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
AMNESTY INTERNATIONAL CANADA AND NISHNAWBE ASKI NATION

Interested Parties

MOTION (DATED NOVEMBER 22, 2016) REGARDING IMMEDIATE RELIEF

REPLY SUBMISSIONS OF THE CHIEFS OF ONTARIO (March 17, 2017)

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The Tribunal did not order Canada merely to report about immediate relief

1. Canada's submissions at paragraph 37 suggest that the order for immediate relief from the Tribunal in relation to the *1965 Agreement* was merely to report on various matters. This is a mischaracterization of the Tribunal's remedial directions and orders.

2. In its decision found at 2016 CHRT 2, the Tribunal ordered Canada to "to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is 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." [emphasis in original][1]

3. The Tribunal found at 2016 CHRT 16,

> [68] Again, for the reasons that follow, the Panel is of the view **that further orders, including additional information and reporting by INAC**, are required to ensure the findings in the *Decision* with respect to the *1965 Agreement* have been or will be addressed in the short term [emphasis added]
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> [...]
>
> [73] The Panel is pleased to learn about the significant new investments mentioned above. **While it may address some of the adverse impacts highlighted in the *Decision*, again, the Panel is not in a position to assess the extent that it does so whether in the short or longer-term.** INAC is ordered to provide its rationale, data and other relevant information to assist this Panel in understanding INAC's Budget 2016 investments and how they are responsive to the needs of the First Nations children and how it addresses the findings in the *Decision*, in the short term, especially in terms of mental health services and Band Representatives.
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> [74] In this regard, the Panel is aware that, as opposed to provincial service delivery and the Ontario's *Child and Family Services Act*, federal health and social services to First Nations children are delivered through different departments. Nevertheless, the Panel made findings with the evidence before it in relation to the gaps and adverse impacts caused by the Federal government's involvement in health and social services to First Nations children in Ontario (for example, see the *Decision* at paras. 364-373 and 391- 392). Overall, the Panel found the situation in Ontario fell short of the objective of the *1965 Agreement* "...to make available to the Indians in the Province the full range of provincial welfare programs" (see Decision at para. 246). **Again, the Panel wants to know how those findings are being addressed in the short term while the *Agreement* is**

[1] 2016 CHRT 2 at para 481.

being reformed.[2] [emphasis added]

4. In addition to other further reporting, the Tribunal stated its hope that at the anticipated case management meeting, "all outstanding short-term remedial requests can be resolved by the end of the meeting as to not delay immediate action any further."[3]

5. It is clear from the Panel's findings in this decision that the Tribunal was contemplating that other orders may be required to alleviate discrimination in the short term, and that reporting would inform such further orders. The case management meeting was adjourned without such further orders being made.

6. At that time, the Complainants and Interested Parties and the Respondent prepared the schedule for hearing the motions on compliance.

7. The remedial process for immediate relief is not complete, contrary to what Canada suggests. The Tribunal has retained jurisdiction over remedies, including remedies to provide immediate relief. With respect to Ontario, the Tribunal has indicated more specific orders are required.

8. Now that there is a complete evidentiary record about how Canada is responding to the Tribunal's findings in the January 2016 Decision, the time is ripe for such further orders.

Canada's evidence about mental health programs is not responsive to the Tribunal's decision

9. Canada characterizes COO and NAN's submissions on the need for mental health funding under the *1965 Agreement* as "new allegations" about the sufficiency of children's mental health funding.[4] Canada suggests that these submissions deal with "matters not raised or dealt with at the original hearings" and states that while "this information is no doubt helpful", it raises "new issues."[5] Canada suggests that this "raises concerns about the fairness of the process."[6]

10. This is without basis. The original complaint expressly alleged discriminatory gaps in child welfare and family services available to First Nations children on reserve. The complaint was substantiated. The Tribunal concluded that, in Ontario, discrimination arose because the *1965 Agreement* "had not been updated to ensure that on-reserve communities could comply with the *Child and Family Services Act*, including the provision of Band Representatives **and mental health services**" [emphasis added].[7] Gaps in mental health services available to children and families under the *1965*

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[2] 2016 CHRT 16 at paras 68, 73-74.
[3] 2016 CHRT 16 at para 163.
[4] Attorney General of Canada, Factum at para 63.
[5] Attorney General of Canada, Factum at paras 63-64.
[6] Attorney General of Canada, Factum at para 64.
[7] 2016 CHRT 2 at paras 10, 26; 2016 CHRT 2 at paras 217-246, 458.

Agreement are a core adverse impact of the faulty funding regime in Ontario that must be addressed at the remedial stage.

11. COO's Notice of Motion directly seeks relief about mental health services under the *Child and Family Services Act*.

12. To the extent that new issues are brought forth at this motion, it is because Canada has introduced evidence about unrelated mental health "investments" in order to deflect from its inaction on the matters at the heart of this case and this motion.

