Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 24
Date: August 11, 2020
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
Edward P. Lustig

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Band Representative Services in Ontario Motion

I. Context

[1] This motion for funding Band Representative and Mental Health Services arises in the context of the Tribunal's retained jurisdiction of the implementation of the remedy in a complaint brought by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) against Canada on behalf of First Nations children.

[2] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Merit Decision*), the Tribunal found that Canada engaged in discriminatory practices contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (the *CHRA*) in its provision of services to First Nations children. In the *Merit Decision*, at paragraphs 392, 425 and 426, the Tribunal identified the discrepancy where Ontario appropriately funded Band Representative Services while Canada took the position that it was not required to do so as it was not included in the *Memorandum of Agreement Respecting Welfare Programs for Indians* (the *1965 Agreement*). This failure to fund Band Representative Services denied First Nations children access to culturally appropriate services.

[3] In *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 at paragraphs 324-337, the Tribunal found that Canada had yet to take steps to rectify the failure to fund Band Representative Services. The Tribunal reiterated its findings from the *Merit Decision* that the failure to fund Band Representative Services was "one of the main adverse impacts of Canada's discrimination" (2018 CHRT 4 at para. 324). The Tribunal ordered Canada to provide immediate funding for Band Representative Services rather than wait to complete a broader national review first. The Tribunal ordered Canada to provide this funding at the actual cost of the services and without deducting it from other funding. The funding was subject to review based on a further order from the Tribunal or upon completion of appropriate funding studies.

[4] In particular, the order from 2018 CHRT 4 at paragraphs 336 and 426-427 addressing Band Representative and Mental Health Services read as follows:

> [366] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 by February 15, 2018 or within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.
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> […]
>
> [426] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, orders Canada to fund actual costs of mental health services to First Nations children and youth from Ontario, including as provided by First Nations, Tribal Councils, First Nations Child and Family Services Agencies, parents/guardians or other representative entities retroactively to January 26, 2016, by February 15, 2018, or within 15 business days after receipt of the documentation of expenses.
>
> [427] The Panel agrees with the Caring Society and the Commission's comments on the appropriate interpretation of the words "documentation of expenses". The Panel directs that the words "documentation of expenses", should not be applied in a legalistic and narrow manner stripping the order of its significance. Therefore, it should also include where invoices/receipts are unobtainable and the service provider is not able to provide documentation that the service was rendered, Canada is prepared to reimburse expenses incurred between January 26, 2016 and February 1, 2018 where the requestor declares that the expenses were incurred and the invoice/receipt is unobtainable.

[5] In this motion, the Chiefs of Ontario (COO), an interested party in the case at hand, argues that Canada failed to comply with this order and seek further direction from the Tribunal on Canada's implementation of funding for Band Representative and Mental Health Services in Ontario.

II. Positions of the Parties

A. The Chiefs of Ontario

[6] The COO argues that it is inappropriate for Canada to impose a deadline for the submission of claims for retroactive reimbursement of Band Representative Services and current-year claims for Band Representative Services.

[7] The COO requests an order that:

> Canada's imposition of a deadline for the submission of Band Representative Services reimbursement is not compliant with the Panel's orders in 2018 CHRT 4;
>
> Canada continue to accept submissions and make reimbursements for Band Representative Services and Children and Youth's mental health services in conformity with the previous orders of the Panel and without imposing a deadline;
>
> Canada cooperate with the COO and those parties designated by the COO (such as provincial-territorial organisations such as the Nishnawbe Aski Nation) in a communications plan to communicate to First Nations or their recipients that the previously stated deadline no longer applies; and
>
> Canada pay the COO's costs of this motion.

[8] The COO argues that any proposed deadline is inconsistent with the Panel's order in 2018 CHRT 4 to provide retroactive reimbursement. A deadline is inconsistent with the order that the actual costs of Band Representative Services be funded. The deadline for current-year claims denies First Nations that have not yet established Band Representative Services the opportunity to do so and to receive funds to which they are entitled during the current-year. Canada postponing the deadline does not change the fact that the deadline, even postponed, will deny reimbursement for expenses not filed by the deadline.

[9] The COO submits that imposing a deadline conflicts with the Panel's order to fund Band Representative Services at actual cost until studies have been completed or the Panel orders otherwise. As of the date the motion was brought, the COO asserts that Canada's deadlines would deprive the majority of First Nations in Ontario of the funding to

which they would be entitled. Some of the reasons First Nations have not yet accessed these funds relate to the long-standing discrimination that occurred in First Nations child welfare funding.

