

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 Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

ATTORNEY GENERAL OF CANADA'S SUBMISSIONS IN RESPONSE TO:
MOTIONS ON REALLOCATION AND AGENCIES' FUNDING AGREEMENTS

**ATTORNEY GENERAL OF
CANADA**

Department of Justice Canada
Atlantic Regional Office
5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3
Fax: (902) 426-8796

Per: **Jonathan Tarlton, Kelly Peck,
Patricia MacPhee & Mary Anne
MacDonald**

Tel: (902) 426-5959

Email: Jonathan.Tarlton@justice.gc.ca
Kelly.Peck@justice.gc.ca
Patricia.MacPhee@justice.gc.ca
MaryAnne.MacDonald@justice.gc.ca
Counsel for the Respondent

Overview

1. The First Nations Child and Family Caring Society (“Caring Society”) has brought a motion alleging that the Respondent, Attorney General of Canada (“Canada”) is not complying with the Tribunal’s orders regarding Reallocation and Child and Family Service Agencies’ funding agreements.
2. Indigenous Services Canada (“ISC”) has complied with these orders and took specific actions following the 2016 Decision and 2018 Ruling to secure supplemental funding for the First Nations Child and Family Services (“FNCFS”) Program, establish revised departmental financial management policies, and facilitate revisions to funding agreements with agencies.
3. The evidence does not support the allegations of non-compliance with these orders.
4. The requested relief falls outside the scope of the complaint and the Tribunal’s earlier decisions and orders. Responsive remedies are those that order the cessation of discriminatory practices, redress those practices and prevent their repetition. Here the proposed remedies invite the Tribunal to supervise matters of internal management of the Department and the Department’s relationship with other departments. The requested relief is not responsive because the orders they seek fall outside the scope of the complaint and the Tribunal’s earlier decisions and orders.

Facts

Tribunal Findings: 2016-2018

5. The complaint was filed in 2007. It claimed the federal government had underfunded child and family services on reserve and that underfunding amounted to systemic and ongoing discrimination against First Nations children and their families. The complaint was largely substantiated.

6. The Tribunal made specific findings concerning the adverse impact of the policy of reallocation and also described how the lack of federal funding exacerbated that impact.¹ For example, the Tribunal observed that the reallocation of funds from other government programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program had been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve.²
7. While recognizing that the reallocation of funding from other programs within ISC to address shortfalls in the FNCFS Program may fall outside the four corners of this complaint, the Tribunal nonetheless urged Canada to eliminate this practice.³
8. In February 2018, the Tribunal said the reallocation of funds from other programs was negatively impacting housing services on reserve and adversely impacting the child welfare needs of children and families on reserve. The Tribunal again acknowledged that not all five ISC social programs form part of this complaint and conceded that it could not now look at all ISC programs and make any type of order outside of its earlier findings for this complaint.⁴
9. Consequently, the Tribunal ordered Canada to stop unnecessarily reallocating funds from other social programs (especially housing) if it has the adverse effect of leading to apprehensions of children or other negative impacts outlined in the 2016 *Decision* by February 15, 2018.⁵ Further, it ordered Canada to evaluate all of its Social Programs in order to determine whether reallocation is necessary and ensure that it does not adversely impact the First Nations children and families by April 2, 2018.⁶

¹ 2016 CHRT 2, at paras. 373 and 390.

² *Supra*, footnote 1, at para. 390.

³ 2016 CHRT 16, at para. 61.

⁴ 2018 CHRT 4, at paras. 272 -274.

⁵ 2018 CHRT 4, at para. 277.

⁶ *Supra*, footnote 5, at para. 279.

10. The Tribunal is now determining appropriate remedies and amended some of its earlier orders by way of two schedules to the February 1, 2018 Ruling. Paragraph 444 of Schedule (B) has extended the Tribunal's jurisdiction to March 31, 2019.⁷
11. Since receiving the February 1, 2018 Ruling, Canada has implemented the orders through extensive efforts respecting reallocations and took additional steps to ensure agency funding agreements are also in compliance. These efforts beginning in February, 2018 through to the present are described in detail in the Affidavits of Paul Thoppil and Paula Isaak.⁸
12. Concerning reallocation, these efforts involved obtaining increased and stable funding for the FNCFS Program, developing and implementing a reallocation policy and budget management principles and consulting with the Parties.
13. Regarding funding agreements, ISC identified changes required to support the needs of agencies and to ensure compliance with the Tribunal orders. ISC also sought the views of the Parties about the changes it was considering.

