Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO and NISHNAWBE ASKI NATION

Interested Parties

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PART I: OVERVIEW

1. The Parties to this proceeding have spilled a great deal of ink and exchanged voluminous written materials. In the midst of this paper fog, one can easily miss the forest for the trees by mistaking words on paper for tangible results for Indigenous children and families.

2. The Parties are now in receipt of the March 14, 2017 responding factum from Indigenous and Northern Affairs Canada ("INAC"). This contribution to the paper fog might lead observers of these proceedings to believe that words equate to real change. However, words mean little to the 163,000 children that have suffered discrimination through inadequate funding for child and family services on First Nations.

3. The communities of Nishnawbe Aski Nation ("NAN") are concerned about practical outcomes. In that regard, INAC's response raises two issues of particular concern for NAN:

    1. Mental health services in Ontario; and,
    2. Agency-specific relief sought by agencies operating within NAN territory.

4. Regarding mental health in Ontario, INAC's responding factum acknowledges for the first time that Jordan's Principle funding is a vehicle to address gaps in mental health services. However, this was never articulated prior to the cross-examination of Robin Buckland in February 2017, and only ten children have ever been approved for mental health coverage under Jordan's Principle.[1] NAN appreciates Canada's aspirational words, but remains concerned that there is no concrete plan of action to prevent something like the Wapekeka First Nation tragedy from recurring.

[1] Respondent's March 14, 2017 Factum, at para 47.

5. Regarding agency-specific relief, the Respondent INAC claims that one challenge in providing immediate relief funding is that there are information gaps regarding the specific needs of agencies. NAN has filed evidence, in the form of affidavits from the Executive Directors of the three child welfare agencies which operate within NAN territory[2] seeking debt relief and funding for capital needs assessment studies. Further, NAN's remoteness experts have proposed a direct survey of First Nations and First Nation agencies.

PART II: ISSUES ON REPLY

A. Words Do Not Fill Gaps in Mental Health Funding

i) INAC Acknowledges that Jordan's Principle Applies to Mental Health Funding

6. INAC acknowledges that there is a gap with respect to mental health services for First Nations children and that Jordan's Principle funding is available to address this gap.[3] To date, INAC reports that precisely ten children have been approved for mental health coverage under Jordan's Principle.[4]

7. INAC's submission arises out of the evidence of Ms. Robin Buckland, during cross-examination by NAN. There is no evidence before the Tribunal that INAC considered Jordan's Principle as a mechanism to address mental health gaps prior to the cross examination of Ms. Buckland. Ms. Buckland was unequivocal in her statement that Wapekeka First Nation's July 2016 proposal for a mental health service team based within the community ("the Wapekeka Proposal") should have qualified for Jordan's Principle

[2] Payukotayno James and Hudson Bay Family Services ("Payukotayno"); Tikinagan Child and Family Services ("Tikinagan"); and, Kunowanimano Child and Family Services ("Kunowanimano").
[3] Respondent's March 14, 2017 Factum, at para 47 & 52.
[4] Respondent's March 14, 2017 Factum, at para 47.

funding. The Wapekeka Proposal resulted from a clear need in an area where there was a clear gap in mental health services.

> Q. And it qualifies, right? Like, there's nothing about this that you wouldn't say --
>
> A. And what does that mean?
>
> Q. That means, well, people talk Jordan's Principle every second sentence. It qualifies as an evinced need and a gap, right?
>
> A. There's, there was clearly a need and there was clearly a gap.
>
> Q. And so it qualifies?
>
> A. **Would it qualify as a Jordan's Principle case? Yes**.[5] [Emphasis Added]

8. The evidence before the Tribunal is that Jordan's Principle has been an insufficient mechanism to address gaps in mental health coverage for First Nations in Ontario. Only a total of ten children have received mental health funding under Jordan's Principle and two 12-year-old girls in Wapekeka First Nation died, six months after the July 2016 Wapekeka Proposal, while the community was still waiting for funding.

9. This is just one example. The month after these tragedies, INAC's national lead on Jordan's Principle was still unaware of why the Wapekeka Proposal was not funded, despite admitting that it should have been.

> Q. Ms. Buckland, what's missing from your answer, with respect, is you telling us what happened. It is close to inescapable that I have asked the same question repeatedly which is factually why did your people not address the clear need? That's the question that I've asked in many different ways and you're not giving me that answer. Why was it left unaddressed? That's the question I'm looking for an answer for.