[10] Denying funding to First Nations who do not comply with the deadline is both contrary to the Panel's orders and perpetuates the conditions the Panel found to be discriminatory in the first instance. Canada's intention to impose a deadline, and to deny funding to First Nations who do not meet it, is an announced intention to subject those First Nations to discrimination. The Panel is not required to wait until a First Nation is actually denied funding from failing to meet the deadline to find non-compliance as it is the intention of a deadline to deny funding. The COO argues that the deadline violates the *CHRA*, section 12 that states "[i]t is a discriminatory practice to publish … any notice … that (a) expresses or implies … an intention to discriminate".

[11] Canada's intention to work with First Nations who have trouble meeting the deadline does not negate the discriminatory nature of a deadline as it relies on Canada's discretion for the affected First Nations to receive their entitled funding.

[12] The COO emphasizes that First Nations in Ontario are in the process of moving towards self-determination over the children and families of their Nations. Band Representative Services are a part of achieving self-determination. The timeline for this step, originally thirteen months when the motion was filed, is brief.

[13] The COO argues that Canada is in essence arguing that not imposing a deadline would constitute an undue hardship for Canada. The COO implies that Canada must establish that it would constitute an undue hardship to justify imposing a deadline.

[14] The COO responds to Canada's concerns about the scope of the Tribunal's ongoing retention of jurisdiction by suggesting it is inappropriate for Canada to seek to extend the deadline beyond the Tribunal's jurisdiction while asserting the discrimination can only manifest after the deadline. The COO also submits that this motion is not raising a new issue.

B. Canada

[15] Canada requests that the COO's motion be dismissed. Canada submits that it has implemented the Panel's orders regarding Band Representative Services in Ontario. Canada has ceased the discriminatory practice. The reimbursement process has redressed past discriminatory underfunding and the funding going forward will prevent a repetition.

[16] Canada summarized its efforts to provide reimbursement for Band Representative Services and to provide ongoing funding. Canada documents a number of efforts it made to communicate relevant information to First Nations. Canada indicates that it has provided funding to cover the costs of submitting claims. Canada submits that, on a going forward basis, it reimburses First Nations, Tribal Councils and Agencies for Band Representative Services costs in the year those costs are incurred. Canada notes that it extended the deadlines it provided at the request of parties engaged in the process. Canada indicates that its deadlines allow Indigenous Services Canada (ISC) to work within the Government's Estimates/Supply process to Parliament in order to access additional funding for Band Representative Services if that is needed.

[17] Canada argues that ISC did not establish irrevocable deadlines but instead tried to be flexible and support First Nations in making claims. Canada highlights that the Panel has not directed a specific administrative process to follow in making reimbursements. Canada submits that the COO has not demonstrated any negative consequences flowing from ISC's implementation process. The Tribunal cannot find Canada non-compliant with the Panel's earlier order or find that Canada's implementation of the order is discriminatory given the lack of clear and cogent evidence to substantiate the COO's claims.

[18] Canada asserts that it has implemented the Panel's orders in a manner that complies with the *Financial Administration Act,* RSC 1985, c F-11 (*FAA*), satisfies the need for Parliamentary control of spending, and ensures the efficient, economic and prudent use of public resources.

[19] Canada submits that the Tribunal does not have the remedial power to dictate the specifics of Canada's replacement policy for funding Band Representative Services. Nor

can the Tribunal remain sized of the matter indefinitely to monitor the implementation of remedies. Canada relies on the Panel's earlier indication that the remedial phase should not be an opportunity "to add anything and everything and new issues that would be unmanageable" (2018 CHRT 4, para. 384).

C. Other Parties

[20] The remaining parties, being the Caring Society, the AFN, the Canadian Human Rights Commission, the Nishnawbe Aski Nation, and Amnesty International, did not provide submissions on this matter.

III. Analysis

[21] The Panel issued orders in 2018 CHRT 4 and remained seized of the implementation of those orders. The Panel has jurisdiction to answer requests for clarification of those orders, especially if the parties disagree on their interpretation. The Panel does not view this motion as a new issue. Rather, it is an issue of interpretation and implementation of the order and is one of the reasons why the Panel remained seized of its orders.

[22] The spirit of the 2018 CHRT 4 ruling is to remain seized of the implementation of the orders and to amend those orders if subsequent studies and/or new information show additional details on best practices and specific needs that were not accounted for given the lack of data. This was always part of the Panel's goal for long-term relief and has not changed.

[23] The Panel does not believe it should remain seized indefinitely past the long-term relief phase nor does it need to constantly hear new issues. However, this issue falls squarely within the scope of its orders and monitoring in order to eliminate discrimination and prevent it from reoccurring. In fact, in 2018 CHRT 4 at paragraph 444, the Panel wrote:

> The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented, and to further refine or clarify its

> orders if necessary. The Panel will continue to retain jurisdiction over these orders until **December 10, 2018** when it will revisit the need to retain jurisdiction beyond that date. Given the ongoing nature of the Panel's orders, and given that the Panel still needs to rule upon other outstanding remedial requests such as mid-to long term and compensation, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by Canada.