ISC has secured Stable and Increased Funding

14. As noted by Mr. Thoppil, who is currently the Chief Finances, Results and Delivery Officer for ISC, Canada has dramatically increased the funding for the FNCFS Program since the Tribunal substantiated the complaint on January 26, 2016. Whereas prior to the Tribunal's 2016 Decision and subsequent orders, the FNCFS Program's total expenditures were \$680.9 million, Canada's investments for the program have grown to approximately \$1.2 billion in 2018-2019. As a result, ISC does not anticipate having to fund the FNCFS Program by reallocating funds from other ISC programs except for "cash management" purposes.⁹ As described further below, cash management is a temporary reallocation of

⁷ See: Schedules A and B to 2018 CHRT 4.

⁸ Affidavit of Paul Thoppil dated April 16, 2019; Affidavit of Paula Isaak dated May 24, 2018.

⁹ Affidavit of Paul Thoppil, para. 3.

funds to address cash flow challenges for initiatives that have been approved but for which dedicated funds have not yet been received. Funds are returned to the original source, once funding is received from the Treasury Board.¹⁰

Budget and Program Funding within ISC is guided by legislation and policies

15. In the performance of his duties, Mr. Thoppil is guided by the *Financial Administration Act* and policies established to administer and manage public monies that are used by all Government of Canada departments.¹¹
16. Program funding is originally approved by the Government through the Federal Budget process and subsequently approved by Treasury Board. Departmental funding appropriations are provided to Departments on a yearly basis in the Estimates process and voted by Parliament. The main estimates outline spending for departments, agencies and programs, and contain the proposed wording of the conditions governing spending that Parliament will be asked to approve. The information provided in the estimates is reproduced as the schedule to the *Appropriation Act*.¹²
17. Budgets within ISC are determined based on anticipated needs, which are normally established through historical trends and forecasting. To support senior management within the Department in meeting their responsibilities under the *Financial Administration Act* and supporting policies (such as the Management Accountability Framework), ISC continually monitors and forecasts program demand to meet program funding needs and legal obligations.¹³
18. According to Mr. Thoppil, there is on occasion a need to reallocate funding internally within the Department to respond to immediate pressures and to ensure continuity of

¹⁰ Affidavit of Paul Thoppil, para. 24.

¹¹ Affidavit of Paul Thoppil, para. 6.

¹² Affidavit of Paul Thoppil, para. 7.

¹³ Affidavit of Paul Thoppil, para. 8.

services to First Nations. The Tribunal recognized that “some reallocations may be inevitable in Federal government”. However, to be compliant with the Ruling, ISC has initiated steps to review the state of financial management in the Department.¹⁴

Actions taken by ISC: Internal Review and Discussions February – May 2018

19. As noted in the Affidavits of Ms. Isaak and Mr. Thoppil, ISC undertook immediate steps to implement the orders between February 1, 2018 and May 24, 2018.¹⁵ Specifically, the following actions were taken:

- a. On February 1, 2018. Margaret Buist, Director General of the Children and Families Branch of ISC, sent an email to all Regional Directors General and Child and Family Services regional staff directing them to review the Ruling. This email is Exhibit "U" to Ms. Isaak's May 24, 2018 affidavit;
- b. On February 8, 2018, Ms. Isaak and Mr. Thoppil sent a directive by email to all departmental Assistant Deputy Ministers and Regional Directors General to advise they could no longer reallocate social programs funding, including housing, to cover shortfalls. This email is Exhibit "V" to Ms. Isaak's May 24, 2018 affidavit;
- c. ISC developed a chart to evaluate past reallocations from other social programs. This chart confirmed social development programs have previously been in deficit positions and have received reallocations from other programs to cover those deficits. This chart is Exhibit "W" to Ms. Isaak's May 24, 2018 affidavit;
- d. At the time of Ms. Isaak's affidavit, she attested that since February 15, 2018, as ordered by the Tribunal, Canada has not permanently reallocated funds from social programs, including housing.

20. In addition to those actions, ISC held a series of senior management discussions on the implementation of the these Orders:

- a. On April 5, 2018 a meeting was held with Regional Social Directors;
- b. On April 6, 2018, a meeting was held with Regional Corporate Services Directors;
- c. On April 18, 2018, a meeting was held with Regional Directors General; and
- d. On May 1, 2018, Mr. Thoppil chaired a meeting of the Financial Management Committee.
- e. At a May 14, 2018 departmental meeting of the Senior Management Committee (including Regional Directors General and Regional Executives), the analysis and implementation of the Orders were discussed.¹⁶

¹⁴ Affidavit of Paul Thoppil, para. 9.

