Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

First Nations Child and Family Caring Society and Assembly of First Nations

Complainant

- 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, Amnesty International Canada, Nishnawbe Aski Nation, and Innu Nation

Interested Parties

Submissions of the Canadian Human Rights Commission

(re the Caring Society's motion alleging non-compliance in respect of non-Agency communities)

(delivered February 3, 2021)

INTRODUCTION

1. The Caring Society says Canada has not done enough to implement the Tribunal's rulings and end discrimination experienced by First Nations children and families in communities on reserve and in the Yukon that are not served by delegated FNCFS Agencies ("Non-Agency Communities"). It asks for a declaration of non-compliance, and orders for immediate relief. Effectively, it asks that Canada reimburse the actual costs of prevention and other services that provincial/territorial agencies and other providers deliver in Non-Agency Communities. If granted, these orders would bring the funding of such services into line with the approach currently

taken with respect to the same expenses, when incurred by FNCFS Agencies. They would also bring the funding into line with Canada's longstanding practice of fully funding the actual costs of maintenance.

2. The Commission supports the Caring Society's motion, and expands below on the following propositions:

a. The Tribunal's retained jurisdiction over the implementation of remedies allows it to hear and decide this motion.

b. Canada has not demonstrated full compliance with findings and orders regarding the funding and support of child and family services in Non-Agency Communities.

c. If the Tribunal agrees that discriminatory impacts continue in Non-Agency Communities, it would be appropriate to provide further guidance and clarification, in the form of the requested orders.

BACKGROUND

A. Procedural History of the Motion

3. The Caring Society filed a Notice of Motion dated August 7, 2020. The Caring Society, COO and the Innu Nation filed affidavits in respect of the motion.[1] Canada did not cross-examine any of the affiants. Canada filed an affidavit in response to the motion.[2] Canada's affiant was cross-examined on January 8, 2021, and provided responses to undertakings on January 28, 2021.[3]

4. By email dated January 21, 2021, the Tribunal confirmed a schedule for the exchange of written submissions in this matter, in advance of an oral hearing to be held March 10, 2021. The

[1] The Caring Society filed two affidavits: the Affidavit of Dr. Cindy Blackstock, affirmed October 30, 2020 ("Blackstock Affidavit"); and (ii) the Affidavit of Grand Chief Peter Johnston (Council of Yukon First Nations), affirmed October 30, 2020 ("Johnston Affidavit"). COO filed the Affidavit of Grand Chief Joel Abram (Association of Iroquois and Allied Indians), affirmed October 30, 2020 ("Abram Affidavit"). The Innu Nation filed the Affidavit of Germaine Benuen (Executive Director of the Innu Round Table Secretariat), sworn October 30, 2020 ("Benuen Affidavit").

[2] Affidavit of Nathalie Nepton (Director General, Children and Families Branch, ISC), affirmed November 20, 2020 ("Nepton Affidavit").

[3] It appears the Commission was inadvertently left off the email distribution list for the responses to undertakings on January 28, 2021. As a result, we only received the document on the afternoon of February 3, a few hours before these Submissions were due. We will advise the Tribunal and parties before the oral hearing if we believe anything in the responses would require modifications to statements made here in the Submissions.

Tribunal directed the Caring Society, the AFN, the Commission, COO and the Innu Nation to deliver submissions by February 3, 2021. Canada is to deliver its responding submissions by February 24, and the Caring Society may reply by March 3. In accordance with this schedule, these are the Commission's submissions in response to the Caring Society's motion.

B. The FNCFS Program -- FNCFS Agencies and Non-Agency Communities

5. Canada's FNCFS Program primarily funds child and family services on reserve and in the Yukon in one of two ways. First, it funds FNCFS Agencies that operate pursuant to delegations under applicable provincial or territorial legislation. Second, pursuant to agreements with provincial or territorial governments ("provincial/territorial agreements"), it funds provincial/territorial agencies or other providers to deliver services to First Nations children and families in Non-Agency Communities.[4]

6. There are over 100 FNCFS Agencies in Canada.[5] ISC estimates that as of August 2020, delegated FNCFS Agencies served approximately 500 First Nations communities.[6] However, there are roughly 140 Non-Agency Communities that are not served by delegated FNCFS Agencies, and instead receive services funded pursuant to provincial/territorial agreements or other funding arrangements with the provinces.[7]