13. For example, in response to COO's motion and the Tribunal's reporting orders, Canada's affiants pointed to programs that provide mental health services to Indigenous peoples as evidence of its compliance with the Tribunal's rulings.[8] However, cross-examination revealed the investments Canada highlights were identified prior to the release of the Tribunal's decision in 2016 CHRT 2.[9] In addition, there is no evidence to indicate that this funding is directed at First Nations children, works to keep First Nations families together, or supports mental health services under the *Child and Family Services Act*.[10] Programs and investments that "mostly deal with adult issues" and which "do not deal specifically with children in care" are not sufficient to address the gaps under the *1965 Agreement*.[11]

14. Although COO agrees that the evidence has little bearing on this motion, no unfairness to Canada is created by cross-examination on Canada's evidence about generally available mental health programs. Canada supplied evidence about such programs as a response to COO's evidence that the funding was insufficient. This evidence must be tested.

15. Finally, given Canada's own admission that the evidence about such programs is irrelevant and not responsive to the issue raised by COO and NAN in this motion,[12] we are left with no evidence that Canada has taken any steps to provide equitable funding for children's mental health services under the *Child and Family Services Act* to fill gaps created by the *1965 Agreement*. The only conclusion, therefore, is that the discrimination against First Nations children in Ontario continues with respect to mental health services under the *Child and Family Services Act*.

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[8] Attorney General of Canada, Factum at para 37; Affidavit of Lee Cranton, February 10, 2017 at paras 5-6; Cross-Examination of Robin Buckland, February 7, 2017 at p 242, Line 10 – p 244, Line 4; p 250, Line 24 – p 253, Line 6; Affidavit of Robin Buckland, January 25, 2017 at para 24.

[9] Cross-Examination of Cassandra Lang, February 7, 2017 at p 10, lines 7-25; Cross Examination of Robin Buckland, February 7, 2017 at p 253, Lines 7-19.

[10] Affidavit of Lee Cranton, February 10, 2017, Exhibit B; Cross Examination of Robin Buckland, February 7, 2017 at p 245, Line 15 – p 246.

[11] See 2016 CHRT 2 at para 241.

[12] Attorney General of Canada, Factum at paras 63-64.

Systemic remedies are appropriate in systemic cases

16. The Attorney General of Canada has relied on *Moore v. British Columbia* for the proposition that "the role of the Tribunal is to adjudicate the particular claim that is before it. It should not determine remedies as if it were a Royal Commission."[13]

17. The Supreme Court of Canada's reasoning about the appropriate remedies in *Moore* does not extend to this case. In *Moore,* the human rights complaint was framed entirely in terms of the exclusion of one child, Jeffrey Moore, from access to education services as a function of his learning disability. There was no allegation of systemic discrimination by the District or Province. It was for this reason that the Supreme Court concluded the broad, systemic remedies ordered were not sufficiently tied to the discrimination suffered by Jeffrey and should be set aside. [14]

18. This case, on the other hand, has always been about systemic discrimination against First Nations children in the provision of child and family services. In 2016 CHRT 2,the Tribunal concluded that INAC's "design, management and control of the FNCFS Program, along with its corresponding funding formulas and other related provincial/territorial agreements have resulted in denials of services and have created various adverse impacts for many First Nations children and families living on reserves."[15] It found that these adverse impacts were located, among other places, in the faulty funding formula upon which INAC has relied and, in Ontario, in INAC's failure to update the *1965 Agreement* so that on-reserve communities could comply fully with Ontario's *Child and Family Services Act.*[16]

19. As a result, it is squarely within the Tribunal's jurisdiction under s. 53(2)(a) to make targeted, systemic orders to prevent the discrimination that flows from these failures. Orders of this nature are closely connected to the original complaint, and to the Tribunal's conclusion that the complaint has been substantiated. Such orders can provide additional guidance and clarity that will assist Canada in complying with the Tribunal's overarching order that it cease "its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the findings in" its decision in 2016 CHRT 2.[17]

The Request for an Ontario Special Study is not an intrusion into policy

20. In its September 2016 decision, Tribunal agreed that the Ontario Special Study would "greatly assist in determining the adequacy of the *1965 Agreement* in achieving comparability of services", and in informing "the long term reform of the *1965*

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[13] Attorney General of Canada, Factum at para 62.
[14] *Moore v British Columbia (Education),* [2012] 3 SCR 360, 2012 SCC 61 at para 69.
[15] 2016 CHRT 2 at para 458.
[16] 2016 CHRT 2 at para 458.
[17] 2016 CHRT 2 at para 481.

