Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 17
Date: June 12, 2020
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 Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

Decision on the Caring Society's Disclosure Request

I. Context

[1] In First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada), 2016 CHRT 2 ("the Decision"), this Panel found 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 contrary to the Canadian Human Rights Act ("the Act"). More specifically, that Indigenous Affairs and Northern Affairs Canada's ("INAC") design, management and control of the First Nations Child and Family Services Program ("the FNCFS Program"), along with its corresponding funding formulas and other related provincial/territorial agreements, results in denials of services and creates numerous adverse impacts for many First Nations children and families living on reserve. Among other things, 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.

[2] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that First Nations children and families suffer the adverse impacts in the provision of child and family services enumerated in the Decision. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Indigenous peoples, in particular as a result of the Residential Schools system.

[3] Canada was ordered to reform the FNCFS Program and Memorandum of Agreement Respecting Welfare Programs for Indians ("the 1965 Agreement") to reflect the findings in the Decision (Merit Decision). Canada. It 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 Jordan's Principle.

[4] This Panel continues to supervise Canada's implementation and actions in response to the Panel's immediate and mid-term orders based on its findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the Canadian Human Rights Act (the CHRA) [see 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)].

[5] The Panel subsequently released a number of rulings including immediate and mid-term relief orders.

[6] The Panel has planned a three-phase approach to remedies: immediate, mid-term and long-term (see 2016 CHRT 10). Additionally, long-term remedies were to be considered once the parties had completed a number of new studies informing best practices. Most studies have now been completed and one report from the Institute of Fiscal Studies and Democracy University of Ottawa (IFSD) is expected in the near future.

[7] The AGC has brought a motion challenging the Tribunal's retention of jurisdiction given that according to Canada, it has complied to all of the Tribunal's immediate and mid-term relief orders.

[8] In this context, the Caring Society filed an informal motion requesting the disclosure of redacted information in a number of documents disclosed by the AGC. The AGC filed submissions in response to this motion. The Panel's ruling on the Caring Society's disclosure motion is explained below.

II. Analysis

[9] The Panel has considered the Caring Society's motion by way of a letter dated June 14, 2019 and Canada's submissions dated June 28, 2019 in response to this motion. The Panel finds the redacted information that the Caring Society requests to be disclosed to be arguably relevant and connected to the outstanding issues in this case as it will be summarized below.

[10] The documents requested from Ms. Joanne Wilkinson relate to requests made pursuant to the Tribunal's February 1, 2018 orders that have been denied, whether in first instance or on appeal.

[11] The Caring Society contends it is essential for the Caring Society to be able to consider specific information regarding these denials, as this information is vital to informing its position regarding the continuation of the Tribunal's jurisdiction over its February 1, 2018 orders.

[12] Furthermore, the Caring Society objects to the redactions made to withhold the identities of the First Nations Child and Family Services (FNCFS) Agencies to whom the denials and appeals relate in the documents provided as Undertaking Responses #5 and #8. Understanding the context of these denials requires knowledge of the specific FNCFS Agency to which the denial relates.

[13] The Caring Society submits the Tribunal has been clear that each community's particular cultural, historical and geographical circumstances must be taken into account, and has specifically ordered that the budgets for each individual FNCFS Agency are to be based on an evaluation of that Agency's distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the Agency's ability to provide services.

[14] The Caring Society argues it cannot be in a position to make submissions with respect to how the denials in question may or may not have respected the distinct needs and circumstances of the FNCFS Agencies in question if it must rely on second-hand information obtained from the community, rather than records in Canada's possession. Accordingly, the Caring Society submits that the documents are highly relevant to the Tribunal's orders, over which Canada contends the Tribunal ought to cede jurisdiction. They should as such be produced in their unredacted form.

[15] The Attorney General of Canada (AGC) submits the redacted portions of the documents are not relevant. Canada argues that the Caring Society's questions related to the contents of the reasons for denial in support of the Caring Society's position that further retention of jurisdiction is merited. The contents could, on the Caring Society's theory of the

case, potentially demonstrate Canada's unfair or unreasonable decision-making to support an argument that further Tribunal supervision is warranted. This evidence remains comprehensible without providing names. While the AGC concedes that likely relevance is not a particularly high standard, the AGC asserts there is no demonstrated relationships between the identity of the recipients and whether a decision was procedurally fair or reasonable.