C. Material Findings in Past Rulings

(i) Discriminatory Impacts in Non-Agency Communities

7. In its 2016 decision on liability ("Merits Decision")[8], the Tribunal found that Canada discriminated by failing to adequately fund and support the delivery of substantively equal child and family services on reserve and in the Yukon. Its conclusions applied to communities regardless of whether they were or were not affiliated with FNCFS Agencies. Indeed, the

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[4] See generally: Blackstock Affidavit, at paras. 6-7; Nepton Affidavit, at para. 9.
[5] Blackstock Affidavit, at para. ; Nepton Affidavit, at para. 12.
[6] Nepton Affidavit, at para. 12.
[7] Blackstock Affidavit, at para. 9 (stating there are roughly 145 Non-Agency Communities); Nepton Affidavit, at para. 12 (estimating there were up to 138 Non-Agency Communities, as of November 6, 2020). The 2020 report of the Institute of Fiscal Studies and Democracy (IFSD) indicated that as many as 170 First Nations are unaffiliated to a FNCFS Agency: IFSD Report, p. 231 (Blackstock Affidavit, Exhibit 11).
[8] 2016 CHRT 2 ("Merits Decision").

following considerations show the Merits Decision applied to the circumstances of Non-Agency Communities:

a. There are no FNCFS Agencies operating in the Yukon. Despite this, the Tribunal finds that Canada's approach has resulted in discrimination "on reserve and in the Yukon" (emphasis added).[9] Given the absence of FNCFS Agencies, the affected Yukon communities can only be Non-Agency Communities.

b. The Tribunal repeatedly holds that, "the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements" (emphasis added) resulted in denials and adverse impacts that perpetuated historical disadvantage and trauma experienced by First Nations children and families.[10] The reference to provincial/territorial agreements shows the conclusions must extend to the Non-Agency Communities that receive services pursuant to such agreements.

8. In the Merits Decision, the Tribunal ordered Canada to "cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision."[11] It refrained from making more detailed orders at that time. Instead, the Tribunal retained its jurisdiction to oversee the implementation of effective remedies, and said it would require further information from the parties about how to best implement immediate and long-term reforms. However, the Tribunal did clarify in a subsequent ruling ("September 2016 Decision") that its general cease and desist order required Canada to "…update its policies, procedures and agreements to comply with the Panel's findings in the [Merits Decision]" (emphasis added).[12]

(ii) 2018 CHRT 4 -- FNCFS Agencies and Actual Costs

9. In response to various non-compliance motions, the Tribunal issued further clarification and guidance in a major ruling in early 2018 ("February 2018 Decision").[13] Two full years after the Merits Decision, it found Canada had not brought itself into compliance, and that, "The National Program, funding formulas and agreements need a full-scale reform not just support

[9] For example, see the Merits Decision, *supra* at paras. 28, 349, 383, 393, 396, 456-459 and 473.
[10] For example, see the Merits Decision, *supra* at paras. 5, 383, 394 and 458-459.
[11] Merits Decision, *supra* at para. 481.
[12] 2016 CHRT 16 at paras. 137 and 157 ("September 2016 Decision").
[13] 2018 CHRT 4 ("February 2018 Decision").

pillars put in place" (emphasis added).[14] Exercising its retained jurisdiction, the Tribunal provided additional clarification and guidance, partly in the form of orders for immediate relief. Among other things, it ordered Canada to fund the actual costs incurred with respect to prevention, intake and investigation, legal fees, necessary building repairs, and child service purchase, pending long-term program reform.[15] It also ordered Canada to reimburse the actual costs of these services, retroactive to the date of the Merits Decision.[16]

10. The Tribunal stated the following in requiring Canada to fund these prevention and other costs at actuals:

> "No evidence was produced to indicate the existence of an alternative method to fund actual costs of eliminating the adverse impacts of the services in the short term while the program is reformed. Nor is there any evidence that Canada had conducted any exercise to determine the costing of funding actual costs; or that payment of actual costs would cause Canada undue hardship. In the absence of any evidence to the contrary, funding the payment of actual costs incurred by the agencies for providing the services in the manner determined by the Panel appears to be the only immediate method of eliminating discriminatory underfunding of these costs while the program is being reformed."[17] (emphasis added)

11. The wording of the orders in the February 2018 Decision requires funding at actuals where the listed services are provided to "First Nations children and families on-reserve and in the Yukon" (emphasis added).[18] The inclusion of the Yukon suggests the order for payment of actuals extended to providers in Non-Agency Communities. However, other wording in the operative provision refers to long-term reform of FNCFS Program "funding formulas/models", and says actuals funding is required for services "as determined by the FNCFS agencies to be in the best interests of the child." These aspects do not expressly account for the existence of provincial/territorial agreements, and the absence of FNCFS Agencies, in Non-Agency Communities. The current motion expressly gives the Tribunal an opportunity to clear up any lingering uncertainties as to whether prevention and other services in Non-Agency Communities should also be funded at actuals.