[5] Buckland Cross-Examination, February 6, 2017, Pg. 157-8, Para. 446-449. See also: Pg. 175, Para. 505, Line 1-4 **AND** Page 180, Paras. 526-528 **AND** Pg. 189-190, Paras. 567-571. **AND** Pg. 216, Para 645.

> A. So when did I receive Dr. Kirlew's affidavit?
>
> Q. No, you advised us that you heard of this right away after it happened, that you saw Mr. Conn's statement in the media, and that you made inquiries about what happened.
>
> A. Sure.
>
> Q. And so I'm asking the question, what was the fruit of your inquiries? Why did they leave this unaddressed?
>
> A. And, and I don't know.
>
> Q. All right, thank you.
>
> A. I don't know.
>
> Q. Thank you. But that's the first time you've told me. It's been five to ten minutes and I've been asking the same question. So as matters currently stand, on February 6th, 2017, in your capacity as in charge of primary care as high-ranking executive for Health Canada, you do not know why the Wapekeka proposal went unaddressed for months on end in relation to children who were a high risk for suicide. Am I right, you don't know?
>
> A. I can speculate.
>
> Q. No, I didn't ask for speculation. I simply wanted to know if you knew?
>
> A. So I do not know with 100 per cent certainty.[6]

10. INAC still refuses to answer the question of why the Wapekeka Proposal went unaddressed for so many months. In the absence of concrete information and a credible administrative process, the bare assertion that Jordan's Principle funding will be available in the future offers little comfort to any other community or group with a similar proposal.

> **Counsel for NAN**: "May I have an undertaking as to why the Wapekeka Proposal was left to languish in the face of children at high risk of suicide?"[7]

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[6] Buckland Cross-Examination, February 6, 2017, Pg. 163-4, Para 476-481.

[7] Examination No. 17-0109.1A of Ms. Robin Buckland, Page 169, lines 7-9 of transcript; See generally, Page 166 to Page 170 to line 7 for the full context of this request.

> **Counsel for INAC**: "I will not, we will not be giving you an undertaking."[8]
>
> and, "[…] there is no legal obligation to give you the undertaking you're requesting…"[9]

11. The story of Wapekeka First Nation is not just evidence underscoring the need for mental health services. It demonstrates that INAC does not have an immediate relief plan to address the "adverse effects identified with respect to the *1965 Agreement*, especially in terms of mental health services…"[10]

12. This requires the Tribunal to issue a clear order to ensure that mental health services are funded in Ontario so that more preventable tragedies do not occur. In NAN's initial factum, NAN requested that the Tribunal issue a "Choose Life Order" that would direct that Jordan's Principle funding be issued to any Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide.[11] We outline a mechanism for a 'Choose Life Order' below.

ii) "Choose Life Order": A Tangible Mechanism to Fill Gaps in Mental Health Services

13. Per INAC's factum, Canada's revised interpretation of Jordan's Principle aims to ensure that where a need for a publicly funded health, education, or social care service or support for a First Nations child is identified, it will be met. INAC has also developed new processes to ensure the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review.

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[8] Page 169, lines 10-11
[9] Page 169, line 25 to Page 170, line 1
[10] 2016 CHRT 16 (Tribunal's September 2016 decision), at page 46, para. F.
[11] NAN February 28, 2017 Factum, at paras. 7, 11, 36, 44, and 90(c)

14. These processes, according to Ms. Buckland, are to move with alacrity:

> All cases of First Nations children with unmet needs are immediately addressed: urgent cases within 12 hours; other cases within 5 business days; complex cases which require follow-up or consultation with others within 7 business days.[1]

15. INAC presents these facts in the face of what actually happened in Wapekeka: a Jordan's Principle case languished for months, still without explanation, and INAC continues to rely on a lack of any legal obligation to communicate an explanation with the affected community.

16. In the absence of any plan for preventing another Wapekeka, NAN seeks a Choose Life order from this Tribunal: that Canada develop a concrete administrative process, in accordance with their own timelines to ensure timely processing and substantive responses to Wapekeka-like proposals.

17. The Commission seeks similar orders in its factum, as follows

> 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[2]

> 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

[1] Commission's March 7, 2017 Factum (with respect to the FNCFCS Program and the 1965 Agreement), at para. 4.
[2] Commission's March 7, 2017 Factum (with respect to the FNCFCS Program and the 1965 Agreement), at para. 4.

> 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.[3]

18. In the alternative, NAN seeks from this Tribunal, a Choose Life order as an individual First Nation driven remedy, available in the following circumstances:

    1. The Party seeking funding qualifies under Jordan's principle by evidencing a need for services, and a gap in services; and,

    2. The party establishes a prima facie meritorious proposal, that is, the proposal is at least of sufficient merit that it is contrary to the best interests of First Nations children for the proposal to languish without timely processing and substantive response.

