In

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[3] *Grover v. Canada (National Research Council – NRC), supra* at paras. 37 and 45; *Canada (Attorney General) v. Moore, supra* at paras. 55 and 70; and *Milazzo v. Autocar Connaisseur Inc.*, [2005] C.H.R.D. No. 3 at paras. 20-21.
[4] *Moore v. British Columbia (Ministry of Education),* 2005 BCHRT 580, [2005] B.C.H.R.T.D. No. 580 at para. 1012 (upheld, but remedies varied, by SCC).
[5] See, for example, Caring Society Submissions at paras. 174-178; and AFN Submissions at paras. 85-89.

that case, the HRTO concluded that a complainant bore the initial burden of proving non-compliance with remedial orders. Only after that point would the burden then shift to the respondent, to rebut the resulting presumption that, by virtue of the non-compliance, the discriminatory practices continued.[6]

21. That said, the evidentiary requirement on the complainant is not necessarily an onerous one. As the HRTO held in a subsequent ruling in *McKinnon*, where a complainant alleges non-compliance with sufficient particulars to dispel any notion that the allegations are frivolous or vexatious, it will be appropriate to require the respondent to present its evidence confirming compliance.[7]

B.) The Tribunal Should Find that Canada is Not Yet in Full Compliance

22. The Commission is encouraged by evidence that increased funding was announced in Budget 2016, that a number of immediate measures have been taken, that a process is underway to assess Agency needs, and that certain consultation processes have begun to move forward.

23. At the same time, as demonstrated in the submissions of the Caring Society and the other Moving Parties, there is also evidence that work remains to be done to eradicate the discriminatory practices identified in the Tribunal's Decisions. Indeed, the Commission does not understand Canada to argue otherwise – and instead believes that the real focus of the present motions is on whether Canada is moving quickly enough in the right direction, and not on whether the steps taken to date have been adequate to bring Canada into full compliance.

24. In all the circumstances, the Commission agrees that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with Tribunal's rulings. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

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[6] *McKinnon v. Ontario (Ministry of Correctional Services),* [2002] OHRBID No. 22 at paras. 28-29 (aff'd by the Divisional Court, and the Ontario Court of Appeal).
[7] *McKinnon v. Ontario (Ministry of Correctional Services),* 2009 HRTO 862 at paras. 29-30.

C.) Should the Tribunal Grant the Additional Orders Sought?

(i) The Commission's Proposed Approach to Implementation

25. The thrust of the Tribunal's decisions has been to require that Canada fund Agencies in a manner that better reflects their actual needs, thus enabling them to better respond to the needs of the communities they serve, and deliver a comprehensive range of services that are consistent with the principle of substantive equality.[8] Accomplishing this overarching goal will be a complex task, requiring that – among other things – Canada gather accurate and up-to-date information about the needs of Agencies, and make policy-informed choices about how to meet those needs, bearing in mind its obligation to ensure the responsible expenditure of public funds.

26. The Commission generally agrees that further guidance is appropriate, to help steer the process of achieving full compliance with the Tribunal's findings. For example, as will be discussed further below, the Commission agrees it would be appropriate to make an order ensuring that critical gaps in mental health services in Ontario are being addressed. However, the Commission does not join the Moving Parties at this time in requesting other Orders that would require Canada to cover actual costs incurred by Agencies, make immediate and specific changes to funding formulas or procedures, or commit now to providing future funding for additional studies or needs assessments requested by the Moving Parties.

27. Instead, the Commission proposes an approach that it believes is consistent with the case law regarding the retention of jurisdiction, and the separation of powers – namely, that the Tribunal order that Canada (i) consult with the appropriate parties, (ii) put concrete measures and plans in place by specified deadlines to eradicate the discriminatory practices identified in the earlier rulings, (iii) take adequate steps to ensure that civil servants, Agencies and the public are made aware of any new policies and procedures, and (iv) provide reports by the specified deadlines, detailing the measures and plans put in place. The length of the deadlines to be attached to particular items could vary,

[8] See, for example, 2016 CHRT 16 at paras. 33-35.

depending on the complexity of the task, whether there is a need to gather or generate necessary input data, and the breadth of any consultations necessary.

28. The Commission acknowledges that the Tribunal's implementation decisions to date have already clarified the discriminatory practices to be addressed, provided directions and suggestions about which aspects of the Program and 1965 Agreement could be improved in the immediate term, directed the sharing of information, and strongly encouraged the parties to work together to develop solutions, outside of the Tribunal hearing room.[9] These decisions have been very helpful. With respect, what remains at this point is for the Tribunal to give Canada specific and realistic deadlines, and clear instructions about its obligations to consult in working towards those deadlines.

