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 ASSEMBLY OF FIRST NATIONS

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA
(Representing the Minister of Indigenous Services Canada)

Respondent

and

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE CHIEFS OF ONTARIO

(on the joint motion of the Complainants and Respondents concerning compensation, dated June 20, 2023)

July 19, 2023

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PART I - OVERVIEW

1. The complainants the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada and the respondent the Attorney General of Canada have filed a joint motion with the Tribunal ("Joint Motion"). This Joint Motion asks the Tribunal to confirm that the revised minutes of settlement on compensation satisfy the Tribunal's compensation orders concerning Canada's willful and reckless discrimination in the provision of child and family services to First Nations and in the implementation of Jordan's Principle ("revised Compensation FSA").

2. The Chiefs of Ontario ("COO") consents to the Joint Motion.

3. In these written submissions and in the accompanying affidavit of Ruby Miller, affirmed July 19, 2023, COO also raises some concerns about how the revised Compensation FSA may inadvertently exclude some First Nations children and caregivers in Ontario, for the information of the Tribunal.

4. COO is not a party to the revised Compensation FSA and did not have the opportunity to provide input before the minutes of settlement were finalized, and as such, COO is raising these concerns now.

PART II - FACTS

5. The revised Compensation FSA requires that, for a person to be eligible for compensation, their or their family member's eligible out-of-home placement (aside from Kith Placements) were "funded by ISC", e.g.:

> "'Out-of-home placement' means a distinct location where a Removed Child Class Member has been placed pursuant to a removal, such as an Assessment Home, Non-kin Foster Home, Paid Kinship Home, Group Home, a Residential Treatment Facility, or other similar placement funded by ISC, except for the members of the Kith Child Class pursuant to Article 7".[1]

6. COO submits that the requirement that a child's placement be "funded by ISC" creates the possibility that some First Nations children and caregivers in Ontario, who might otherwise be eligible for compensation, may be ineligible due to the operation of the 1965 *Memorandum of Agreement Respecting Welfare Programs for Indians* ("1965 Agreement").

7. The Panel's findings with respect to the delivery of child and family services in Ontario in 2016 CHRT 2[2] rightly centres the locus of racial discrimination in the 1965 Agreement. The Panel held that there was discrimination under the 1965 Agreement because First Nations children did not receive all the services set out in the Ontario child welfare legislation, the *Child and Family Services Act* and its predecessors (now replaced by the *Child, Youth and Family Services Act, 2017*).[3]

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[1] Minutes of Settlement, s. 1.01, p. 23.
[2] As noted by the Panel in 2016 CHRT 2 at paras. 217-246.
[3] As noted by the Panel in 2016 CHRT 2 at para. 392.

Rather, Canada underfunded services to First Nations children under the 1965 Agreement by funding only some of the services set out in provincial legislation and failing to keep up to date with legislative changes.[4]

8. The 1965 Agreement does two main things. One, it requires Canada to pay a reimbursement on a cost-share basis to Ontario, and that cost-share is based on a calculation that uses the population of registered "Indians" mainly (though not exclusively) resident on reserve.[5] Two, it requires Ontario to make the listed services available to "Indians" throughout the province, and not merely to those on reserve.

9. The funding formula that sets the amount of funding that agencies receive for the delivery of core child and family services in Ontario, e.g., child protection and "maintenance" costs, is the same on-and-off-reserve and is the same for Indigenous child wellbeing societies (called FNCFS agencies in the litigation, "Indigenous Agencies") and mainstream children's aid societies ("Mainstream Agencies").[6]

10. There are two additional key facts about how the 1965 Agreement operates that are of note to the Tribunal when considering compensation for First Nations children and caregivers in Ontario:

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[4] As noted by the Panel in 2016 CHRT 2 at paras. 222-226.
[5] The cost-share calculation under the 1965 Agreement includes the population of registered Indians (1) resident on reserve, (2) resident on Crown land in non-municipally organized territories (i.e., most off-reserve rural and northern areas of Ontario), and (3) resident in a municipality for under 12 months.
[6] Affidavit of Ruby Miller, sworn July 19, 2023, filed in the within motion, at para. 17.

(a) Neither Mainstream nor Indigenous Agencies had/have control over what services or amounts the government of Ontario ultimately chooses to remit for reimbursement to the government of Canada, nor what services or amounts the government of Canada chooses to ultimately reimburse to the government of Ontario.