19. The Tribunal may extend the period for which it will remain seized of issues concerning implementation. NAN submits that the Tribunal should remain seized until concrete processes are in place, and have been proven effective.

B. Words Do Not Address Agency Specific Needs

20. NAN is seeking agency-specific immediate relief for the three child welfare agencies which operate within NAN territory: Payukotayno James and Hudson Bay Family Services ("Payukotayno"); Tikinagan Child and Family Services ("Tikinagan"); and, Kunowanimano Child and Family Services ("Kunowanimano"). Specifically, NAN seeks the following

[3] Commission's March 7, 2017 Factum (with respect to the FNCFCS Program and the 1965 Agreement), at para. 39.

orders for immediate relief for all three child welfare agencies: (1) that INAC fund the current debts and deficits of these agencies; and, (2) that INAC fund a capital needs assessment study for each agency.

21. In its responding factum, INAC claims that the issue that prevents funding agency-specific needs is the lack of information regarding those needs.

> [t]he challenge in providing funding for immediate relief based on actual need is that there are information gaps regarding the specific needs of agencies.[12]

22. However, NAN has filled some of these information gaps by: (1) filing evidence on the debts experienced by the three agencies operating within NAN territory; (2) indicating that these three agencies want a capital needs assessment study funded and conducted. Indeed, the request for a capital needs assessment study is aimed at further filling information gaps in order to inform potential medium and long-term relief. NAN's remoteness experts have also proposed a direct survey of First Nation communities and service providers.

C. The Tribunal Can and Should Act on NAN's Practical Concerns

23. On the subject of the Tribunal's remedial powers, INAC asserts that the Tribunal does not have the statutory authority to enforce its own orders[13] or determine the manner in which remedies should be implemented[14]. INAC further asserts that it is not fair to Canada that evolving facts on the ground affect the determination of issues in these proceedings.[15]

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[12] Respondent's March 14, 2017 Factum, at para 32.
[13] Respondent's March 14, 2017 Factum, at para 21.
[14] Respondent's March 14, 2017 Factum, at para 66.
[15] Respondent's March 14, 2017 Factum, at para 64.

24. It is not enough to presume that the Tribunal's "rulings will be executed with reasonable diligence and good faith."[16] INAC's position is of particular concern to NAN in light of the evidence that INAC often relies on its *intentions to act* or statements that INAC is *making efforts* rather than demonstrated action. As but one example, when cross-examined on the ongoing issue of lack of mental health services in Ontario, INAC's witness, Ms. Cassandra Lang stated:

> I think we're making an effort to discuss a range of, a range of issues that are coming up. It's going to take time, given different issues that have been raised to be able to move forward on, on the various pieces.[17]

25. INAC acknowledges that the Tribunal may convene a hearing to determine whether a party has "implemented its rulings and directions in a manner that addresses the discriminatory practice identified in that earlier ruling and, if necessary, clarify and supplement by further direction."[18]

26. NAN agrees with the Commission's submission in its March 7, 2017 factum that "to deny the Tribunal's power to reserve jurisdiction and oversee implementation would be overly formalistic, and would defeat the remedial purpose of the [*Canadian Human Rights Act*]."[19]

27. Further, the Tribunal has previously and clearly communicated its expectations of INAC:

> "It rests on INAC and the federal government to implement the Panel's findings and orders, and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data

[16] Respondent's March 14, 2017 Factum, at para 69.
[17] Lang Cross Examination at p 60, lines 10-13.
[18] Respondent's March 14, 2017 Factum, at para 20.
[19] Commission's March 7, 2017 Factum (with respect to the FNCFCS Program and the 1965 Agreement)

> and/or documentation, ensures the Panel and the parties that this is indeed the case"[20]

28. INAC can choose to work in partnership with First Nations and resolve relevant issues in the ongoing proceedings. Alternatively, it can invite the parties to commence new proceedings in Federal Court to enforce this Tribunal's orders and/or bring additional human rights proceedings every time new facts become available. NAN submits that it is proper and effective for the Tribunal to maintain a flexible process that is responsive to the actual needs of Indigenous children and families.

PART III: ORDERS REQUESTED

29. NAN reiterates and relies on its requested orders as outlined in its main February 28, 2017 factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF MARCH, 2017

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[20] 2016 CHRT 10, para 9