Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 10
Date: April 26, 2016
File No.: T1340/7008

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 Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

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I. Continuation of remedial order

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*).

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[3] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

[5] Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

II. Progress to date

[6] INAC accepts the *Decision* and has not sought judicial review of its findings or general orders. It is committed to working with child and family services agencies; front-line service providers; First Nations organizations, leadership, and communities; the Complainants; and the provinces and territories, on steps towards program reform and meaningful change for children and families. It has also specifically committed to the following:

- A full-scale reform of its child welfare program.
- Review of the *1965 Agreement*.
- Not to reduce or restrict funding to the FNCFS Program
- To immediately re-establish the National Advisory Committee.
- And, it supports the new iteration of the Canadian Incidence Study.

[7] INAC's submissions also indicated that immediate relief in response to the *Decision* would include increased funding for the FNCFS Program. The 2016 federal budget allocated $634.8 million over five years for the FNCFS Program. According to INAC, $71.1 million is to be provided in 2016-2017 for the following:

- $54.2 million for:
    - immediate adjustments to Operations and Prevention through additional investments to update existing funding agreements;
    - increases to the per child service purchase amounts (including for prevention services);
    - funding for intake and investigation services;
    - upward adjustments for agencies with more than 6% of children in care; and,

- investments for providing federal support to expand provincial case management systems on reserve.

- $16.2 million for prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon at nationally-consistent levels across all jurisdictions.

- $700,000 to INAC resources for outreach, engagement and effective allocation of funding to service providers.

[8] In addition to the funding identified in the 2016 budget, INAC also commits to provide additional funding for:

- maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements, as they arise; and

- support for an engagement process going forward in conjunction with the National Advisory Committee and Regional Tables to work on medium and long-term reform.

[9] The Panel acknowledges the commitments made by the Federal government so far and is encouraged by its efforts to implement the Tribunal's orders.

III. Updated order

[10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.

[11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). In line with this special status, the

CHRA must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).

[12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect to the principle that:

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of

the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 11 CHRR D/194 (CHRT) at paras. 15 and 21).

[18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).

[19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.

A. The FNCFS Program

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.
>
> [385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.
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> [386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations

in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure

> reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief.

[22] Again, while it appreciates the Federal government's commitments and efforts to date, the Panel requires more clarity from INAC moving forward to ensure its orders are effectively and meaningfully implemented. As the Assembly of First Nations stated in its submissions; "[a]n order for immediate relief to the FNCFS Program should be meaningful but temporary until such time that the FNCFS Program can be completely overhauled." The Panel agrees with this statement. To address this, the Panel believes the best course of action is for INAC to provide ongoing reporting to the Tribunal. That is, the Panel will supervise the implementation of its orders by way of regular detailed reports created by INAC, to which the parties will have an opportunity to provide submissions.

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on

budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

[24] INAC is directed to provide this report within four weeks of this ruling. Following reception of the report, and given the length of time that has elapsed since the *Decision*, an in-person case management meeting will then occur to provide an opportunity for the parties and Panel to discuss the report, ask questions, and make submissions, if any. Thereafter, the Panel will issue a further ruling if necessary. The Tribunal will canvass the parties for dates for this case management meeting in the days following the release of this ruling.

[25] The Panel recognizes that INAC provided additional information regarding its 2016 budget allocation for the FNCFS Program following the close of submissions for this ruling and invited the parties to meet to discuss the issue. The Complainants raised concerns with the timing and manner in which this information was sent to the Tribunal. Neither is interested in another round of submissions on the issue at this time. The Panel did not consider INAC's additional information regarding the 2016 budget as part of this ruling. However, in a much more detailed fashion, this information will presumably form part of the material to be included in the report to follow and the other parties will have an opportunity to provide submissions thereon.

B. The *1965 Agreement*

[26] The Panel's main finding with regard to the *1965 Agreement* was that it had not been updated to ensure on-reserve communities in Ontario could fully comply with the *Child and Family Services Act*, including the provision of Band Representatives and mental health services (see the *Decision* at paras. 217-246 and 458).

[27] The Federal government has indicated that it has met with the Government of Ontario and expressed a need to review the *1965 Agreement*. It submits these preliminary

meetings have set the stage for more substantive discussions that will take place with First Nations.

[28] Furthermore, following the *Decision* and while submissions were being filed in advance of this ruling, the Nishnawbe Aski Nation (NAN) filed a motion seeking interested party status. NAN seeks to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario.

[29] Notwithstanding NAN's motion, the Panel made a commitment to the parties to rule upon immediate relief items expeditiously and wanted to rule upon as many of those items as possible in this ruling. However, given the Panel will rule upon NAN's motion shortly following the release of this ruling and that there may be further submissions to consider on the *1965 Agreement*, the Panel believes it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* after receiving those further submissions from the parties.

C. Jordan's Principle

[30] In the *Decision*, the Panel found the Federal government's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, that delays were inherently build into the Federal government's process for dealing with potential Jordan's Principle cases and that it was unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children and not just those with multiple disabilities (see the *Decision* at paras. 379-382 and 458).

[31] According to the Federal government, INAC and Health Canada have begun discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. Over the next two to three months, it will begin engaging First Nations and the provinces and

territories in these discussions. It anticipates options for changes to Jordan's Principle could be developed within twelve months.

[32] However, the Panel's order specifically indicated that INAC was to "…immediately implement the full meaning and scope of Jordan's principle" (the *Decision* at para. 481). While it understands a period of time may have been needed to meet with partners and stakeholders and put a framework in place, the Panel did not foresee this order would take more than three months to implement. The order is to "immediately implement", not immediately start discussions to review the definition in the long-term. There is already a workable definition of Jordan's Principle that has been adopted by the House of Commons. While review of this definition and the Federal government's framework for implementing it may benefit from further long-term review, the Panel sees no reason why the current definition cannot be implemented now.

[33] Therefore, the Panel orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[34] INAC will report to the Panel within two weeks of this ruling to confirm this order has been implemented.

D. Other issues

[35] The Complainants made various other submissions with respect to implementing the Panel's orders in the short term. While some were addressed by INAC, others were not (see for example para. 16 of the First Nations Child and Family Caring Society's submissions dated March 31, 2016; and paras. 12-15 of the Assembly of First Nations' submissions dated March 3, 2016). It would be helpful to the Panel and the parties if INAC could respond to those additional immediate relief items as part of its report on the FNCFS Program ordered above. Therefore, in its FNCFS Program report, the Panel directs INAC

to address the immediate relief items sought by the Complainants that have not been addressed in INAC's submissions to date.

E. Retention of jurisdiction

[36] Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33).

[37] Given the ongoing nature of the orders above, and given the Panel still needs to rule upon other outstanding remedial requests, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following the further reporting by INAC and the Panel's ruling on the other outstanding remedies.

IV. Concluding remarks by Panel Chairperson

[38] I wish to share some concluding remarks with the parties. Member Lustig has read and supports these remarks.

[39] The hearings in this matter were held in a spirit of reconciliation, with an overarching goal of maintaining an atmosphere of peace and respect. Respect for all involved was paramount and, given the nature of the case, respect for Aboriginal peoples not only participating in the proceedings, but also following the proceedings in person and on the Aboriginal Peoples Television Network. Fostering this atmosphere of peace and respect is of paramount importance considering the Tribunal's key role in determining fundamental human rights and in safeguarding the public's confidence in the administration of justice, especially for Aboriginal peoples.

[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an

opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.

[41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the *Decision* are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change. The time is now.**

[42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 26, 2016