(ii) General Comments about Orders for Consultation

29. The Tribunal has stressed the importance of consultation with appropriate experts, including the Moving Parties, in bringing the Program and the 1965 Agreement into compliance with the *CHRA*.[10] However, it does not yet appear to have made a binding order creating enforceable obligations in that regard. In the absence of such an order, some disagreements have arisen, for example around Canada's decision not to consult with the Caring Society or AFN before initiating the Agency survey late last year. In all the circumstances, and as discussed in more detail throughout the balance of these submissions, the Commission submits the time is right for the Tribunal to make a binding order under s. 53(2)(a) of the *CHRA*, requiring Canada to consult not only with the Commission, but also directly with the Moving Parties.

30. In *Canada (Attorney General) v. Johnstone*,[11] the Federal Court of Appeal struck out a Tribunal order that required the Canada Border Services Agency to adopt policies "satisfactory" to the Commission and the complainant. It found that s. 53(2)(a) did not specifically allow for such a remedy, and that the Tribunal had not provided any explanation for its authority to impose such a requirement – with the result that the

[9] For comments urging the parties to work collaboratively to identify solutions, see: 2016 CHRT 10 at paras. 40-42; and 2016 CHRT 16 at paras. 11-12.
[10] See, for example: 2016 CHRT 16 at paras. 10-12.
[11] *Canada (Attorney General) v Johnstone*, 2014 FCA 110, [2014] F.C.J. No. 455.

outcome was unreasonable, in the sense that it lacked justification, transparency and intelligibility.

31. The *Johnstone* ruling might arguably be read as calling into question the Tribunal's authority to order that a respondent consult with anyone other than the Commission when implementing public interest remedies. However, with all due respect to the Court of Appeal, the Commission submits that s. 53(2)(a) should allow for Orders requiring consultation directly with the Moving Parties, in the context of this proceeding. This is the case for several reasons.

32. First, allowing for such consultation will promote reconciliation with Indigenous peoples. Indeed, bearing in mind constitutional changes, apologies for historic wrongs, and the reports of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC), the Supreme Court of Canada has declared in *Daniels* that "…reconciliation with all of Canada's Aboriginal peoples is Parliament's goal." [12] Including the voices of the Moving Parties in the reform of services that directly affect their interests, and the Indigenous children and communities they serve, will further this objective, giving voice to those who have historically been excluded from decision-making processes. Section 53(2)(a) of the *CHRA* should be expansively interpreted to allow this to happen.

33. Second, a number of recent decisions and reports have lamented the suffering that resulted when past decisions about the welfare of Indigenous children were made without the direct involvement of Indigenous stakeholders.[13] Using s. 53(2)(a) of the *CHRA* to require consultation with Indigenous stakeholder organizations will help to ensure that the current reform of the Program and the 1965 Agreement does not repeat the mistakes of the past.

34. Third, there can be no doubt that the Caring Society and AFN have invaluable expertise to contribute to any discussion about reform of the Program and 1965 Agreement, and that COO and NAN share expertise about such matters as they relate to their constituent

[12] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 9, at para. 37.
[13] See, for example: *Brown v. Canada (Attorney General)*, 2017 ONSC 251 at paras. 4-7. [AFN Book of Authorities, Tab 9]; and *Catholic Children's Aid Society of Hamilton v. G.H.*, 2016 ONSC 6287 at paras. 26, 27 & 71; and the Report of the Truth and Reconciliation Commission.

communities in Ontario. Indeed, the Tribunal has already recognized that INAC is not itself an expert in the delivery of child welfare services, and that consulting with experts (such as the Caring Society) should therefore be a priority.[14]

35. For all these reasons, when the Commission refers in these submissions to the importance of consultation, it should be taken to refer to meaningful consultation, held in good faith, on the basis of necessary shared information and data, with both the Moving Parties and the Commission.

