Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA WRITTEN SUBMISSION RE: CANADA'S CURRENT FINANCIAL APPROACH IN LINE WITH THE *FINANCIAL ADMINISTRATION ACT* AND TREASURY BOARD AUTHORITIES

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I. Overview

1. On August 11, 2020, the Tribunal requested that the parties provide submissions on the following question:

> [D]oes Canada's current financial approach, in line with the [*Financial Administration Act*] and Treasury Board's authorities, support the implementation of the Panel's orders effectively, hinder the effectiveness of the implementation of the orders or neither support nor hinders the effectiveness of the Panel's orders?[1]

2. Canada did not raise the *Financial Administration Act*, R.S.C. 1985, c. F-11 ("*FAA*") in its final submissions on the hearing on the Merits[2] that gave rise to 2016 CHRT 2, which was not judicially reviewed. Since then the role of the *FAA* has arisen in these proceedings. It raised the matter of the separation of powers and parliamentary appropriations again in its March 10, 2016 submissions regarding remedy, this time adding reference to "the rules and restrictions put into place by the Treasury Board".[3] It made similar references in its March 14, 2017 submissions regarding the immediate relief motions,[4] in its January 29, 2019 submissions regarding major capital expenditures,[5] and in its May 30, 2019 additional submissions regarding major capital expenditures.[6] It makes those arguments again in its September 18, 2020 submissions in response to the Panel's question.[7]

3. For its part, the Tribunal has ruled twice on this question. Neither of these rulings were judicially reviewed. First, in its February 1, 2018 order with respect to immediate relief for the First Nations Child and Family Services Program ("FNCFS Program"),[8] and second, in the context of its August 11, 2020 order with respect to the "end date" for Band Representative Services claims.[9] In both cases, the Tribunal held that the *FAA* does not override the Tribunal's orders to cease discriminatory practices. In light of these rulings, the Caring Society is concerned that Canada's continued submission that "orders which specifically direct the content of policy intrude

[1] Tribunal's August 11, 2020 letter.
[2] Canada's October 3, 2014 closing submissions at paras 231-233.
[3] Canada's March 10, 2016 submissions regarding remedy at paras 31-33.
[4] Canada's March 14, 2017 submissions regarding immediate relief at paras 23 and 66-70.
[5] Canada's January 29, 2019 submissions regarding major capital expenditures at paras 4-8.
[6] Canada's May 30, 2019 additional submissions regarding major capital expenditures at paras 18, 21 and 32.
[7] Canada's September 18, 2020 submissions regarding the *FAA* at paras 6-7 and 17-23.
[8] *FNCFCSC et al v AGC*, 2018 CHRT 4 at paras 21-55.
[9] *FNCFCSC et al v AGC*, 2020 CHRT 24 at paras 37-38.

into the legislative branch of government"[10] is a further attempt by Canada to re-argue points on which the Tribunal has already ruled, and for which no judicial review was sought.

4. The Caring Society's position is that any question with respect to the role of the *FAA* and Treasury Board policies has been asked and answered by the Tribunal in its February 1, 2018 decision. The Tribunal has held that while it will not draft policies, choose between policies, supervise the policy drafting process, or unnecessarily embark on the specifics of reform,[11] it will intervene where it finds that Canada's policy choices are resulting in discrimination in the same ways found in the January 2016 Decision on the Merits.[12]

5. The process set out in the *FAA* and Treasury Board policies involves the Executive requesting funds from Parliament for any given program, which then approves funds to be administered by the Executive. This process, in and of itself, does not support or hinder the effectiveness of the Panel's orders. Rather, the Caring Society submits that it is the behaviour, attitudes, and mindset of the political and bureaucratic actors within this system that will hinder or promote the effectiveness of the Panel's orders.

6. Canada's submissions regarding the *FAA* and recent experience with respect to the Terms and Conditions of the FNCFS Program indicate that Canada's "old mindset" prevails, such that continued accountability measures are required. At the immediate and medium-term relief stage, this accountability is provided by the Panel's continued jurisdiction over the complaint. With respect to long-term reform, the Caring Society submits that independent and effective accountability measures to prevent the recurrence of discrimination will be required before the Panel can end its jurisdiction over this complaint.