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[14] February 2018 Decision, *supra* at para. 228.
[15] February 2018 Decision, *supra* at paras. 195, 202, 211, 213, 241, and 252.
[16] February 2018 Decision, *supra* at paras. 234 and 241.
[17] February 2018 Decision, *supra* at para. 223.
[18] February 2018 Decision, *supra* at para. 410.

SUBMISSIONS

A. The Motion Falls Within the Tribunal's Retained Jurisdiction

12. The Commission has already made several submissions over the years about the Tribunal's authority to grant and oversee the effective implementation of systemic remedies.[19] The Commission does not propose to repeat all those same arguments again here. Instead, it simply wishes to reiterate the following principles, which are reflected in prior Tribunal rulings[20], and should continue to guide the exercise of the Tribunal's remedial authority under the *CHRA*:

a) Section 53(2)(a) of the *CHRA* gives the Tribunal a broad discretion to order any measures it considers appropriate to redress a discriminatory practice, or to prevent the same or a similar discriminatory practice from occurring in the future. As the Supreme Court of Canada held in discussing the analogous power in Quebec's human rights law, mandatory orders to prevent discrimination will be needed where they have a connection with the dispute, are supported by relevant evidence, and are appropriate in light of all the circumstances.[21]

b) Where the Tribunal retains jurisdiction to oversee the implementation of such mandatory remedies, and is not satisfied that adequate steps are being taken to remedy and prevent discrimination, it may issue such further and more detailed orders as are needed to ensure the remedies are properly carried out.

c) Where evidence indicates that specific steps or measures will be necessary components of any effective approach to implementation of an order, it is appropriate for the Tribunal to make more detailed orders requiring that such steps or measures be taken.

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[19] For just three of the more recent examples, see: Submissions on Jordan's Principle Eligibility dated March 20, 2019, at paras. 7-11; Submissions on Capital, Scaling and Compensation dated April 3, 2019, at paras. 3-9; and Submissions on the Impact of Canada's Current Financial Approach dated October 2, 2020, at para. 11.

[20] For a non-exhaustive list of prior Tribunal rulings that have discussed principles relating to the retention of jurisdiction, see: 2017 CHRT 14 (Jordan's Principle) at paras. 23-34; 2018 CHRT 4 (FNCFS Program) at paras. 17-20 and 50-54; 2020 CHRT 20 (Jordan's Principle eligibility) at 118-119; and 2020 CHRT 24 (band representative services) at paras. 21-23.

[21] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 103-105.

13. As described above, the January 2016 and September 2016 Decisions directed Canada to cease and desist from continuing to discriminate in the provision of child and family services, including to Non-Agency Communities. Among other things, they required Canada to revisit its "policies, procedures and agreements," to ensure the delivery of substantively equal services, capable of meeting actual needs. The February 2018 Decision similarly remarked upon the need for full-scale reform of the FNCFS Program, funding formulas and agreements, including in the Yukon. In those and other rulings, the Tribunal has retained jurisdiction to oversee its remedies with respect to child and family services.[22]

14. In light of these prior findings, the Tribunal's retained jurisdiction allows it to consider the Caring Society's motion, and make such further orders as may be needed to ensure those remedies are implemented, for the benefit of children and families in Non-Agency Communities.

B. Canada Has Not Shown Full Compliance

15. The Commission agrees with the Caring Society that Canada is not yet in full compliance with the Tribunal's rulings regarding the funding and support of services to Non-Agency Communities. We say this for several reasons.

16. First, unchallenged evidence from the Council of Yukon First Nations and the Innu Nation shows there is no mechanism to ensure prevention services in their Non-Agency Communities are fully funded in a manner comparable to maintenance costs – with the result that prevention needs outstrip available resources.[23] Indeed, for Non-Agency Communities served by provincial agencies generally, there are no entities that can be reimbursed for the actual cost of providing prevention services.[24] As the Tribunal previously held, fully funding maintenance but not prevention creates incentives to remove children, contrary to principles of substantive equality and the best interests of the child. The continuing existence of this dynamic suggests that Canada has yet to take adequate steps to implement the Tribunal's past rulings.