¹⁵ Affidavit of Paul Thoppil, para. 10; Affidavit of Paula Isaak, para. 16, Exhibits U, V and W.

¹⁶ Affidavit of Paul Thoppil, para. 11.

Further Actions taken by ISC: the Development of a Reallocation Policy and Budget Management Principles May – December 2018

21. ISC has continued to expend significant efforts in collaboration with the Consultation Committee on Child Welfare (CCCW) to support the direction given by Ms. Isaak and Mr. Thoppil to create a more fulsome policy regarding reallocation of funds that adheres to the Tribunal's orders.¹⁷
22. ISC consulted with the CCCW on the Reallocation Policy in order to respect the Consultation Protocol. On October 15, 2018, ISC sent the draft policy on reallocation to the CCCW for consultation.¹⁸
23. By November 1, 2018, ISC had received comments on the reallocation policy from the Caring Society and nothing from the other Parties.¹⁹
24. ISC recognized a need to take a whole-of-Department approach for all programs and developed Budget Management Principles ("Principles") that went beyond the scope of the 2018 Ruling. The Principles provide guidance to ISC departmental officials in the context of the implementation of the Tribunal orders and also apply to the management of all programs within the Department. The Principles support the Government's *Policy on Financial Management*, which provides the key responsibilities for Deputy Heads, Chief Financial Officers, Senior Departmental Managers and the Comptroller General of Canada in exercising effective financial management.²⁰
25. The Policy on Financial Management sets out specific responsibilities for departmental Chief Financial Officers, who lead and manage the assessment of financial pressures, both

¹⁷ Affidavit of Paul Thoppil, para. 12.

¹⁸ Affidavit of Paul Thoppil, para. 13.

¹⁹ Affidavit of Paul Thoppil, para. 14.

²⁰ Affidavit of Paul Thoppil, para. 15.

on an in-year and multi-year basis, and recommend resource management strategies, including opportunities to reallocate funds as necessary, and where appropriate.²¹

26. On November 19, 2018, comments from the Caring Society on the draft reallocation policy were received and next steps were discussed at the Indigenous Services Canada - Senior Management Committee.²²
27. On January 16, 2019, the ISC Financial Management Committee approved the Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds (“the Reallocation Policy”) and the corresponding Budget Management Principles. The Reallocation Policy and the Principles complement each other, will support compliance with earlier directives and will ensure that First Nations children and families benefit from the full allocation of funding intended for implicated ISC programs.²³
28. The Principles serve as the foundation for the Reallocation Policy and are based on financial management practices for public entities in Canada. They are specifically informed by the Indigenous Services context to ensure that First Nations children and families benefit from the full allocation of funding intended for implicated ISC programs. ISC intends to continue to implement the Reallocation Policy and the Budget Management Principles indefinitely.²⁴ The Principles were posted on the ISC’s website on February 1, 2019.²⁵
29. The vast majority of the comments received from the Caring Society on November 1, 2018, were accepted and integrated into the final policy. However, ISC could not integrate a few comments into the final policy, including extension of the policy to all ISC programs, and the restriction of temporary cash management reallocations to a period of 30 days. ISC

²¹ Affidavit of Paul Thoppil, para. 16 and Exhibit C.

²² Affidavit of Paul Thoppil, para. 18.

²³ Affidavit of Paul Thoppil, para. 19.

²⁴ Affidavit of Paul Thoppil, para.17

²⁵ Affidavit of Paul Thoppil, para.19.

gave a response to the Caring Society to that effect on January 8, 2019.²⁶ ISC senior management determined that restricting temporary cash management reallocations to a period of 30 days would not be possible for the reasons provided below.²⁷

30. As further explained by Mr. Thoppil, ISC decided to include additional programs within the Reallocation Policy that the Tribunal did not address in the Ruling, specifically, education and health programs. The education program was added as Ms. Isaak was Assistant Deputy Minister of the Education, Social Development Programs and Partnerships Sector, and it was in line with her overall financial responsibilities. Further, the creation of the Department of Indigenous Services Canada in August, 2017 merged services under the former Indigenous and Northern Affairs Canada with the First Nations and Inuit Health Branch. Given these developments and the potentially adverse impact that reallocations from these programs could have on First Nations children and families, ISC determined that including both education and health programs under the Reallocation Policy was consistent with the Budget Management Principles. As such, the Reallocation Policy applies to not only the five departmental social programs and housing, as identified in the 2018 Ruling, but also education and health programs.²⁸

31. The Reallocation Policy allows reallocations in six circumstances, which are described in section 5.6. The Reallocation Policy also governs the transfer of funds for cash management under section 5.7.