[24] The Panel understands why Canada adopted administrative measures to distribute retroactive payments for Band Representatives as per the Tribunal's orders. The Panel also finds that Canada was flexible to some extent and worked with First Nations in regards to this order.

[25] The Panel agrees with Canada it did not impose an administrative process on Canada dictating how to comply with its orders. The Panel also agrees with the COO that it did not order a cut-off date for entitlement to retroactive actual costs or current-year claims for Band Representatives.

[26] Canada contends it complies with the Panel's orders and the Panel has no reason to doubt that Canada is not complying with this Band Representative order. The issue here is to determine if Canada's elected administrative cut-off date for reimbursements of actual costs for Band Representatives responds to First Nations specific needs as per the Tribunal's orders following a substantive equality approach.

[27] The Panel disagrees with Canada that no evidence was presented as part of this motion to support the COO's position. The COO filed affidavit evidence in support of its motion. While the affidavit evidence is untested, the Panel finds this issue goes to weight and is considered alongside Canada's position and supporting materials on a balance of probabilities (see *Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 [Bombardier]).

[28] Moreover, the reasons that not all First Nations have accessed the funds are deposed to by Ms. Diane Maracle-Nadjiwon, in her affidavit affirmed March 14, 2019, at paragraph 6.

[29] In Ms. Joanne Wilkinson's affidavit referred to in Canada's submissions for this motion, it appears that Canada has set a deadline:

> 29. To continue to support this flexible approach for agencies and communities submitting claims, Canada has further extended its dates for submission of retroactive and actual claims costs. Correspondence was sent to agencies on March 29, 2019 to communicate the change. A sample of this correspondence (also shared with the CCCW) is attached as Exhibit 13. Retroactive claims for actual costs for Prevention and Operations and Band Representative Services for the period of January 26, 2016 to. March 31, 2018 will now be accepted until 8 December 31, 2019. The deadline for current year actual costs claims (fiscal year 2018-2019) for Prevention and Operations and Band Representative Services is now September 30, 2019.

[30] However, in Ms. Vanessa Follon's email dated January 31, 2019, found at Exhibit D to the Affidavit of Glykeria Prokos, Ms. Follon wrote that there was no deadline *per se*. The department is accepting claims on an ongoing basis given that they were under the Tribunal's jurisdiction and the Child First initiative and, until that changed, they were accepting applications.

[31] According to Mr. Stelio Grigorakis' email named: Deadline for Retro and Current-Year claims-BRS (CHRT Order 427), dated February 22, 2019, filed in evidence as Exhibit A to the Affidavit of Glykeria Prokos, two interpretations are possible.

[32] The wording used in the email suggests that an extension could be granted if First Nations are unable to meet the deadline and need more time. This supports Canada's assertion (see first paragraph of the email reproduced below). At the same time, the email states that retroactive funds may not be reimbursed past the deadline set by Canada. This supports the COO's assertion.

> We would like to remind you of the deadline of March 01, 2019 to submit 2018-2019 CHRT claims as it has been indicated in the guidelines communicated by the ISC head office on November 09, 2018. You are advised to confirm submission of any such claim by March 01, 2019. You are also advised to communicate ISC Ontario office before March 01, 2019 if you will need additional time to submit your 2018-2019 CHRT claims.
>
> Please also note that:
>
> a. New 2018-2019 CHRT claims submitted after March 01, 2019 may not be considered by ISC Ontario region for processing;

> b. CHRT retroactive (January 26, 2016 – March 31, 2018) reimbursement claims submitted after March 31, 2019 may not be considered by ISC Ontario region for processing;
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> c. 2018-2019 CHRT claims left incomplete with ISC beyond March 31, 2019 may not be considered by ISC Ontario region for processing;
>
> d. CHRT retroactive (January 26, 2016 – March 31, 2018) reimbursement claims left incomplete with ISC beyond March 31, 2019 may not be considered by ISC Ontario region for processing;

[33] The information above suggests both an extension and a denial of extension are possible. This explains why the parties disagree on this issue. Moreover, the COO's clarification request of the Panel's order for Band Representatives is reasonable given their reasonable interpretation that, past Canada's deadline, First Nations in Ontario may not receive the retroactive or current-year funds ordered by the Panel.

[34] After careful consideration of all the materials before the Tribunal, the Panel finds it is more probable than not that despite Canada giving some flexibility concerning the deadlines, a cut-off date was established by Canada in order for First Nations in Ontario to request and receive their retroactive and current-year funds for Band Representatives and Mental Health services as per the Tribunal's 2018 CHRT 4 orders. The Panel also finds it is more probable than not that some First Nations in Ontario were unaware or did not have the capacity to meet Canada's deadlines.