(b) Neither Mainstream nor Indigenous Agencies will necessarily be aware of whether services to a particular First Nations child were ultimately funded by the government of Canada and will have no internal means to obtain this information.[7]

11. The consequences of these aspects of the operation of the 1965 Agreement are that some First Nations children and caregivers in Ontario who meet all other eligibility criteria – i.e., the First Nations child was resident on-reserve during the applicable time period, and the child was placed in an out-of-home placement by an Agency – may be ineligible for compensation solely because they will not be able to prove that their placement was funded by ISC or because their placement was not funded by ISC due to the administrative decisions of the government of Canada or the government of Ontario.

12. Thus, a child or caregiver may be excluded from compensation under the revised Compensation FSA despite having received child and family services under a

[7] Affidavit of Ruby Miller, sworn July 19, 2023, filed in the within motion, at paras.19-20.

discriminatory funding regime, for reasons that are entirely outside of the control of the victim of discrimination and outside of the control of the Agency.

PART III - DISCUSSION

13. The Tribunal dealt with some implications of the term "funded by ISC" in 2022 CHRT 41. Paras. 283 and 309 are instructive of the rational underlying the Tribunal's ultimate determination that the qualifier "funded by ISC" was not a proper interpretation of the Tribunal's previous decisions on compensation:

> "[283] The FSA adds another requirement in order to award compensation to First Nations children. The Tribunal decisions provide compensation for children removed from their homes, families and communities as a result of the FNCFS Program's systemic discrimination. The FSA narrows it to removed children who were also placed in ISC-funded care. […] However, the requirement of removal and placement in care in an ISC-funded location cannot be considered a proper interpretation of the Tribunal's findings and orders."
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> …
>
> "[309] The Tribunal focused on the adverse impacts of the Federal Program causing harm to First Nations children and families and not whether the First Nations child was placed in ISC funded care. What happens if as a result of the Federal Program, a First Nations child is removed and placed in care but not funded by ISC? The Tribunal was not confronted with this question until now and, therefore, could not have made any order with this rationale in mind."[8]

14. COO submits that the concerns raised herein are in line with the Tribunal's previous analysis on the possible exclusionary effect of the "funded by ISC"

[8] 2022 CHRT 41, at paras. 283, 309.

qualifier, and that COO's concerns are not remedied in the revised Compensation FSA.

15. A possible solution to the issues COO has raised would be to qualify the "funded by ISC" criteria for claimants in Ontario. This could be achieved by clarifying that if a claimant in Ontario meets the following criteria:

    a. if a child was ordinarily resident on-reserve at the time the child was placed in out-of-home care by a Mainstream or Indigenous Agency; then,

        i. no First Nations child or caregiver in Ontario shall be deemed to be ineligible for compensation under the revised Compensation FSA solely because:

            a) the claimant is unable to adduce evidence that the child's placement was funded by ISC; or,

            b) the child's placement was not funded by ISC for reasons attributable to the administrative decisions of the government of Canada or the government of Ontario.

16. COO is not proposing that the parties to the revised Compensation FSA adopt this exact language, we merely offer this as a possible solution for the Tribunal's consideration.

17. In raising these concerns, COO is not arguing for an expansion of the class of eligible claimants, COO is seeking to protect the right to compensation for First Nations children and caregivers in Ontario who would otherwise be eligible for compensation under the revised Compensation FSA, but for the operation of the 1965 Agreement.

PART IV - CONCLUSION

18. COO raises these concerns for the sake of the First Nations children and caregivers in Ontario who may be left out of compensation, to ensure that it is clear what the settlement means for children and caregivers in Ontario, and to clarify for the record that there may be such gaps. COO nonetheless consents to the Joint Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: July 19, 2023

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PART VI – LIST OF AUTHORITIES

Jurisprudence
First Nations Child and Family Caring Society of Canada et al. v Canada, 2016 CHRT 2
First Nations Child and Family Caring Society of Canada et al. v Canada, 2019 CHRT 39
First Nations Child and Family Caring Society of Canada et al. v Canada, 2020 CHRT 7
First Nations Child and Family Caring Society of Canada et al. v Canada, 2020 CHRT 15
First Nations Child and Family Caring Society of Canada et al. v Canada, 2021 CHRT 6
First Nations Child and Family Caring Society of Canada et al. v Canada, 2021 CHRT 7
First Nations Child and Family Caring Society of Canada et al. v Canada, 2022 CHRT 41