32. For clarity, section 5.7 defines cash management transactions as the temporary movements of funds between programs to address cash flow challenges (advancing initiatives that have been approved, but for which dedicated funds have not yet been received). These funds are then returned once funding has been received from the Treasury

²⁶ Affidavit of Paul Thoppil, para. 20 and Exhibit F

²⁷ Affidavit of Paul Thoppil, para. 26.

²⁸ Affidavit of Paul Thoppil, paras. 21-22.

Board.²⁹ As outlined in the Reallocation Policy, funds may be managed over multiple years, if approved by the Program Director General and the Chief Finances, Results, and Delivery Sector.

33. Cash management plays a role in the federal government's expenditure management system. Within the Estimates process, the Supplementary Estimates provide departments with the opportunity to access additional funds or to make other financial adjustments to their appropriations within the current fiscal year. Because this process only occurs once or twice in a fiscal year, programs may temporarily reallocate funds within a fiscal year to address cash flow challenges for initiatives that have been approved but for which dedicated funds have not yet been received. Funds are returned later in the year to the original source, once funding is received.³⁰

34. Additionally, throughout a given fiscal year, initiatives/projects may be also delayed for a variety of reasons, such as weather/winter roads or contracting issues. To ensure that funding is still used to support communities, ISC may ask the Treasury Board for the ability to spend that funding in future years, when it will be needed for the original project. In line with accepted fiscal management principles, ISC programs may also use funding originally allocated to a delayed project to support other initiatives, with funds being returned to the original program in a future fiscal year.³¹

35. Within this context, senior management determined that restricting temporary cash management reallocations to a period of 30 days would not be possible.³²

²⁹ Affidavit of Paul Thoppil, para. 23

³⁰ Affidavit of Paul Thoppil, para. 24.

³¹ Affidavit of Paul Thoppil, para. 25.

³² Affidavit of Paul Thoppil, para. 26.

Implementation of the Reallocation Policy: January –April 2019

36. The Reallocation Policy and Budget Management Principles were distributed by email to the departmental Assistant Deputy Ministers on February 25, 2019 and are now in effect. ISC is developing implementation tools in the form of monthly reports for ‘temporary’ cash management and permanent reallocations. The process will identify transfers of funding out of implicated programs. Each region must attest that these transfers reflect ‘temporary’ cash management, and that they will not result in an adverse impact on First Nations children and families. Additionally, this monthly report will require departmental officials to attest and identify a resource management plan to return the funds back to the implicated program. The resource management plan will include the source of funds that will be used for the reimbursement.³³
37. Before any future reallocation can be implemented, ISC will require the responsible approving senior departmental officials to give a rationale explaining why the reallocation is necessary - including supporting evidence - and confirmation that no adverse impact on First Nations children and families is anticipated as a result of the reallocation.³⁴
38. ISC has also written a Guidance Document to aid ISC departmental officials in assessing if a reallocation of funds is likely to have an adverse effect/impact that leads to additional apprehensions of First Nations children, or impacts First Nations children and families negatively to prevent discrimination practices from reoccurring due to the Reallocation Policy.³⁵ Prior to full implementation within the Department, this Guidance Document will be shared with the Consultation Committee for consultation.

³³ Affidavit of Paul Thoppil, paras. 27-28.

³⁴ Affidavit of Paul Thoppil, para. 30.

³⁵ Affidavit of Paul Thoppil, para. 31.

Consultations with the Parties after Approval of Reallocation Policy: January – April 2019

39. ISC will distribute the implementation tools for the Reallocation Policy, including the Guidance Document, to regional ISC officials by the end of April, 2019, after the majority of year end accounting processes affecting the implicated accounts have been completed. Prior to their full implementation, ISC intends to share these tools with the CCCW and expects they will continue to develop with input from both the CCCW and regional ISC officials.³⁶

Agency Agreements

40. As previously discussed at paragraph 15, there are policy requirements for transfer payment programs such as the funding agreements ISC enters into with First Nations child welfare agencies. These requirements are further described by Mr. Thoppil in his affidavit.³⁷

41. For example, the objectives of the Policy on Transfer Payments (PTP) and the Directive on Transfer Payments (the “Directive”) are to ensure that transfer payment programs are managed with integrity, transparency and accountability in a manner that is sensitive to risks; are citizen- and recipient-focused; and are designed and delivered to address government priorities in achieving results for Canadians.³⁸

42. ISC also maintains departmental guidance documents, as well as funding agreement models that are used nationally as the basis for all ISC funding agreements. The Department’s national funding agreement models vary based on recipient type. The Funding Agreement-Other (FA-Other) is the model used for recipients that are other than

³⁶ Affidavit of Paul Thoppil, paras. 32 and 35.

