Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY 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, AMNESTY INTERNATIONAL CANADA, NISHNAWBE-ASKI NATION and INNU NATION

Interested Parties

BOOK OF AUTHORITIES OF THE INTERESTED PARTY, CHIEFS OF ONTARIO

February 3, 2021

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Tab	Authorities
1.	Transcript of cross-examination of Nathalie Nepton, January 8, 2021, p 139 line 6 – 141, line 14, p 141, line 15 – p 142, line 6
2.	*First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2
3.	*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

TAB 1

Canadian Human Rights Tribunal | Tribunal canadien des droits de la personne

Ottawa, Canada K1A 1J4

BETWEEN/ENTRE:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS
Complainant **Plaignant**

and/et

CANADIAN HUMAN RIGHTS COMMISSION
Commission **Commission**

and/et

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs
Respondent **Intimée**

and/et

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION
Interested Parties **Parties intéressées**

BEFORE/DEVANT:

Sophie Machildon	CHAIR
Edward Lustig	PANEL MEMBER
Judy Dubois	REGISTRY OFFICER

FILE NO. /NO CAUSE:	T 1340/7008
VOLUME:	1
LOCATION/ENDROIT:	VIA ZOOM VIDEOCONFERENCE
DATE:	2021/01/08
PAGES:	1 - 183

distributing it in whatever -- according to ISC's own judgment?

A. Exactly.

Q. All right. Given that, I don't have too, too many other questions.

Mr. Taylor had asked you several times or asked you quite a bit about how the CWJI formulas and the ramp-up monies -- how the gross amounts to be distributed over Canada, how you came to those.

Did I hear you -- can you just clarify for me, do you agree that those weren't based on any kind of assessment of First Nations needs at the time?

A. Based upon my understanding, yes.

Q. All right. Okay. So I'm just going to -- I didn't put the Ontario special study into the document book because I'm not going to draw you to any particular part of it, but -- and I note you didn't say that you had read it in preparation, so can you just let me know when the last time you read it was?

A. Oh, my goodness. It's a good question, Ms. Wente. I would say probably a good

nine months ago.

Q. Okay.

A. Prior to or about the same time that the IFSD was starting its study that was released earlier in September, early October.

Q. Do you recall, though, from the Ontario special study that there was a recommendation in there that the funding formula for Ontario First Nations would be such that there was a community-directed prevention approach? Meaning that the communities -- the First Nations themselves would prefer to deliver prevention services?

A. I do not recall at this point in time having seen it, but I seem to recall in many of our informative discussions that you may have mentioned it to me.

Q. Okay. That's fair. So you're in the position now twice of having to take my word for it.

A. I know.

Q. And just to go with the Ontario special study, can you just, for everybody's sake and for the panel's sake, let us know where Canada is? It's my understanding that

you have not yet said that Canada agrees to implement the recommendations of the special study.

A. I would agree with that statement. In terms of where we are with it, I think it's an important piece of the puzzle as we move forward or an important piece of the foundation as we embark on work around funding methodologies.

Q. Okay. Do you know when you might have a position about whether or not the recommendations of the special study will be implemented?

A. No, I do not have any type of time frame. Again, I think as we move forward, looking at, you know, at the orders that are already being implemented in terms to actuals, work that's being done on capital, and as well as the orders pending on capital, I think, you know, it's all, again, part of a comprehensive process, and COO is one important piece and source of information of that overall funding methodology and what we -- where we go with that report.

When I say "we", it's ISC but also in partnership with you -- excuse me, with the Chiefs of --

Q. Not me personally.
A. Sorry. So --
Q. Okay. All right. And then I have asked this question of one of your colleagues before and I guess I will ask you as well.
Does ISC have an idea of what it might do if it decides not to adopt the recommendations of the Ontario special study?
A. No, and I wouldn't want to speculate on that. You know, I'm -- yeah, I think that's a broader discussion in terms of ISC and the government of Canada accepting it. So I would be speaking a little -- I would obviously be speaking outside my program role.
Q. Sure. Understood. And with respect to the 1965 agreement, I noted that you did refer to it in your affidavit.
A. Yes.
Q. And the renegotiation of it. You will agree that the renegotiation of the 1965 agreement has not yet commenced?
A. No, I would agree with that, that it is definitely work that needs to be undertaken or restarted.
Q. Right.