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[22] Most recently, in 2020 CHRT 24, the Tribunal said at para. 47 that, "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."
[23] Johnston Affidavit, at paras. 14, 19, 22 and 24; Benuen Affidavit, at paras. 42-46, 68 and 83-86.
[24] Nepton cross-examination: p. 136, ll. 7-19; p. 174, l. 15 – p. 175, l. 12.

17. Second, when read together, the Merits Decision, September 2016 Decision and February 2018 Decision require Canada to revisit its funding agreements with provinces and territories, to bring them into compliance with the Tribunal's findings. This has not been done.[25]

18. Third, since the Merits Decision, Canada has made additional funds available that can supplement the prevention work done by provincial/territorial agencies and other providers in Non-Agency Communities – such as:

a. additional investments in Budget 2016, which in Ontario only can be provided directly to First Nations (as opposed to FNCFS Agencies); and

b. the Community Wellbeing and Jurisdiction Initiatives (CWJI) funding stream – which may be accessed through an applications-based process, and can fund various initiatives, including prevention, jurisdictional initiatives, and Covid-19 responses, in both Agency and Non-Agency Communities.

19. These additional investments are positive developments. However, they are not sufficient to show that Canada has fully implemented the Tribunal's rulings and orders in respect of Non-Agency Communities. This is the case for several reasons:

a. Both the Budget 2016 additional funds and CWJI are fixed pots of money that are not needs-based.[26]

b. The gross amounts of the Budget 2016 ramp-up and CWJI were not based on any assessment of the actual needs of First Nations at the material times.[27] Canada is aware they have been criticized as inadequate.[28]

c. The additional investments in Budget 2016 were determined before, and therefore do not take into account, the 2016 January Decision. Indeed, the February 2018 Decision already held that while Budget 2016 allocated more funds to address prevention, it did not fully address all the orders made to that point.[29] Just as Budget 2016 did not preclude the

[25] Transcript of Cross-examination of Nathalie Nepton, January 8, 2021 (Nepton Cross-examination): p.30, l.19 – p. 31, p. 9; and p. 50, l. 13 – p. 51, l. 24.
[26] Nepton Cross-examination, pp. 65, l. 12 – p. 66, l. 2 (re CWJI); p. 133, ll. 7-13 (re CWJI and Budget 2016).
[27] Nepton Cross-examination, p. 138, ll. 6-16,
[28] Nepton Cross-examination, p. 61, ll. 3-13; p. 65, ll. 12-24.
[29] February 2018 Decision, *supra* at paras. 100-107.

immediate relief previously granted in respect of FNCFS Agencies, it should not preclude the immediate relief now sought with respect to Non-Agency Communities.

d. While CWJI funds may be allocated towards prevention, they cannot be used to fund other kinds of services that FNCFS Agencies can claim at actuals under the February 2018 Decision – such as intake and investigations, legal fees and necessary building repairs.[30]

e. There do not appear to be any assurances that funding made available through the Budget 2016 ramp-up or CWJI will be continued, once the existing pots of money are exhausted.[31]

20. Fourth, there is no evidence that Canada is taking proactive steps to consult with First Nations about whether or to what extent its efforts since the Merits Decision have actually enabled the delivery of substantively equal child and family services in Non-Agency Communities.[32] No action plan for responding to any concerns about such services existed prior to the Caring Society bringing this motion.[33] Although the IFSD Report has recommended that Canada conduct a needs assessment in Non-Agency Communities[34], Canada has not accepted the IFSD's recommendations to date, and instead says it is still in discussions about what impacts the IFSD Report may have.[35] Plans for long-term reform in Non-Agency communities are thus uncertain, at best.

C. Remedies are Appropriate

21. If the Tribunal agrees that insufficient steps have been taken to date to eliminate the identified discriminatory impacts in Non-Agency Communities, it would be appropriate to provide further guidance and clarification, in the form of the relief now sought by the Caring Society.

22. In this regard, we note that the primary remedies sought – funding of prevention, intake and investigation, legal fees and building repairs at actuals going forward, with retroactive reimbursement back to the date of the Merits Decision -- are essentially the same as the interim remedies the Tribunal previously granted in the February 2018 Decision, with respect to FNCFS

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[30] Nepton Cross-examination, p. 66, ll. 8-24.
[31] Nepton Affidavit, para. 21.
[32] Nepton Cross-examination, p. 41, l. 25 – p. 43, l. 5; p. 52, l. 9 – p. 53, l. 5. In these passages, Ms. Nepton says she cannot say whether steps are being taken, but will be happy to take the question back to see. See also Johnston Affidavit, at para. 15.
[33] Nepton Cross-examination, p. 24, l. 7 – p. 25, l. 2.
[34] IFSD 2020 Report, at pp. 233-234 and 253 (Blackstock Affidavit, Exhibit 11).
[35] Nepton Cross-examination, p. 110, l. 19 – p. 111, l. 22.