³⁷ Affidavit of Paul Thoppil, paras. 36-46.

³⁸ Affidavit of Paul Thoppil, para. 37 and Exhibit I.

First Nations and Tribal Councils, including for example, agencies and other service providers.³⁹

43. According to Mr. Thoppil, while all ISC funding agreements must be based on one of the national models, the specific needs of each recipient or recipient type are considered and accommodated, where possible, through two formal processes:

a. In instances where recipients are already under an existing agreement, changes to the agreement are made by way of notice (the Notice of Acceptance of Requests, or the NAR) which simply requires the signature of a delegated ISC official. Use of a notice allows the Department to legally change the agreement very quickly in response to a request and avoids the administrative burden of amending the funding agreement.

b. In instances where recipients are entering a new agreement, any required changes to the model are made through the internal Text Deviation process, prior to presenting the agreement to the recipient for signature.⁴⁰

44. While the the Tribunal has never issued orders respecting agency funding agreements, ISC reviewed the standard language included in the FA-Other funding model to identify the changes required to support the needs of agencies and ensure compliance with the Tribunal orders.⁴¹

45. In September 2018, ISC distributed documents for consultation to the CCCW including: the current FA-Other funding model; draft versions of the proposed NAR and Text Deviation Request; and a draft updated sample funding agreement.⁴² Later that same month, the Caring Society provided feedback on the draft updated sample funding agreement.⁴³

³⁹ Affidavit of Paul Thoppil, para. 38.

⁴⁰ Affidavit of Paul Thoppil, paras. 38-39.

⁴¹ Affidavit of Paul Thoppil, para. 40.

⁴² Affidavit of Paul Thoppil, para. 41 and Exhibit J

⁴³ Affidavit of Paul Thoppil, para. 42 and Exhibit K.

46. ISC integrated the majority of this feedback. In its response to the Caring Society on December 3, 2018, ISC provided the following: a formal ISC response to the feedback, updated versions of the NAR and Text Deviation Request; and an updated sample funding agreement.⁴⁴

Control over spending and internal allocation remains solely the Department's responsibility

47. There remain two areas of disagreement between the Caring Society and ISC related to standard language that is included in all Government of Canada funding agreements regarding a) the powers of Parliament and the Minister, and b) the provision of a dispute resolution process.

48. The first area of disagreement is due to the Caring Society wanting a non-derogation clause to protect recipient's rights to take legal recourse against Canada if Parliament fails to appropriate funds for the activities identified in agency funding agreements. Secondly, the Caring Society would like the dispute resolution process removed from agency funding agreements, as they would like all funding disputes to go through the appeals process ISC created to support the implementation of the Tribunal's orders on payment of actuals.

49. Regarding the first area the PTP and Directive require departments to include clauses in agency funding agreements enumerating those exceptional circumstances, which would enable the Department to terminate agreements. In the case of agency funding agreements:

- a. if Parliament opts not to vote funds that would fund the agreement (section 6.1 of agency funding agreements);
- b. if Treasury Board changes or ends the program (section 6.2(a) of agency funding agreements);
- c. if the Minister changes or ends the program (section 6.2(b) of agency funding agreements); or

⁴⁴ Affidavit of Paul Thoppil, para. 43 and Exhibit L.

- d. If Parliament changes funding levels (section 6.2(c) of agency funding agreements).⁴⁵

There is no evidence showing that any agency has refused to sign a funding agreement because of the above provisions. There has also been no evidence that the above mentioned exceptional circumstances clauses have ever been invoked.

50. The Directive also requires departments to include a provision for a dispute resolution mechanism in funding agreements. Section 28.1(b) of agency funding agreements provides for such a dispute resolution process to address disagreements between recipients and Canada. This applies to the entire funding agreement with agencies, including funding provided outside of the Tribunal orders. This provision therefore allows agencies access to a dispute resolution process to all aspects of their funding, not just those covered by the Tribunal orders, providing agencies with a means to challenge Canada on matters outside of the Tribunal's Ruling.⁴⁶
51. ISC could not accept the two changes suggested by the Caring Society. ISC addressed the concerns of the Parties through other means that complied with the Ruling, which includes the appeals process as identified in Ms. Wilkinson's affidavit of April 16, 2019.⁴⁷

Submissions

52. Canada has implemented the Tribunal's orders regarding reallocation and agencies' funding agreements. It has focused on securing supplemental funding for the FNCFS Program so future reallocations are unnecessary to ensure the Program is adequately funded from the beginning. It has established revised departmental financial management policies. It has facilitated revisions to the funding agreements with agencies to support

⁴⁵ Affidavit of Paul Thoppil, para. 45.