(iii) Immediate Relief regarding Mental Health Services in Ontario

36. COO and NAN have sought orders requiring that INAC fund mental health services in Ontario.[15] In support of their requests, they have described evidence indicating that (i) Budget 2016 does not specifically provide for increases in mental health services to First Nations children in Ontario, (ii) responsible officials do not appear to have a full understanding of the 1965 Agreement as it relates to mental health services, (iii) Canada currently has no concrete plans or deadlines for analyzing or addressing information gaps around mental health services, and (iv) although Jordan's Principle can be used to fill gaps as an interim measure, this message has not been clearly delivered to government officials or stakeholders, and few children nationally have actually received services through this mechanism to date.[16]

37. The Commission accepts and endorses these descriptions of the relevant evidence, and agrees there are critical gaps in the provision of mental health services in Ontario that demand immediate attention. Indeed, the Moving Parties have described evidence that underscores the need for action. Specifically, they have described the tragic events that took place in Wapekeka First Nation, where two 12-year old Indigenous girls – Jolynn Winter, and Chantel Fox – took their own lives in January of 2017. Although the Nation had requested emergency mental health funding from the regional office of Health Canada's First Nation and Inuit Health Branch (FNIHB) months earlier, in part based on word of a suicide pact in the community, the request was denied – apparently without any consideration of whether funding might have been made available through Jordan's

[14] *Supra*, at note 10.
[15] COO submissions at para. 98(iii); and NAN submissions at para. 90(A).
[16] See, for example: COO submissions at paras. 27-42; and NAN submissions at paras. 17-43.

Principle. During cross-examination, Health Canada's affiant on these motions confirmed that the request could have qualified for such funding.[17]

38. The Commission acknowledges that in the longer term, Canada may need to consult with Ontario about any changes to the 1965 Agreement touching on the provision of mental health services to First Nations children in the province. However, there is nothing that would prevent Canada from directly funding such services in the meantime. Indeed, Canada appears to have recognized as much, stating that – at a minimum – funding for mental health services can and should be available through Jordan's Principle.

39. In all the circumstances, for the sake of clarity, the Commission asks for an immediate Order requiring that Canada (i) ensure that funding is available, through Jordan's Principle or otherwise, to fill gaps that exist with respect to the delivery of mental health services to First Nations children in Ontario, (ii) ensure that the availability of such funding, and the procedures by which such funding is made available, have been communicated to all employees of Canada responsible for administering the procedures, to First Nations, Agencies and other stakeholders, and to the public; and (iii) within 30 days of the Tribunal's Order, provide a report to the Tribunal, confirming Canada's compliance.

(iv) Requests for Orders Requiring Immediate Funding of Actual Costs

40. The Moving Parties have variously asked for Orders requiring that Canada immediately, and/or retroactively, fund the actual costs of certain capital improvements or services relating to the delivery of substantively equal child welfare services. For example, requests have been made for Orders requiring that Canada fund the actual cost of:

- legal fees incurred by Agencies;[18]
- building repairs, where an Agency has received notice that repairs are necessary to comply with applicable codes and regulations, or there is other evidence of non-compliance with such codes and regulations;[19]

[17] See, for example, the evidence described in the following passages: COO submissions at para. 58; and NAN submissions at para. 36.
[18] Caring Society submissions at para. 207.
[19] Caring Society submissions at para. 196.

- intake and investigations work (i.e., receipt, assessment and investigation of child protection reports);[20]
- band representative services in Ontario;[21] and
- such prevention services as are determined by Agencies to be in the best interests of First Nations children.[22]

41. The Commission agrees that the Tribunal's earlier implementation decisions have identified all these items as ones that ought to be addressed in the immediate term, and that the Moving Parties' submissions have raised concerns showing that aspects of these matters still need to be addressed. However, based on the evidence available to date, and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that orders to fund these actual costs are appropriate at this time. As a result, the Commission does not now join the Moving Parties in seeking these orders.

42. Instead, the Commission submits that the best approach for these immediate relief items would be an Order that gives Canada (i) four months from the date of the Order to consult with the Moving Parties and the Commission about the best methods for addressing these items, and put in place concrete measures to address the items, and (ii) an additional two months to deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

43. The Commission anticipates that Canada may argue that more time is necessary to consult with various stakeholders, other than the Moving Parties and the Commission, before these items can be addressed. The Commission does not agree. It appears that all these matters are ones that could be dealt with through the provision of appropriate funding directly from Canada to the Agencies, without the need for the involvement or approval of other parties. Further, and in any event, nothing in the Order proposed by the

[20] Caring Society submissions at para. 217.
[21] COO submissions at para. 83.
[22] AFN submissions at para. 146 (asking for funding of actual costs within 60 days).

Commission would prevent longer-term consultation with the Moving Parties or other stakeholders, with the goal of realizing further improvements.