Agencies. This makes sense, given the Tribunal's initial findings of discrimination were made across First Nations communities, without significant distinctions based on affiliation or non-affiliation with FNCFS Agencies.

23. The Commission is not aware of any practical barriers that would impede the effective carrying out of the proposed orders. Canada did not seek judicial review of the February 2018 Decision, and has instead been implementing the orders requiring that it reimburse FNCFS Agencies at actual costs. There are no indications in the record that Canada would be unable to do the same in respect of provincial/territorial agencies or other providers serving Non-Agency Communities.

24. For example, Canada has not introduced evidence suggesting it would suffer undue financial hardship within the meaning of ss. 15(1)(g) and 15(2) of the *Canadian Human Rights Act*, if ordered to provide the requested funding. Further, while Canada cannot unilaterally dictate the terms of funding agreements with provinces or territories, it can provide interim funding directly to service providers as needed, pending efforts to renegotiate. Indeed, there appear to be a few scattered examples in the record of cases where Canada is already covering the actual costs of prevention services delivered by entities other than delegated FNCFS Agencies.[36]

25. It has now been five years since the Merits Decision, and three years since the February 2018 Decision. Bearing that in mind, and taking all the foregoing into account, the Tribunal should grant the remedies sought by the Caring Society. Borrowing the language used by the Tribunal when making the February 2018 Decision, funding actual costs incurred in respect of Non-Agency Communities "…appears to be the only immediate method of eliminating discriminatory underfunding of these costs while the program is being reformed."

D. Two Final Observations

26. The Caring Society has asked for an order that Canada fund the actual costs of services that are "…determined, in consultation with the First Nation involved, to be in the best interests of the

[36] For examples, see the discussions in the record of the Mi'kmaq Confederacy of Prince Edward Island (MCPEI), and Miakpukek First Nation (in Newfoundland and Labrador). Although neither MCPEI nor Miakpukek First Nation have delegation agreements with their respective provinces, Canada appears to fund each to provide protection and prevention services. While both bodies then purchase protection services, they provide prevention services themselves – and are apparently able to seek reimbursement at actuals, as if they were small agencies. See, among other things, Nepton Responses to Undertakings, Undertakings #11 and #12.

child." If the Tribunal is inclined to direct consultation with First Nations, it may wish to direct the parties to work on an associated protocol that would, among other things, address any additional funding needed to allow First Nations to meaningfully participate in such consultations. The Tribunal and the parties recently took a similar approach in the context of First Nations' recognition of children for purposes of Jordan's Principle.[37]

27. The Caring Society has asked for a declaration that Canada may fulfill its obligations under the Tribunal's rulings "…through nation-specific funding agreements, rather than through amendments to provincial/territorial agreements."[38] The Commission agrees that this option is appropriate, and consistent with the Tribunal's past discussions of the circumstances in which its orders regarding child and family services might cease to have effect.[39]

CONCLUSION

28. The Caring Society asks for orders requiring Canada to fund the actual costs of service delivery in Non-Agency Communities. In essence, it asks the Tribunal to take the prior detailed orders issued with respect to the funding of FNCFS Agencies, and ensure they are similarly applied to the delivery of child and family services in Non-Agency Communities. Given the Tribunal's prior rulings, evidence of ongoing unmet needs (especially with respect to prevention), and the passage of time to date, the Commission agrees the Tribunal should provide the additional guidance and clarification now being sought.

29. We look forward to discussing these matters, and attempting to answer any questions the Tribunal may have, at the hearing scheduled for March 10, 2021.

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[37] The Tribunal approved the resulting protocol in 2020 CHRT 36. Canada has recently filed an application for judicial review of the Tribunal's findings with respect to Jordan's Principle eligibility, which is still pending.
[38] Caring Society, Notice of Motion dated August 7, 2020, at para. 4.
[39] In this regard, the Tribunal stated in para. 413 of its February 2018 Decision, *supra*, that its interim orders with respect to the funding of child and family services will last until such time as any one of a series of options occurs. Two of those options are (i) "Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services", and (ii) "Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling."

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 3, 2021

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