7. The Caring Society makes these submissions in response to the Panel's question. The Caring Society does not understand the Panel to have asked the parties in this context to evaluate the quality of Canada's compliance. Therefore, the Caring Society will simply reiterate its concerns regarding Canada's compliance that can be found in its April 8, 2020 submissions, the most recent non-compliance motion filed on (August 7, 2020) and to note that nearly five years

[10] Canada's September 18, 2020 submissions regarding the *FAA* at para 18.
[11] 2018 CHRT 4 at para 48.
[12] 2018 CHRT 4 at para 54.

following the January 26, 2016 Decision on the Merits, long-term reform has still not been achieved.

II. Canada's process for appropriating and administering funds to address discrimination is dependent on political will

8. The federal process for appropriating and administering funds was described in detail by the April 16, 2019 affidavit of Paul Thoppil (then ISC's Chief Financial, Results and Delivery Officer ("CFRDO")) and in Mr. Thoppil's May 15, 2019 cross-examination.

9. As described by Mr. Thoppil, this process proceeds as follows:

(1) public servants at ISC prepare a funding request for the Minister's approval;

(2) in the course of preparing this funding request, public servants from central agencies (Treasury Board, Privy Council Office, and Finance), are consulted and perform a "challenge function";

(3) the Minister signs off on the funding request;

(4) public servants within the Ministry of Finance perform a challenge function with respect to the request;

(5) the Minister of Finance approves the request;

(6) public servants at the Privy Council Office review the funding request and recommend that the Prime Minister support the request (or not);

(7) the Prime Minister approves the request and secures space in the fiscal framework for the request;

(8) a submission is made to Treasury Board detailing how the money requested will be spent and what will be achieved;

(9) Treasury Board includes the request in estimates to be voted on by Parliament; and

(10) Parliament approves the appropriation for the funding request out of the Consolidated Revenue Fund.[13]

10. In and of itself, the mechanics for parliamentary approval of sufficient money to ensure the eradication of discrimination does not support or hinder the effectiveness of the Tribunal's orders. Indeed, Mr. Thoppil acknowledged that "[t]he orders are our legal obligation, which we must factor as part of our financial planning."[14] However, Mr. Thoppil also very clearly identified the numerous stages at which both public servants and political actors exert control over this process. Public servants within ISC must bring forward proposals to remedy discrimination, and public servants within Central Agencies must pass them through a "challenge function".[15] There are then multiple points at which politicians must support whatever proposal is brought forward: (a) the Minister of Indigenous Services must agree with public servants that the financial need identified should be met;[16] (b) the Minister of Finance must approve the request;[17] (c) as must the Prime Minister;[18] and (d) Treasury Board.[19]

11. There has been evidence throughout this complaint of public servants' failure to move needed reforms forward.

12. For example, with respect to Jordan's Principle, during the hearing on the merits, Ms. Baggley indicated that she did not put forward a request to modify the definition of Jordan's Principle during her tenure, despite the Department having received several objections to the definition:

> **In response to questions from the Caring Society:** I don't remember writing a recommendation to modify. Most of the input we would have provided would have been considerations in terms of here's what Jordan's Principle is, here's what we've learned and then some considerations in terms of issues, challenges and successes.[20]
>
> **In response to questions from Member Lustig:** So perhaps it didn't send up enough of a risk or an alert to fundamentally change position when we were actually making some progress. So I think all along it's been more of a wait and see approach, let's see

[13] May 15, 2019 cross-examination of Paul Thoppil at pages 31-37.
[14] May 15, 2019 cross-examination of Paul Thoppil at pages 59-60.
[15] May 15, 2019 cross-examination of Paul Thoppil at pages 32-34.
[16] May 15, 2019 cross-examination of Paul Thoppil at page 32.
[17] May 15, 2019 cross-examination of Paul Thoppil at page 34.
[18] May 15, 2019 cross-examination of Paul Thoppil at page 35.
[19] May 15, 2019 cross-examination of Paul Thoppil at page 36.
[20] Evidence of Corinne Baggley, May 1, 2015, Vol 58, page 126, see also: pages 123-126.