[35] Furthermore, the undue hardship defence advanced by Canada was not established here. In fact, the Panel finds the administrative process established by Canada may unduly burden some First Nations who did not have the capacity to respond by Canada's deadlines. The Panel finds there is a need to clarify its orders to ensure that First Nations in Ontario receive their retroactive and current-year funds and will do so below.

[36] While the Panel sees no issue in Canada adopting a deadline for management and administrative purposes, it does see an issue when the cut-off date results in Canada keeping the funds that are owed to First Nations who were discriminated against by Canada. Moreover, the Panel consistently ordered Canada to provide funding according to the specific needs of children, families and communities. This flexible approach should

guide Canada in its dealings with First Nations. If some First Nations' specific needs include the need to account for the lack of capacity to respond by a given deadline, Canada should take this into consideration and set aside the estimated funds owed to those First Nations until it is claimed. This would respect a substantive equality approach and is in line with the Panel's orders in the *Merit Decision* and all of its rulings.

[37] Further, the relationship between the *FAA* and the *CHRA* was considered and determined in previous rulings. The *FAA* does not trump the quasi-constitutional status of the *CHRA*. The *FAA* cannot override the Panel's orders to cease the discriminatory practices identified in the *Merit Decision* and subsequent orders accepted by Canada.

[38] The repeated arguments surrounding the *FAA* as a justification to limit the Panel's orders and jurisdiction may result in a pattern of perpetuating the systemic discrimination found in this case and does not prevent the practice from reoccurring. It could also indicate a lack of systemic change within Canada. Furthermore, the *FAA* and Canada's interpretation of the *FAA* is not a replacement for a recourse of judicial review.

[39] The 2018 CHRT 4 ruling was not judicially reviewed. It also led to a consultation protocol signed by Canada's Ministers accompanied by a commitment to abide by all of the Panel's orders. This engagement was significant and should not be taken lightly. The Panel directed that the words "documentation of expenses", should not be applied in a legalistic and narrow manner stripping the order of its significance. The same reasoning applies here.

[40] In past rulings, the Panel found Canada's funding formulas and authorities to be discriminatory, and ordered a complete reform of the First Nations Child and Family Services (FNCFS) Program. For example, in the *Merit Decision*, the Panel wrote as follows:

> [388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail

to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC [now ISC] maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[…]

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA [Enhanced Prevention Focused Approach]. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a <u>REFORM</u> of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between

> comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.
>
> [465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[41] The core of the discrimination found in the *Merit Decision* is systemic and was caused by Canada's structure and funding methodology which was focused on financial considerations and not the best interests of children or their specific needs. The Panel's orders intend to eliminate this racial systemic discrimination.

[42] Additionally, the reason to include studies in the 2018 CHRT 4 order was to ensure the funding was appropriate to the Ontario First Nations' needs. The studies were a contemporary tool to indicate what those needs are and if the orders needed to be amended to reflect those needs.

[43] In 2018 CHRT 4, at paragraph 415, the Panel recognized "that in light of its orders, and the fact that data collection will be further improved in the future and the [National Advisory Committee's] work will progress, more adjustments will need to be made as the quality of information increases."

[44] Finally, on COO's cost request, it is unclear if the COO is seeking costs for obstruction of process as per the Panel's ruling in 2019 CHRT 1 or legal costs. Moreover, insufficient argument or supporting evidence was advanced to justify an award of costs for

obstruction of process. Furthermore, the Supreme Court of Canada, made it clear in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, that the Tribunal does not have the jurisdiction to award legal costs. The Panel addressed the distinction between costs for an obstruction of process and legal costs in its past ruling (see 2019 CHRT 1). Therefore, the COO's unspecified cost request is denied.

IV. Order

[45] The Panel, pursuant to Section 53(2)(a) and (b) of the *CHRA*, reiterates its order that Canada fund Band Representative Services for Ontario First Nations, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.

[46] The Panel, pursuant to its previous orders that consistently account for the specific needs of First Nations children, families and communities and Section 53(2)(a) and (b) of the *CHRA*, orders Canada

A. to continue to accept submissions and make reimbursements for Band Representative Services and Children and Youth's mental health services on an ongoing basis, in conformity with the reasons explained above and previous orders of the Panel and, without imposing an inflexible deadline; and

B. to cooperate with the COO and those parties designated by the COO (such as provincial-territorial organisations such as the Nishnawbe Aski Nation) in a clear communications plan to communicate to First Nations or their recipients that the previously stated deadline no longer firmly applies.

V. Retention of jurisdiction

[47] The Panel retains jurisdiction on all its 2018 CHRT 4 orders including the clarification orders in this decision until all the outstanding issues before the Tribunal in this case have been resolved by the parties or ruled upon by the Panel. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 11, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: August 11, 2020

Motion dealt with in writing without the appearances of the parties

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