Tribunal File: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (representing the Minister of Indigenous and Northern Affairs Canada)

Respondent (Responding Party)

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS RESPONDING TO CANADA'S FINANCIAL ADMINISTRATION ACT SUBMISSIONS

ASSEMBLY OF FIRST NATIONS
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Overview

1. On August 11, 2020, this Panel requested submissions from the Parties on "the relationship between the *Financial Administration Act* (FAA), Treasury Board policies and the systemic racial discrimination found in this case". Specifically, whether Canada's "current financial approach, in line with the FAA and Treasury Board's authorities, support[s] the implementation of the Panel's orders effectively."

2. Canada must implement the *FAA* in a manner that is consistent with the purpose of the human rights legislation, which has quasi-constitutional status. To a large extent, Canada has been abiding by the Orders of this Panel and positive reforms to the First Nations Child and Family Services (FNCFS) Program were achieved.

3. The AFN is of the view that nothing in the *FAA* or Treasury Board policies act as a barrier to implementation of this Panel's orders. Any barriers that may result can be attributed to lack of political or bureaucratic will on the part of the Respondent.

The *FAA* Does not Preclude Implementation

4. Canada's authority to appropriate and expend public funds was described in the Affidavit of Paul Thoppil dated April 16, 2019, and in the transcripts of his cross-examination. He advises that budgets of Indigenous Services Canada (ISC) are based on "anticipated needs, which are normally established through historical trend and forecasting."[1] Moreover, departmental funding is approved through the federal budget process voted on by parliament annually.[2]

5. There are a number of steps departmental staff must go through to set the department's budget. Essentially, officials prepare a funding request and seek the Minister's approval to ask for funding.[3] Officials in central agencies assist in the preparation of the funding request to the Treasury Board[4] and it is forwarded to the

[1] Affidavit of Paul Thoppil at para 7.
[2] Thoppil affidavit at para 6.
[3] Thoppil Transcript p 32 lines 18-22.
[4] Thoppil Transcript, p. 33 – 34, lines 23-25 and 1- 9.

Minister of Finance and the Prime Minister for approval.[5] Next, a Treasury Board submission is drafted[6] and Parliament votes on the budget.[7] Once the funding requests is approved, Parliament appropriates funds from the Consolidated Revenue Fund.

6. Canada acknowledges the Panel's orders are compatible with the *FAA*. However, Canada suggests the Panel refrain from guiding further reforms to the FNCFS Program, stating that only Parliament can direct how public funds can be expended.

7. The AFN submits that this Panel has rejected this argument in previous rulings, noting that systemic remedies are appropriate to end discrimination. In its February 1, 2018 ruling, this Panel noted that the FAA does not bar the Tribunal from making Orders that address past discrimination and prevent future ones from occurring.[8] In its August 11, 2020 Order, this Panel held that the *FAA* does not override the Tribunal's Orders to cease discriminatory practices.[9] Neither of these rulings were judicially reviewed.

8. Mr. Thoppil stated that Orders of this Panel impose legal obligations that Canada must factor into its financial planning and budget considerations.[10] Therefore, Canada is able to comply with the *FAA* while facilitating the implementation of the Panel's Orders. In short, the *FAA* is not a barrier to implementation on long-term reforms.

Addressing Systemic Remedies

9. The remedial powers of the Tribunal are set out in section 53 of the *CHRA*, the following provisions of which are relevant to this case:

> **53.** (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member of panel may … make an order

[5] Thoppil Transcript, p. 34 lines 13-23; and p. 35, lines 1- 9.
[6] Thoppil Transcript, p. 36 lines 14-21.
[7] Thoppil Transcript, p. 36 lines 22-25.
[8] 2018 CHRT 4, at paras 32-33.
[9] 2020 CHRT 24 at para 37-38.
[10] Thoppil Transcripts p, 59 line 25 through p. 60, line 1.

against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future […];

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

10. Human rights legislation is a fundamental quasi-constitutional law that is intended to ensure that individual rights of vital importance are capable of enforcement.[11] The Supreme Court of Canada has repeatedly affirmed that human rights legislation is to be interpreted liberally and generously to advance its purpose to give full recognition and protection to human rights and to prevent and eliminate discrimination.[12]

11. Further, where there is a real or perceived conflict between a systemic remedy granted under the s. 53 of *CHRA*, and other legislation or policies, the *CHRA* remedy is presumed to take priority.[13]

Conclusion

12. Canada asserts that reforms to the FNCFS Program falls to the legislative and executive branches of government. However, Canada has not sought judicial review of any of the Panel's Orders directing targeted reforms of the FNCFS Program. The AFN submits that Canada is attempting to relitigate settled matters and rulings of the Tribunal.

13. As Canada has not sought a judicial review of prior Orders of the Panel, those Orders are binding, impose enforceable obligations and are not open to further

[11] *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 ("*Action Travail*"), at p. 1134.
[12] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, at para 33.
[13] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, at para. 26.

review. Further, Canada must respect in the course of program reform. The obligation to implement future orders that direct additional program or funding reform arising from the discrimination found in this matter, as well as the Panel's authority to provide effective remedies will be binding on Canada to implement.

14. Canada is required to implement Orders of the Panel and undertake directed reforms to bring the FNCFS program in compliance with direction ordered by this Panel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 3, 2020

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