> where you get and where you really hit some stumbling blocks and maybe where there are just bumps in the road, and maybe it's that distinction that I think is most important, and that's how we have really briefed up, is we try to make it very balanced to make sure we highlight our progress, but we also highlight the challenges.[21]

13. A further example, with respect to the FNCFS Program, arose during Ms. Lang's cross-examination on the immediate relief motions, Ms. Lang indicated that she did not put forward a request to expand funding for FNCFS Agencies beyond the Budget 2016 funding allocation:

> **Ms. Clarke:** And internally, have there been any written directions as between the departments or between your team? Have you recommended to Ms. Buist that this change that I just described, that funding at actuals occur?
>
> **Ms. Lang:** Have I personally?
>
> **Ms. Clarke:** Yes.
>
> **Ms. Lang:** No, I have not. I don't believe that we would have what we need to be able to move forward in terms of seeking that, seeking that change.
>
> **Ms. Clarke:** Is that belief based on your review of all of the evidence from the Tribunal, *Wen:De*, the [NPR], the Auditor General's reports?
>
> **Ms. Lang:** And based on my experience from seeking, seeking authorities and seeking funding previously.[22]

14. Mr. Thoppil advised, public servants cannot move these requests forward on their own: "No federal civil servant has authority to secure additional funds out of the fiscal framework. It all requires, I guess, the government's approval."[23] As such, "political will" is an inherent limit on the system outlined above:

> […] seeking additional funding requires political approvals. So, with all due respect to a federal official, I can identify a need and I can project a need, but, in the end, there has to be a political will and Parliament has to also -- has to approve the funding. Right? And as long as that political will and Parliament continues to vote on the funding, then the Department, through the innate tabling of the legislation, will ensure those needs are met. And it's up to us civil servants to ensure that those needs are identified and costed and tabled in front of political leaders as fast as possible so that the gap is addressed as soon as possible.[24]

[21] Evidence of Corinne Baggley, May 1, 2015, Vol 58, at pages 123, see also pages 121-123.
[22] Cross-examination of Cassandra Lang, February 8, 2017 at page 244, see also pages 240-244.
[23] May 15, 2019 cross-examination of Paul Thoppil at page 35.
[24] May 15, 2019 cross-examination of Paul Thoppil at page 156.

15. However, as the sad history of this complaint shows, it is not a given that political leaders will address gaps in services for First Nations children "as soon as possible". Indeed, Mr. Thoppil's evidence on cross-examination with respect to the chronic underfunding of the FNCFS Program and Jordan's Principle was that he believed "that there was a desire by those programs at that time to have more funds in order to deliver on those programs, but approvals were not secured in order to provide the adequate resources for those programs to meet the needs at that time [emphasis added]."[25]

16. ISC's CFRDO's view of the importance of "political will" to accessing greater funding for the FNCFS Program and Jordan's Principle is of fundamental importance to any consideration of whether the *FAA* and Treasury Board policies hinder or support the Tribunal's remedies:

> I think the Department was fundamentally aware for a long time of the chronic underfunding and has put forward, over the years, needs for supplemental funding. I think that what has come forward through the Tribunal has been an assistance in demonstrating the needs that the Department, over the years, has already worked out and identified.[26]

17. This casts the legal obligations set out in the Tribunal's orders as one source among many to assist ISC in "moving the needle" with bureaucratic and political actors. Indeed, as Mr. Thoppil made clear in response to Member Lustig's questions, at the level of the Minister of Finance, outside of the legal orders already made by the Tribunal, macroeconomic goals such as credit ratings and inflationary goals have a role decisions on funding requests ISC brings forward.[27] In particular, Mr. Thoppil described the current government's commitment to "diversity and inclusion-related issues" as arising from the government's political platform,[28] as opposed to its statutory obligations under the *Canadian Human Rights Act*.