(v) Caring Society Requests for Specific Changes to Funding Mechanisms

44. The Caring Society seeks Orders that would require Canada to immediately change two aspects of the current funding regime. Specifically, it asks that:

- the child service purchase amount be increased from the current level of $175 per child, to $200 per child;[23] and
- rather than using 300 children as the population threshold for core FNCFCS Agency funding, Canada use a system of incremental funding for every 25 children, as recommended in the Wen:de report.[24]

45. The Commission acknowledges the common sense principle that increases to Agency purchasing power will increase their ability to deliver substantively equal services. It also appreciates that Dr. Loxley has opined that increasing funding on an incremental basis would produce better results than Canada's current approach.

46. However, the Commission also notes that the Tribunal's decisions to date have not found that the specific funding alternatives now urged by the Caring Society are necessary to ensure the elimination of the discriminatory practices. It may be that other options or mechanisms are available to Canada that could equally or better contribute to the establishment of an overall system that complies with the *CHRA*. In the circumstances, the Commission believes it would be premature on the current record, and inconsistent with general principles regarding the separation of powers, to order now that Canada make these specific changes to its practices. Instead, the Commission recommends that these topics be included in the scope of a longer-term Order directing consultation, the putting in place of concrete steps to eliminate discrimination, and reporting.

[23] Caring Society submissions at para. 283(b)(iv).
[24] Caring Society submissions at para. 283(b)(iii).

(vi) Caring Society Request for Funding to Enable Participation in the Agency Survey

47. Canada has offered to provide Agencies with $25,000 to enable their participation in the Agency survey costing exercise. The Caring Society asks the Tribunal to order that Canada instead pay a minimum of $25,000 per Agency, to be scaled proportionally upwards for large or multi-site Agencies.[25]

48. The Commission is mindful of the fact that, while Canada is obliged to implement the Tribunal's decision and eliminate discriminatory practices, it is required to do so in a manner that respects the public nature of its funding. In the absence of greater evidence demonstrating that the amounts actually offered will not permit Agencies to meaningfully participate in the Agency survey, the Commission believes the Tribunal should decline to issue the requested Order, at least at this time.

(vii) Caring Society Request for an Order Barring Reallocation of Funds

49. The Caring Society seeks an Order that Canada immediately cease the practice of reallocating costs from other First Nations programs (eg. infrastructure and housing) in order to fund the Program.[26]

50. There seems little doubt that reallocating funds in this fashion has an adverse impact on the delivery of other important and necessary services on reserves across Canada. The Auditor General of Canada has denounced the practice as "unsustainable," and this Tribunal has already urged Canada to eliminate it.[27]

51. At the same time, the Tribunal appears to have concluded in its last Implementation Decision that the reallocation of funding from other programs was "outside the four corners of this complaint."[28] As a result, the Commission does not now join the Caring Society in seeking an Order prohibiting the practice.

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[25] Caring Society submissions, at para. 283(e).
[26] Caring Society submissions, at para. 269.
[27] 2016 CHRT 16 at paras. 56-61.
[28] 2016 CHRT 16 at para. 61

(viii) NAN Request for Immediate Remoteness Adjustments

52. NAN seeks an Order requiring that Canada immediately apply the remoteness quotients identified in the Barnes Report to all funding for the NAN-mandated child welfare agencies.[29]

53. The Commission agrees that the Tribunal's earlier implementation decisions have identified remoteness as an item that ought to be addressed in the immediate term[30], and that the Moving Parties' submissions have raised concerns showing this matter still needs to be addressed. However, based on the evidence available to date, and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel it would be appropriate to order the adoption of the Barnes Report quotients at this time. As a result, the Commission does not now join NAN in seeking this order.

54. Instead, the Commission submits that the best approach for this immediate relief item would be an Order that gives Canada (i) four months from the date of the Order to consult with the Moving Parties and the Commission about the best methods to address short-term remoteness adjustments, and put in place concrete measures to address the matter in the immediate term, and (ii) an additional two months to deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

(ix) NAN Request for Immediate Payment of Current Agency Debts and Deficits

55. NAN has requested an Order requiring that Canada fund all the current debts and deficits of the NAN-mandated child welfare agencies.[31] The Commission appreciates there may be a link between the request and the discriminatory practices – i.e., systemic past underfunding may have led to the development of significant debts and deficits, the management of which currently has a negative impact on front-line service delivery.

[29] NAN submissions at para. 90(B)(a).
[30] See, for example, 2016 CHRT 16 at para. 81.
[31] NAN submissions at para. 10.