⁴⁶ Affidavit of Paul Thoppil, para. 46.

⁴⁷ Affidavit of Paul Thoppil, para. 46

their needs. These steps have ensured compliance with the Tribunal orders and they will ensure future compliance.

Reallocation

53. The Tribunal ordered Canada to stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect of leading to apprehensions of children or other negative impacts. Canada has been complying with this order since February 8, 2018.
54. Following the 2018 Ruling concerning reallocation, ISC began to develop policy tools and implementation processes to comply with the order. In particular, ISC developed and implemented Budget Management Principles and a Reallocation Policy that both go beyond the scope of the 2018 Ruling. The Budget Management Principles and the Reallocation Policy set tight standards of transparency that will allow ISC to demonstrate compliance on an ongoing basis and provide good administration of the financial resources under its control.⁴⁸
55. The Budget Management Principles are founded on financial management practices for all public entities in Canada. They guide budget management decisions for all ISC funding and serve as a foundation and for the Reallocation Policy. Additionally, the Reallocation Policy applies to more programs than the Ruling identified. The inclusion of education programs and health programs as part of the Reallocation Policy was consistent with the Budget Management Principles it had developed, and remediated any adverse impact that future reallocations from these programs could have on First Nations children and families.
56. The development of Budget Management Principles and a Reallocation Policy, which go beyond the Rulings, demonstrate that Canada has taken a generous and purposeful

⁴⁸ Affidavit of Paul Thoppil, para. 20 and Exhibit F

approach. This further demonstrates how ISC has reflected upon the “old mindset” that led to the initial findings of discrimination – as described by the Tribunal – and modified its approach to respect the intent and spirit of the Ruling.

57. Canada also consulted with the Parties on the development of the Reallocation Policy and shared the Principles with the Parties. The Budget Management Principles and the Policy apply to the internal management of financial resources for the Department. However, ISC welcomed comments from the CCCW on the Policy and integrated as many as possible, while respecting the policies which govern the Department’s financial management responsibilities.
58. Respectful disagreement has happened regarding two matters. The Department would be compromised in its ability to respond to changing realities, which could adversely impact First Nation children and families if ordered to restrict cash management to a period of 30 days. Regarding the extension of the Reallocation Policy to all ISC programs, the Department has implemented the Budget Management Principles to ensure a whole-of-Department respect for the intent and spirit of the 2018 Ruling. Such disagreement on these two issues should not be conflated to non-compliance with the orders.

Funding Agreements

59. Additionally, the Caring Society is asking the Tribunal to impose its own dispute resolution process concerning matters, such as funding agreements, outside of the scope of the Rulings. Currently, there are two dispute resolution processes available to agencies. As further described in Joanne Wilkinson’s April 16, 2019, affidavit, Canada has created an interim appeals process to address disagreements over agency claims related to the orders on reimbursement of actual costs for services as detailed in the Ruling. This process was developed through extensive consultation with the Parties, as evidenced through Ms. Wilkinson’s affidavit, and is currently in practice.⁴⁹

⁴⁹ Affidavit of Joanne Wilkinson dated April 16, 2019, para 20, 27 & 38.

60. However, this appeal process was created to address disagreements related to the payment of claims as a result of the Tribunal's Ruling is not the focus of the Caring Society's motion. Instead, the Caring Society has taken issue with the dispute resolution process included in the agency funding agreements, which is a mechanism for agencies to seek redress on issues that are outside of the scope of the Tribunal's orders. While the Caring Society has raised concerns, there is no evidence before the Tribunal of concerns from agencies about this standard language found in funding agreements.

61. Furthermore, the request to include a non-derogation clause in agency funding agreements is not necessary to ensure the implementation of these orders. There has been no evidence submitted to the Tribunal to indicate why adherence to the legal principle of Parliamentary supremacy results in discrimination, or that Canada is intending to terminate any agency agreements. The allocation of public funds remains under the control of Parliament and the Executive. They alone determine the process of internal Departmental administration and financial management within ISC; these are not areas where the Tribunal has the authority to intercede.