[16] In the alternative, the AGC contends that a confidentiality order under section 52 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*] would be appropriate should the Panel decide to order disclosure. Canada raises concerns that the disclosure of these names could create undue hardship for the affected agencies and the children and families they serve.

[17] In applying the test in *Egan v. Canada Revenue Agency,* 2018 CHRT 29, relying on *Guay v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 34, the Panel has reviewed the parties' submissions and also reviewed the redacted documents discussed by the parties and filed in evidence. The Panel agrees with the Caring Society's position on this point. The Panel does not see how disclosing the names of FNCFS Agencies can harm children and families. Therefore, the Panel will need to obtain more information by way of submissions from the AGC on this point should the AGC still require a confidentiality order from this Tribunal.

[18] The documents essentially discuss denials or appeals related to public funding and the information contained in the letters often discuss the Panel's orders in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4. The issues appear to relate to public funds requested by FNCFS Agencies subsequent to the Tribunal's orders. The letters do not relate to specific individuals or disclosure of personal information about children or families or any information.

[19] Additionally, the evidence in the record contains ample information about FNCFS Agencies. Canada already disclosed and filed documents as part of a past progress report listing most FNCFS Agencies and the amounts of funding they have received following the

Panel's 2018 CHRT 4 orders. Moreover, in its May 3, 2018 progress report following the Panel's orders in 2018 CHRT 4, the AGC included the names of some FNCFS Agencies and indicated their respective deficits or surpluses. The AGC did not seek confidentiality orders prior to disclosing and filing those reports which now form part of the public record. FNCFS Agencies have been at the heart of this case since the filing of the complaint and the Panel has a difficulty understanding why at this late stage, the FNCFS Agencies would take exception with the fact that their funding requests following the Tribunals' orders in their favour and the orders that their specific needs be addressed and form part of the studies performed by the (IFSD) would be disclosed publicly.

[20] Furthermore, the Panel finds this situation to be significantly different than the situation raised by the Chiefs of Ontario where, given the detailed nature of the information contained in their filed affidavit, a child and the child's family would have been easily identified if the community and the agency had been disclosed publicly.

[21] There is a nexus between the names of the specific FNCFS Agencies and their specific needs which the Panel ordered to be funded. Their disclosure may enable the Caring Society to better prepare its submissions in response to the AGC's motion on retention of jurisdiction. The Panel disagrees with the AGC that the Caring Society's requests are irrelevant.

[22] The Panel agrees with the Caring Society that the Tribunal has been clear that each community's particular cultural, historical and geographical circumstances must be taken into account, and has specifically ordered that the budgets for each individual FNCFS Agency are to be based on an evaluation of that Agency's distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the Agency's ability to provide services.

[23] The AGC's retention of jurisdiction motion essentially deals with a request that the Panel cease to retain jurisdiction since the AGC submits Canada has complied with all of the Tribunals' orders.

[24] The disclosure of the FNCFS Agencies' names may assist the Caring Society in responding to the AGC's motion as there is a rational connection between the names and

the Tribunal's orders to provide funding to the FNCFS Agencies according to their distinct needs and circumstances. The Panel understands how difficult it may be to demonstrate this without having the names of the specific FNFCS Agencies.

[25] However, given the informality of the submissions filed and given that the AGC has made a section 52 of the *CHRA* request indicating its desire to make further submissions on this point by way of a motion or otherwise as instructed by this Panel, the Panel directs the parties to file submissions by way of a letter following the schedule below:

> The AGC will file its submissions by **June 26, 2020**;
>
> The Caring Society and other parties who wish to make submissions will file their response by **July 3, 2020**; and
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> The AGC will file its reply by **July 10, 2020**.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
June 12, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: June 12, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

David Taylor, Sarah Clarke, and Barbara McIsaac, Q.C., counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

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Brian Smith, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. Jonathan Tarlton and Patricia MacPhee, counsel for the Respondent

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