Information Sheet

Implementing the CHRT Remedies

Canada's Failure to Comply

November 14, 2016

CHRT Ruling

2016 CHRT 2 (*Decision*) In January 26, 2016, the Canadian Human Rights Tribunal (CHRT) ruled in favour of First Nations children living on-reserve, finding that Indigenous and Northern Affairs Canada's (INAC) First Nation Child and Family Services (FNCFS) Program, and its related funding models and federal-provincial agreements, is discriminatory contrary to section 5 of the *Canadian Human Rights Act*. The Tribunal further found that INAC's failure to properly implement Jordan's Principle, a measure to ensure First Nations children can access public services on the same terms as other children, was discriminatory on the basis of race and national ethnic origin.

The Tribunal ordered Canada to immediately cease its discriminatory practices in First Nations child and family services and to immediately fully and properly implement Jordan's Principle. They set out a three phase process for relief: 1) immediate relief (act on evidence-based recommendations to alleviate the most egregious impacts of the discrimination); 2) mid-term relief (act on recommendations that require some, but not substantive research or consultation, and 3) long-term reform (overhaul the FNCFS Program).

Canada's failure to comply

The *Decision* acknowledged that for years INAC has repeatedly failed to correct fundamental flaws in the FNCFS Program, despite having evidence of the inequities and their impacts on First Nations children. INAC's compliance reports post-ruling demonstrate a continued failure to cease its discriminatory practices.

Following the *Decision*, the Caring Society presented INAC with detailed immediate relief reforms based on recommendations arising from expert reports dating back two decades that INAC had already agree to. Drawing on a 2012 document on funding shortfalls for First Nations child welfare prepared by senior officials at INAC, the Caring Society estimated that the immediate shortfall in First Nations child welfare funding for 2016/2017 is at minimum $155 million over and above the $71 million the government allotted in Budget 2016. In total, $216 million is required for immediate relief for child welfare, plus additional funds for full implementation of Jordan's Principle.

2016 CHRT 10 On April 26, 2016, the Tribunal released its review of INAC's compliance report, noting that they have the burden to prove that the $71 million allotted for First Nations child and family services in Budget 2016 is sufficient to alleviate its discrimination against First Nations children, but had failed to do so. The Tribunal ordered INAC to provide more detailed financial reports linking their actions to remedies. In addition, the Tribunal found that INAC's progress on Jordan's Principle did not comply with the *Decision* requiring the federal government to *implement* Jordan's Principle, and they ordered the government to comply by May 10, 2016. The day before Canada was required to file its final submission in compliance with 2016 CHRT 10, INAC made a unilateral announcement of "up

to" $382 million, allegedly for Jordan's Principle, saying that only children with disabilities and short-term illnesses on reserve could access this funding, despite the Tribunal's clear order to apply Jordan's Principle to *all* First Nations children immediately. INAC refused to give details about which children are eligible for this funding, when and how the money will be released, and how they will ensure First Nations children do not face additional red tape in accessing public services.

2016 CHRT 16 On September 15, 2016, the Tribunal found INAC's compliance to be in violation of both earlier orders (2016 CHRT 2 and 2016 CHRT 10), and was "concerned to read in INAC's submissions much of the same type of statements and reasoning that it has seen from the organization in the past" (para. 29). For example, INAC asserted that it is up to each FNCFS Agency to determine how they allocate funding for prevention and cultural programming, even though agencies lack sufficient funding to deliver these services in the first place. In addition, INAC said they would determine funding for remote and small agencies at a later date, despite the fact that they have been studying the challenges faced by these agencies for years, and the direct order by 2016 CHRT 2 to incorporate additional resources and revisit their flawed funding model for these agencies within the year.

The Tribunal also found that INAC had not complied with previous CHRT orders to apply Jordan's Principle to *all* First Nations children on and off reserve and ordered them to immediately do so. Health Canada documents dated after the release of 2016 CHRT 16 show that INAC continues to restrict Jordan's Principle to children on reserve with disabilities and short term illnesses and has implemented a process that will inevitably result in service delays and possibly service denials.

In addition to its failure to comply with the Tribunal's ruling to immediately fully and properly implement Jordan's Principle for all First Nations children, INAC has fought First Nations children and their families in court who are seeking equitable health services. Most recently, INAC spent more than $32,000 fighting a First Nations teenager in need of medical care in court than it would have spent providing the $8,000 required for her medical treatment. This behaviour indicates that the failure of Canada to comply with the legal orders cannot be reasonably explained by a shortage of federal money. As the Tribunal noted in 2016 CHRT 16, INAC seems to still be operating within the same "old mindset" that "led to discrimination" and the filing of the complaint in the first place.

On November 1, 2016, Parliament voted unanimously in favour of a motion calling on the federal government to fully implement the orders and properly implement Jordan's Principle. The government has not yet complied with the motion.

Non-compliance is not an option

INAC's compliance with the CHRT's legal orders is *not* discretionary. Failure to comply could result in a contempt order against the government issued by the Federal Court. The unanimous passing of the NDP motion to compel Canada to fully comply with the Tribunal's orders is an important moral statement, but is not legally binding. And, as we saw after the House of Commons motion in support of Jordan's Principle passed in 2007, and through INAC's continuous failure to make changes to the FNCFC Program for over two decades, it will take continuous pressure to ensure INAC immediately and fully complies with the Tribunal's order to end racial discrimination against First Nations children in Canada.