A. Am I aware that the province has indicates its desire to look at the agreement as well, and I will leave it at that.

Q. So internally or even amongst the parties, there's no timeline by which the 1965 agreement will be renegotiated?

A. To the best of my knowledge, a fixed timeline has not been established.

Q. Okay. Thank you. And I believe, if you will just give me one moment, that those are probably all of my questions. I think that's everything. Thank you, Ms. Nepton.

A. Thank you.

THE CHAIR: Ms. Wente?

MS. WENTE: Yes.

THE CHAIR: We're not rushing you, so are you sure?

MS. WENTE: No, I'm quite confident I'm done. Thank you. No, I wouldn't leave something behind. You know me. I'm not one to spare words. Thank you.

THE CHAIR: I didn't want to convey the message that everybody has to rush. I was just trying to figure out how long we needed to --

MS. WENTE: No. Understood. I will --

THE CHAIR: There is no negative, you know, things that are cast on the Caring Society or Mr. Taylor, who did a great job. It's just that I wanted to make sure that we are right on time, because I believe we have to end by 4:30.

MS. WENTE: Yes. I was lucky in that Mr. Taylor did most of my work for me, as usual, so thank you very much.

THE CHAIR: Okay. Thank you. I believe -- how are you, Ms. Nepton? I don't see -- there you are. Are you okay to continue for about a half an hour with another set of questions?

THE WITNESS: That would be Ms. Rae?

THE CHAIR: I'm wondering, Ms. Nepton, if you're okay if we continue for about a half an hour. Do you feel comfortable --

THE WITNESS: If we could have a five-minute break, if you don't mind.

THE CHAIR: Sure.

THE WITNESS: Okay. Thank you.

THE CHAIR: Okay.

MS. DUBOIS: I will pause the

TAB 2

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 2
Date: January 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

Decision

Members: Sophie Marchildon and Edward Lustig

funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[423] AANDC submits that in determining what services to provide and how to deliver them, the FNCFS Agencies decide what is "culturally appropriate" for their community. The definition of what is culturally appropriate depends on the specific culture of each First Nation community. According to AANDC, this is best left to the discretion of the FNCFS Agencies or First Nations leadership.

[424] However, in the *2008 Report of the Auditor General of Canada*, the Auditor General indicated that "[t]o deliver this program as the policy requires, we expected that the Department would, at a minimum know what "culturally appropriate services" means" (at s. 4.18, p. 12). That is, AANDC had no assurances that the FNCFS Program funds child welfare services that are culturally appropriate. In response, AANDC developed a guiding principle for what it understands culturally appropriate services to be:

> the Government of Canada provides funding, as a matter of social policy, to **support the delivery of culturally appropriate services** among First Nation communities that **acknowledge and respect values, beliefs and unique circumstances** being served. As such, culturally appropriate services encourage activities such as kinship care options where a child is placed with an extended family member so that cultural identity and traditions may be maintained.
>
> (see *AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*, **emphasis added**)

[425] Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless. A glaring example of this is the denial of funding for Band Representatives under the *1965 Agreement* in Ontario. Another is the assumptions built into Directive 20-1 and the EPFA. If funding does not correspond to the

actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[426] Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.

[427] In this regard, it should be noted again that the federal government is in a fiduciary relationship with Aboriginal peoples and has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, more has to be done to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children. This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples.

iii. Canada's international commitments to children and Indigenous peoples

[428] As stated earlier, Amnesty International was granted "Interested Party" status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. Amnesty International argues that the interpretation and application of the *CHRA*, and in particular of section 5, must respect Canada's

international obligations as enunciated in various international United Nations instruments, such as the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Elimination of all Forms of Discrimination*, the *Universal Declaration on Human Rights* and the *Declaration on the Rights of Indigenous Peoples.*

[429] Amnesty International also refers to the views of treaty bodies, such as the United Nations Human Rights Committee (UNHRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC) in support of its argument that when a treatment discriminates both on the basis of First Nations identity and because of residency, it constitutes multiple violations of the prohibition of discrimination, which is a peremptory norm of international law. Specifically, Amnesty International points to these bodies' recommendations that special attention must be given to the prohibition of discrimination against children.