62. In any event, given a hypothetical scenario where a decision to terminate an agency's funding agreement would be made, the Tribunal's order would continue to be implemented by virtue of the process provided for in section 30(1) of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50)⁵⁰

63. The Tribunal has not made orders regarding the funding mechanisms used by ISC. Nonetheless, ISC took actions to review these types of funding instruments, which demonstrates how the Department has gone beyond the requirements of the Ruling to ensure compliance. The standard dispute resolution process ensures that agencies have a means to resolve disputes with Canada on issues not within the scope of the Ruling.

⁵⁰ Payment of judgment: 30 (1) On receipt of a certificate of judgment against the Crown issued under the regulations or the Federal Courts Rules, the Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown.

Further, Canada in consultation with the Parties has developed an additional mechanism to resolve disputes that come within the scope of the Ruling. Together, the agencies now have additional means to seek recourse if needed.

64. The Tribunal has jurisdiction to address the complaint before it and its task, in this case, has been to determine whether there has been discrimination and, if so, to order that it cease. However, as acknowledged by the Panel in the February 1, 2018 Ruling, the remedy phase should not be an occasion to add new issues, which would be unmanageable.⁵¹
65. As confirmed by Canada's evidence, ISC has taken actions that are informed by the *Financial Administration Act* and policies established to administer and manage public monies. While financial administration within ISC remains fundamentally a matter for the Department, it has listened respectfully to the input of the Parties and addressed the majority of their concerns.
66. Further, the orders do not prescribe a specific administrative process to follow, nor does the Tribunal have the power to dictate the specifics of Canada's chosen means to implement the orders. It also cannot remain seized of the matter indefinitely to monitor progress on its remedies. Canada has complied with and gone beyond the scope of the orders with respect to reallocation in a manner that is responsive to the concerns of First Nations children and their families. As previously mentioned in paragraph 60 above, the Tribunal has never issued orders regarding agency funding agreements. At the same time the Reallocation Policy, Principles and revisions to the agencies funding agreements comply with the *Financial Administration Act*, satisfy the needs for Parliamentary control and reporting, and ensure the efficient, economic and prudent use of public resources.

⁵¹ 2018 CHRT 4, at para. 384.

Conclusion

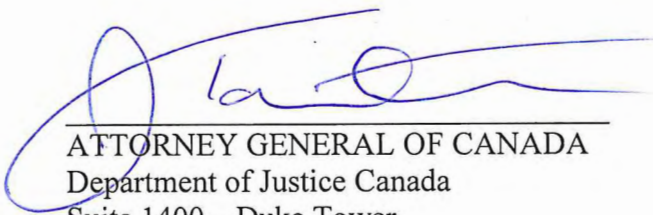
67. Canada has implemented the orders in both a responsive and compliant manner. It has ceased the discriminatory practice. The processes it has adopted have redressed the discriminatory underfunding and the adverse impacts that accompanied it. Going forward, they will prevent a repetition of it.
68. The arguments of the Caring Society lack a proper evidentiary and legal foundation and they seek relief that the Tribunal is not empowered to give.

Order Sought

69. Canada respectfully asks the Tribunal to dismiss this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Nova Scotia this 26th day of April, 2019.



ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Suite 1400 – Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3
Fax: (902) 426-2329

Per: Jonathan Tarlton
Tel: (902) 426-5959
E-Mail: Jonathan.Tarlton@justice.gc.ca

Counsel for the Respondent

Crown Liability and Proceedings Act

R.S.C., 1985, c. C-50

30 (1) On receipt of a certificate of judgment against the Crown issued under the regulations or the *Federal Courts Rules*, the Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown.

30 (1) Sur réception d'un certificat de jugement rendu contre l'État et délivré en vertu des règlements ou des *Règles des Cours fédérales*, le ministre des Finances autorise le paiement, sur le Trésor, de toute somme d'argent accordée à une personne, par jugement contre l'État.

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

the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have

meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.

4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

Approach A: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.

Approach B: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to

maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[390] Notwithstanding budget surpluses for some agencies, additional funding or reallocations from other programs, the evidence still indicates funding is insufficient. The Panel finds AANDC's argument suggesting otherwise is unreasonable given the preponderance of evidence outlined above. In addition, the reallocation of funds from other AANDC programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program has been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve. Again, recommendations by the Auditor General and Standing Committee on Public Accounts on this point have largely gone unanswered by AANDC.