18. Mr. Thoppil's views are particularly significant in the context of Canada having at least twice submitted that Indigenous Services Canada's ability to respond to the discrimination identified in these proceedings is dependent on federal government actors outside of that department:

[25] May 15, 2019 cross-examination of Paul Thoppil at pages 146-147.
[26] May 15, 2019 cross-examination of Paul Thoppil at pages 156-157.
[27] May 15, 2019 cross-examination of Paul Thoppil at pages 141-142.
[28] May 15, 2019 cross-examination of Paul Thoppil at pages 142-143.

> **Canada's March 10, 2016 submissions regarding remedy:** The Minister can only provide funding for child welfare programs on reserves to the extent that funds have been authorized for that purpose. The Minister is constrained by the rules and restrictions put in place by the Treasury Board, the statutory committee designated by Parliament to oversee financial management in government.[29]
>
> **Canada's May 30, 2019 additional submissions regarding major capital expenditures:** Substantive expansion of the FNCFS Program, such as by adding on a complex capital program as well as providing capacity and dedicated investments, would need to factor in federal policy development and budgetary processes which ISC must follow. These processes require obtaining authority for expenditures from Cabinet, and securing the appropriation of funds from Parliament.[30]

19. Accordingly, and particularly in light of past failures to rectify the chronic discriminatory underfunding that continues to result in harm to children, in order to be effective the Tribunal's orders must include mechanisms to hold actors within and outside of ISC to account in eradicating discrimination related to the FNCFS Program or Jordan's Principle, wherever it occurs.

III. Canada's process for appropriating and administering funds provides shelter and refuge for the "old mindset" within Indigenous Services Canada

20. The Tribunal has repeatedly expressed concerns about ISC's "old mindset", which relied on process over substance and failed to directly address obvious concerns.[31] As outlined in the Caring Society's April 8, 2020 submissions, this "old mindset" is alive and well in ISC, as ISC continues to give primacy to its program Terms and Conditions over and above the Tribunal's orders.

21. The Caring Society's April 8, 2020 submission details multiple issues, such as the jurisdictional models that ISC will fund or the FNCFS Program's outcomes, that the Caring Society has long identified as raising compliance concerns. Rather than addressing the problem, ISC simply adheres to its authorities and states its desire to reach agreement on alternatives at an

[29] Canada's March 10, 2016 submissions regarding remedy at para 32.
[30] Canada's May 30, 2019 additional submissions regarding major capital expenditures.
[31] *FNCFCSC et al v AGC*, 2016 CHRT 16 at para 29; *FNCFCSC et al v AGC*, 2018 CHRT 4 at para 154.

unspecified time without proposing a clear and effective process for resolution.[32] This "defer the problem" approach is one of the overarching reasons that the discrimination against First Nations children and families persists.

22. In May 2019, three Assistant Deputy Minister-level officials were cross-examined. Each was asked what options the complainants would have, beyond proceedings before the Tribunal, in the event of disagreement with ISC over implementation of the Tribunal's orders. No clear mechanism for resolving these disputes was cited.[33]

23. Throughout this nearly 14 year old case, Canada has repeatedly proclaimed itself as free of any discriminatory conduct or compliant with the Tribunal orders despite compelling evidence to the contrary. This element of the "old mindset" prevails in Canada's submissions on this matter as Canada argues that ISC ought to be the sole arbiter of whether its Terms and Conditions and other documents that it determines are required by Treasury Board policies comply with the Tribunal's orders. Without the continued exercise of the Tribunal's supervisory jurisdiction over its orders or an accountability mechanism provided as part of long-term reform, the effectiveness of the Tribunal's orders is at stake. Particularly in a case of systemic discrimination such as this one, in which notoriously chronic underfunding went unaddressed for many years, complainants cannot be left with the sole option of commencing contempt enforcement proceedings pursuant to section 57 of the *Canadian Human Rights Act* in order to ensure that discrimination is truly eradicated.

All of which is respectfully submitted this 2nd day of October, 2020.

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[32] April 8, 2020 affidavit of Cindy Blackstock at paras 18-22, and at Exhibits "6", "7" and "8".
[33] May 7, 2019 cross-examination of Valerie Gideon at pages 78-81; May 14, 2019 cross-examination of Joanne Wilkinson at pages 168-169; May 15, 2019 cross-examination of Paul Thoppil at page 89.