56. At the same time, the Commission notes that none of the Tribunal's decisions to date have commented on whether the funding of debts and deficits is necessary or required to redress the discriminatory practices it identified. In the circumstances, the Commission believes it would be premature on the current record to order that Canada pay the full debts and deficits of these Agencies. Instead, the Commission recommends that the topic of debts and deficits for all Agencies – not just the NAN-mandated Agencies – be included in the scope of a longer-term Order directing consultation, the putting in place of concrete steps to eliminate discrimination, and reporting.

(x) Requests for Funding of Specific Studies and Assessments

57. COO and NAN have variously asked for Orders requiring that Canada fund the design and conduct of certain studies or assessments, for the purpose of informing medium and long-term implementation items. For example, requests have been made for Orders requiring that Canada:

- retain an independent expert, agreed to by COO and NAN, to conduct an "Ontario Special Study" regarding gaps in service under the 1965 Agreement in Ontario, and propose reform options;[32]
- fund jointly-appointed experts to obtain remoteness data, and develop a new remoteness quotient (with corresponding orders requiring the production of information relating to the project, and the funding of all costs relating to the collection of data);[33]
- fund an immediate update of the Barnes Report, using data from the 2006 census, 2011 national household survey, and from INAC;[34]
- fund a second future update of the Barnes Report, once data from the 2016 census becomes available;[35]
- fund the design and implementation of a direct survey of First Nations in northern Ontario with respect to community child welfare needs and infrastructure;[36]
- fund a capital needs assessment study for all NAN-mandated child welfare agencies.[37]

[32] COO submissions at para. 95.
[33] NAN submissions at para. 45.
[34] NAN submissions at para. 90(B)(f).
[35] NAN submissions at para. 90(B)(g).
[36] NAN submissions at para. 90(B)(h).

58. The Tribunal has already agreed that the proposed Ontario Special Study would "greatly assist" in determining the adequacy the 1965 Agreement in achieving comparability of services, and inform long-term reform to the 1965 Agreement.[38] It further noted NAN's desire for studies that thoroughly review and address the effect of the 1965 Agreement on northern remote communities.[39] However, it stopped short of finding that these proposed studies were necessary steps to address the discriminatory practices, nor did it comment in any way on any of the details that would be needed to carry out the studies (e.g. amount of funding, means of choosing who will conduct the studies, scope and methodology, and so on).

59. In the circumstances, and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that orders to fund these studies are appropriate at this time. As a result, the Commission does not now join the Moving Parties in seeking these orders.

60. Instead, the Commission submits that the best approach for these items would be an Order that gives Canada (i) four months from the date of the Order to consult with the Moving Parties and the Commission about the need to conduct some or all of the requested studies, and the terms of any studies that are to be conducted, and put in place concrete measures to move forward with any approved studies, and (ii) deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

(xi) Communications and Sharing of Information

61. The Moving Parties have variously asked for Orders imposing different sorts of obligations on Canada to (i) inform staff, stakeholders and the public about changes to policies and procedures flowing from the Tribunal's decisions, and (ii) report back to the

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[37] NAN submissions at para. 90(C)(b).
[38] 2016 CHRT 16 at para. 103.
[39] 2016 CHRT 16 at para. 102.

Tribunal, the Moving Parties and the Commission about ongoing efforts to achieve full compliance with those decisions.

62. The Commission agrees with the Moving Parties that it is critically important to ensure that key information about the Tribunal decisions, and resulting changes to policies and procedures, is quickly and consistently communicated to employees of Canada responsible for implementing the policies and procedures, Agencies and other stakeholders, and the public. For example, although Canada has said that Agencies may now apply on a case-by-case basis to receive additional funding for certain legal fees or capital expenditures, it was not able to demonstrate that this information had actually been clearly communicated to Agencies themselves.[40] Without effective communication, positive changes of this kind will effectively be rendered meaningless.

63. For this reason, the Commission joins the Moving Parties in requesting an Order that underscores Canada's obligation to properly publicize any changes to the Program and 1965 Agreement. It submits, however, that the details of such obligations be left as a matter for the parties to discuss as part of the consultations that the Commission encourages the Tribunal to order, and that the communications strategies actually used be described in detail as part of the corresponding reporting obligations.