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps,

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2016 CHRT 16
Date: September 14, 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 Aboriginal Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

[61] While the reallocation of funding from other First Nations programs to address shortfalls in the FNCFS Program may be outside the four corners of this complaint, the Panel made findings about the adverse impacts of this practice in the *Decision* (see for example paras. 373 and 390). Therefore, the Panel urges INAC to eliminate this practice.

E. Additional information requests

[62] The CCI Parties request further detail on the budget allocations for the FNCFS Program and FNCFS Agencies. Specifically, they note that INAC's compliance report states that much of the additional funding will be provided "at full implementation" and "over the next five years." In the CCI Parties' view, INAC has not provided an explanation as to why there is a five-year delay in taking action and requests INAC be ordered to cease its incremental approach to remedying discrimination. The CCI Parties are also unclear as to when exactly "full implementation" will be reached or when "over the next five years" many of INAC's proposed measures will come into effect.

[63] Furthermore, while INAC has provided the funding models that generated its budgets, the CCI Parties also request that it provide the raw data relied upon to calculate any funding increases, including how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba, and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services.

[64] According to INAC, 'full implementation' of Budget 2016 will be reached in Year 4 and again in Year 5 of its five-year plan. The financial projections for 2017-18 to 2020-21 were calculated by scaling the full annual investment of Years 4 and 5. Funding will be provided to agencies incrementally because, according to INAC, past experience and discussions with funding recipients have shown that incremental funding allows agencies enough time to hire, train and retain staff, based on the availability of qualified social workers and other staff, and to expand their prevention programming. INAC submits that this approach in no way means that Canada presumes that agencies lack the capacity to

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

Alberta to deal with these issues and is committed to doing the same in other provinces by 2012". (emphasis added).

[271] The Panel agreed and included the above in its findings. We are now in 2018, six years after INAC's commitment to deal with these issues by 2012. Of note, the Auditor General was analyzing a decade of policy-decision making when it made this finding.

[272] While not all 5 INAC social programs were part of this complaint, and recognizing that the Tribunal has limits in terms of adjudicating the claim that is before it, a number of comments are worth mentioning. Canada's practice of reallocating funds from other programs is negatively impacting housing services on reserve and, as a result, is adversely impacting the child welfare needs of children and families on reserve by leading to apprehensions of children. This perpetuates the discriminatory practices instead of eliminating them.

[273] The Panel addressed this issue as part of its findings in the *Decision* and identified it was part of the adverse impacts on First Nations children and families.

[274] This does not mean the Tribunal can now look at all Programs and make any type of order outside of its findings for this complaint. This was addressed in 2016 CHRT 16 para.61.

[275] However, the Panel can make orders under section 53 (2) (a) and (b) to cease the discriminatory practice and prevent it from reoccurring if it has evidence to that effect. This exercise is based on the evidence at the hearing on the merits and, new evidence before the Tribunal as part of the motions proceedings. Moreover, the current situation in this case is a clear example of policy decision-making repeating historical patterns that lead to discrimination and that warrant intervention to ensure it is eliminated.

[276] It is also in the best interest of First Nations' children and families to eliminate this practice as much as possible. Some reallocations may be inevitable in Federal government.

[277] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to stop unnecessarily reallocating funds from other social programs especially housing if it has the

adverse effect to lead to apprehensions of children or other negative impacts outlined in the *Decision* by **February 15, 2018**.

[278] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities by **February 15, 2018**.

[279] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to evaluate all its Social Programs in order to determine and ensure any reallocation is necessary and does not adversely impact the First Nations children and families by **April 2, 2018**.

ii. 1965 Agreement

Mental health services

[280] The COO submits that the Tribunal has identified the gaps in mental health services available to First Nations children as a discriminatory effect of the *1965 Agreement* and that Canada is aware, generally, that such gaps exist. According to the COO, the budget was not increased to provide Band Representative services or mental health services (or any other services other than prevention services), even after the Tribunal's *Decision* that the failure to provide Band Representatives and children's mental health services is discriminatory.

[382] NAN was granted interested party status after the hearing to bring its unique perspective on communities in Northern Ontario. Mental health and youth suicides, while unfortunately not unique to NAN, sadly form part of this perspective.

[383] The Panel acknowledges that the part about respite care was not specifically referred to in the *Decision*. However, it is linked to gaps and denials that the Jordan Principle can address.

[384] While the Panel agrees that this remedy phase should not be an occasion to add anything and everything and new issues which would be unmanageable, this is not what has happened here.

[385] There is no unfairness to Canada here. The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long term relief that will address the discrimination identified and explained at length in the *Decision*. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long term relief.

[386] Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc.

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

[388] Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.