Agreement."[18] Noting that INAC had not addressed the request for the Special Study directly in its submissions,[19] the Tribunal ordered INAC to give a "response indicating its views on the request that it conduct a special study on the application of the *1965 Agreement*".[20]

21. In its October 2016 report, INAC accepted the need to understand "the adequacy of the *1965 Agreement* in achieving comparability of services; culturally appropriate services that account for historical disadvantage; and, ensuring the best interest of the child are paramount" and indicated it was working with the province of Ontario and First Nations leadership and other partners to "look specifically at INAC's support for child and family services through the application of the *1965 Agreement*".[21]

22. In spite of this, in the five months since, INAC has made no progress in identifying gaps in the *1965 Agreement*, nor has it identified any internal deadlines for when it will do so.[22] COO has accordingly requested that Canada be ordered to undertake an Ontario Special Study within one year to identify gaps in services to First Nations children arising out of its application of the *1965 Agreement*.

23. The Commission declined to support this request, citing "the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated."[23] The proposed Ontario Special Study, however, will identify service gaps, not dictate policy outcomes. Far from being a constraint on policy choice, it is a precondition for informed policy action.

Discrimination is not a permissible policy choice

24. Canada has characterized the Complainants' and Interested Parties' request for remedies as disagreement with Canada's "policy choices".[24]

25. If Canada's position is that persistent discrimination against First Nations children in Ontario is a "policy choice", then it is true that COO disagrees with that choice.

26. Canada's discretion to implement policy and allocate funding as it chooses ends where its chosen approach is discriminatory. The Tribunal's January 2016 Decision, and the entire body of human rights law, supports that proposition.[25]

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[18] 2016 CHRT 16 at para 103.
[19] 2016 CHRT 16 at para 104.
[20] 2016 CHRT 16 at para 160.
[21] October 31, 2016 Response of Indigenous and Northern Affairs Canada to the Canadian Human Rights Tribunal Order of September 14, 2016 at p 30, citing 2016 CHRT 16 at para 103.
[22] Cross-Examination of Cassandra Lang, February 7, 2017 at p 78, Line 267 – p 80, Line 24.
[23] CHRC, Factum at para 59.
[24] Attorney General of Canada, Factum at para 3.
[25] See, for example, *Canada (Attorney General) v Canada (Human Rights Commission),* 2003 FCT 89 at paras 52-53; *Kelso v The Queen,* [1981] 1 SCR 199 at 207.

No further consultation is required for COO's requested orders

27. Canada points to the need for consultation as a reason to delay implementing the immediate relief measures requested by COO.

28. COO agrees that longer term comprehensive reform requires consultation, informed by evidence like the requested Ontario Special Study.

29. However, further consultation is not required to move forward on restoring funding to the Band Representative program and providing funding for mental health services under the *Child and Family Services Act.*

30. All implicated parties and the Tribunal agree that the failure to fund the Band Representative program under the *1965 Agreement* has an adverse impact on First Nations children, and is a source of the discrimination in the scheme as a whole. The Tribunal noted that "the Band Representative [program] address[es] the need for culturally relevant services, […] the goal of keeping families and communities together, and is directly provided for in Ontario's *Child and Family Services Act.*"[26]

31. Ontario's position on this matter is clear. It has repeatedly asked INAC to fund the Band Representative program under the *Child and Family Services Act,* identifying it as a crucial tool to promote the best interests of First Nations children.[27]

32. COO, as a representative of the First Nations in Ontario, has over and over again stated to Canada through this proceeding and elsewhere, that the Band Representative program is something that First Nations children in Ontario need now.[28] It is precisely the kind of discrete investment that would ameliorate ongoing discrimination while broader reforms are undertaken.

33. The Tribunal's decision on the merits similarly makes clear that lack of funding for mental health services is one of the ways the *1965 Agreement* fails provide First Nations children with comparable levels of service to other children under the *Child and Family Services Act.* COO has stated that further consultation on this issue is not required.[29]

34. What is lacking is not consultation, it is concrete action by Canada to show concerted efforts within the last 14 months to meet with COO and Ontario to reform the *1965 Agreement*, to fill mental health gaps created by the *1965 Agreement*, and to fund Band Representative services. It is time for action, not endless "conversations". The children in COO's communities are entitled to relief, now, from Canada's policy choice of persistent discrimination. There is no more time to waste.

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[26] 2016 CHRT 2 at para 348.
[27] 2016 CHRT 2 at paras 236-237.
[28] Affidavit of Deputy Grand Chief Denise Stonefish, sworn January 29 2017, at paras 4-7.
[29] Affidavit of Deputy Grand Chief Denise Stonefish, sworn January 29 2017, at paras 4-7.

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

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LIST OF AUTHORITIES

Canada (Attorney General) v Canada (Humans Rights Commission), 2003 FCT 89

Kelso v The Queen, [1981] 1 SCR 199

Moore v British Columbia (Education), [2012] 3 SCR 360, 2012 SCC 61