[430] In AANDC's view, the international law concepts and arguments advanced by Amnesty International do not assist the Tribunal in interpreting and applying the *CHRA* to the facts of this Complaint. Rather, they see Amnesty International's arguments as a claim that the Government of Canada is in violation of its international obligations, which is beyond the purview of the Complaint.

[431] In order to form part of Canadian law, international treaties need national legislative implementation, unless they codify norms of customary international law that are already found in Canadian domestic law. However, when a country becomes party to a treaty or a covenant, it clearly indicates its adherence to the contents of such a treaty or covenant and therefore makes a commitment to implement its principles in its national legislation. This public engagement is solemn and binding in international law. It is a declaration from the country that its national legislation will reflect its international commitments. Therefore, international law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313.

TAB 3

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 4
Date: February 1, 2018
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

Members: Sophie Marchildon and Edward P. Lustig

that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada, numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them. ''.

[155] Canada says it needs data and information to understand specific needs and therefore it needs to discuss the same with all its partners. This is all legitimate. However, now a clear plan needs to be established to ensure this will be done and not perpetuate the negative cycle: I cannot fully fund because I do not have the data.

[156] At the present time, it is clear that the 5 year budget has gaps in information to address the actual needs of children. While informed by reports and other information in the preparation of Budget 2016, because Canada has not done a comprehensive costing analysis, it cannot be sufficiently responsive to the orders found in the *Decision* and subsequent rulings.

[157] To be fair, Canada has invested new funds to increase prevention that will assist in reducing the children coming into care. It also started a data collection process to understand what the agencies' needs are in order to comply with the Panel's orders. This is very helpful.

[158] Now that the Panel has some of its questions answered with new supporting evidence, it determines Budget 2016 does not address all the immediate relief orders.

[159] The Panel has sufficient information to make further orders in terms of actual costs for prevention and specific items.

[160] This is the time to move forward and to take **giant steps** to reverse the incentives that bring children into care using the findings in the *Decision*, previous reports, the parties'

expertise and also everything gathered by Canada through its discussions since the *Decision*.

[161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[162] In the words of Elder Robert Joseph who testified at the hearing: We can't make the same mistake twice.

[163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance.

[164] It is of paramount importance to assist First Nations agencies who are the front line service providers to help keep children safe in their homes and communities when removal is not necessary.

[165] **As stated above, the *CHRA*'s objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.**

[166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (*see the Decision at paras.341-347*).

[167] The TRC recognized that children's rights, enshrined in the UNDRIP and other international instruments as well as in domestic law have to be a priority. The child welfare services have to be deemed essential services and the services must be prevention

oriented rather than removal oriented if Canada wants to reverse the perpetuation of removal of children that is 3 times higher than at the heights of the residential school era.

[168] While ongoing discussion with Indigenous peoples, provinces and, territories are necessary to reform the system, the Panel believes it can be done at the same time as immediate-mid-term relief is allocated. It will also allow Canada and all partners to obtain current data informing long term reform.

[169] Canada argues that it cannot act unilaterally on a number of items. However, this argument runs counter to examples where it has actually done so. For instance, it did so with Budget 2016.

[170] The October 28, 2016 letter to assess specific needs came after the Budget 2016 announcements so Canada did not have all the data and the specific information to inform its budget.

[171] Canada admits it lacks data to address some of the Panel's immediate relief orders so it unilaterally decided they were best left to mid-term or long term without seeking leave from the Tribunal. It has treated some of the orders as recommendations rather than orders.

[172] While it is true that Canada needs to work with its partners including the provinces, the Nations and the parties, this cannot be used as an excuse to avoid funding in a meaningful way to eliminate the most discriminatory aspects of the National First Nations Child and Family Services Program (FNCFS).

[173] On February 25, 2016, shortly after the Tribunal's *Decision*, National Chief Perry Bellegarde addressed a letter to Minister Carolyn Bennett, Indigenous and Northern Affairs Canada, on behalf of the AFN. The letter sought INAC's confirmation that it would not seek judicial review of the Tribunal's *Decision*. The letter also expressed the AFN's concern that "no efforts or program changes have been made to date to end the discriminatory practices by your department". The correspondence expressed the AFN's willingness to assist INAC in identifying the immediate relief that could be implemented in compliance