(xii) Reporting

64. The Moving Parties have variously asked for Orders imposing different sorts of obligations on Canada to report back to the Moving Parties, the Commission and the Tribunal on steps taken, and progress made, in eradicating discriminatory practices.[41]

65. The Commission agrees with the Moving Parties that detailed and accurate reporting of this kind is essential to the success of the implementation framework being proposed. Without such reporting, it will be impossible for the Moving Parties, the Commission and the Tribunal to evaluate whether Canada has or has not complied with the Tribunal's orders. For this reason, as already stated, the Commission suggests that Canada be

[40] See, for example, the Caring Society submissions at paras. 66-68.
[41] See, for example: Caring Society submissions at para. 287; AFN submissions at para. 146; and COO submissions at paras. 97 and 98(vii).

ordered to provide detailed compliance reports, on or before any deadlines that the Tribunal may come to fix for the completion of steps in the implementation process.

CONCLUSION

66. The Commission agrees that immediate relief is warranted on the critical question of mental health services in Ontario, and otherwise proposes a framework by which the Tribunal (i) requires that Canada consult with the Moving Parties and the Commission, (ii) orders Canada to put concrete measures or plans in place by specified deadlines to eradicate discriminatory practices, (iii) directs Canada to take adequate steps to ensure that government officials, Agencies and the public are made aware of any changes to policies and procedures, and (iv) requires the delivery of reports by the specified deadlines, detailing the measures put in place.

67. This approach builds on the Tribunal's repeated comments that negotiation and collaboration are most likely to produce effective reforms, and promote reconciliation. The approach would also be consistent with the wording of s. 53(2)(a) of the *CHRA*, case law concerning the retention of jurisdiction to oversee implementation, and important principles regarding the separation of powers and responsible use of public funds. The Commission further believes that it would also be consistent with the submissions of AFN, which generally seek (among other things) the creation of protocols for consultation that will allow the effective and expeditious cessation of discriminatory practices.[42]

68. For all the foregoing reasons, the Commission suggests that the Tribunal issue the following order:

Immediate Relief Measures

1. Canada will:
    a. ensure that funding is available, through Jordan's Principle or otherwise, to fill gaps that exist with respect to the delivery of mental health services to First Nations children in Ontario;

[42] AFN submissions at para. 146.

b. ensure that the availability of such funding, and the procedures by which such funding is made available, have been communicated to all government officials responsible for administering the measures, to Agencies and other stakeholders, and to the general public; and

c. within 30 days of the Tribunal's Order, provide a report to the Tribunal, confirming Canada's compliance with clauses 1(a) and 1(b);

2. Within four months of the Tribunal's Order, Canada will consult with the Moving Parties and the Commission, and put in place concrete measures that it believes will address the following items of immediate relief, pending completion of consultations on the final long-term reform of the Program and the 1965 Agreement:

   a. legal fees incurred by Agencies;

   b. building repairs needed to ensure compliance with applicable health and safety codes or regulations;

   c. intake and investigations work;

   d. band representative services in Ontario;

   e. short-term remoteness adjustments; and

   f. the conduct of any studies deemed necessary to identify gaps in services (such as the proposed Ontario Special Study), or inform the long-term development of remoteness quotients;

3. During the period described in clause 2, the Tribunal will retain jurisdiction to resolve any disputes that may arise regarding the process for conducting the consultations ordered.

4. Within six months of the Tribunal's Order, Canada will provide a report to the Tribunal, describing:

   a. the concrete measures that have been put in place to address the immediate relief items described in clause 2;

   b. how those measures have been communicated to employees of Canada responsible for administering the measures, to Agencies and other stakeholders, and to the general public; and

   c. how Canada expects those measures to address the discriminatory practices identified by the Tribunal.

5. For two months after Canada delivers the statement or statements described in clause 4, the Tribunal will retain jurisdiction to resolve any disputes that may arise about whether the concrete measures put in place are adequate interim measures, pending completion of consultation on final long-term reform.

<u>Long-Term Relief Measures</u>

6. Canada will consult with the Moving Parties and the Commission on long-term final reform of the FNCFCS Program and the 1965 Agreement. Consultation with the Complainants and Commission may be conducted through the NAC process.

7. The Tribunal will retain jurisdiction until June 30, 2018 (or such later time as the Tribunal may later order), to resolve any disputes about:
   a. the process for conducting the consultation described in clause 6; or
   b. whether the concrete final measures that Canada puts in place after the consultation have redressed all the discriminatory practices identified by the Tribunal.

All of which is respectfully submitted this 7th day of March, 2017.

Daniel Poulin/Samar Musallam
Counsel
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1

Tel: (613) 947-6399
Fax: (613) 993-3089

Counsel for the Commission

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