Docket: T1340/7008

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 Indigenous and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA,
NISHNAWBE-ASKI NATION and INNU NATION

Interested Parties

SUBMISSIONS OF CHIEFS OF ONTARIO on MOTION DATED AUGUST 7, 2020 REGARDING PREVENTION FUNDING TO FIRST NATIONS

February 3, 2021

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I. OVERVIEW

1. In August 2020, nearly five years after the Tribunal's decision on the merits[1], the Complainant, the First Nations Child and Family Caring Society of Canada (the "Caring Society"), again sought a finding that the Respondent, the Attorney General of Canada ("Canada"), has failed to comply with the Tribunal's orders.

2. The Caring Society's motion concerns Canada's failure to fund prevention/least disruptive measures for First Nations children, families, and communities receiving child and family services from provincial/territorial service providers on-reserve and in the Yukon, contrary to the Tribunal's Orders in 2016 CHRT 2 and 2018 CHRT 4[2].

3. The Caring Society seeks an order requiring Canada to fund prevention/least disruptive measures at actual cost for First Nations children and families living on-reserve and in the Yukon who receive child and family services from provincial/territorial agencies and to provide retroactive reimbursement for prevention/least disruptive measures costs analogous to that ordered in 2018 CHRT 4.

4. Chiefs of Ontario ("COO") makes submissions to inform the Tribunal of the Ontario context, and to provide considerations when crafting a remedy should the Tribunal find that Canada is not in compliance with the Tribunal's previous orders in this case.

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[1] *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2 ["2016 CHRT 2"], Tab 2 of the Book of Authorities of the Chiefs of Ontario ["COO BOA"].

[2] *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 ["2018 CHRT 4"], COO BOA Tab 3.

II. FACTS

5. Canada funds child and family services for First Nations in three ways: (i) funding First Nations Child and Family Services Agencies ("FNCFS Agencies"), which are delegated under provincial/territorial law; (ii) where no FNCFS Agency is in place, Canada funds provincial and territorial governments to provide child and family services to First Nations children, families, and communities[3]; or (iii) where an Indigenous governing body exercises jurisdiction through *An Act respecting First Nations, Inuit and Métis children, youth and families,*[4] funding for the implementation/operation of the Indigenous law may flow through a coordination agreement.[5]

6. There are 134 First Nations in Ontario[6]. Thirteen First Nations in Ontario, or 9.7%, are not served by a FNCFS Agency[7]; these children, families, and communities are served by "mainstream" Children's Aid Societies who do not have access to prevention/least disruptive measures supports funded at actual cost as ordered by the Tribunal in 2018 CHRT 4. Therefore, these First Nations children, families, and communities are reliant on the Ontario funding formula for prevention/least disruptive measures supports and rely on "mainstream" Children's Aid Societies to deliver those services.

7. First Nations in Ontario have clearly expressed a desire that long-term reform engage a service delivery model that enables First Nations to either partially or entirely deliver

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[3] Affidavit of Dr. Cindy Blackstock affirmed October 30, 2020, para 6.
[4] *An Act respecting First Nations, Inuit and Métis children, youth and families,* SC 2019, c 24 ["the *Act*"].
[5] The *Act,* s. 20(2)(c).
[6] This includes MoCreebec, a Cree community which does not have the status of a "band" under the *Indian Act,* RSC 1985, c I-5.
[7] Affidavit of Grand Chief Joel Abram affirmed October 30, 2020, para 9 ["Grand Chief Abram Affidavit"].

prevention services to their own citizens (which they call "community-based prevention"), rather than relying (solely) on FNCFS Agencies [8].

8. It is unclear when long-term reform will become a reality. It has been over five years since the Tribunal's initial decision on the merits, yet Canada has not informed COO whether it agrees with the long-term service delivery model proposed in the Ontario Special Study (and endorsed by the Ontario Chiefs-in-Assembly), and the 1965 Agreement is not yet being reformed or renegotiated[9].

III. ISSUE

9. The issue in this Motion is whether Canada's refusal to fund prevention/least disruptive measures for First Nations children, families, and communities not served by a FNCFS Agency complies with the Tribunal's orders in this case.

IV. LAW & ARGUMENT

10. COO agrees with the Caring Society's position that the Tribunal's previous orders to fund certain services at actual cost (including prevention/least disruptive measures) should apply to First Nations not served by a FNCFS Agency. COO also agrees that a brief consultation period is the appropriate remedy.

[8] Grand Chief Abram Affidavit, para 12. INDsight Consulting, (2019), *Ontario Special Study,* Ch. 4: Delivering Services for Child and Family Well-Being. Submitted to the Tribunal on February 28, 2020. See also transcript of cross-examination of Nathalie Nepton, January 8, 2021 p 139, line 6 – p 141, line 14 ["Nepton Transcript"], COO BOA Tab 1.
[9] Grand Chief Abram Affidavit, para 16. See also Nepton Transcript p 141, line 15 – p 142, line 6, COO BOA Tab 1.

11. The situation as it stands perpetuates inequality *among* First Nations in Ontario and leaves some First Nations in Ontario without direct access to the prevention funding at actual cost that the Tribunal has already determined is an appropriate interim remedy for Canada's systemic racial discrimination.

12. The Caring Society's requested remedy would create a situation within Ontario that sees First Nations who are not served by a FNCFS Agency receive funding to deliver prevention services at actual cost, while First Nations who are served by a FNCFS Agency would *not* be able to access such funding.

13. If the Tribunal finds that Canada is in breach of its past orders, COO suggests that the remedy that the Tribunal crafts should avoid introducing new differences among First Nations; rather, it should enhance choice and self-determination in service delivery by allowing for a flexible funding model.

14. It is COO's position that any future order for Canada to provide funding at actual cost for prevention/least disruptive measures should be flexible enough to empower First Nations' choice and support the delivery of culturally appropriate prevention supports. Therefore, COO asks that the Tribunal direct Canada and COO to work together to craft a remedy that allows for this, guided by the principle that the remedy ordered in this motion should not leave some First Nations in Ontario (those not served by a FNCFS Agency) as the only First Nations who achieve the goal being advanced by *all* First Nations in Ontario: community-based prevention services, delivered at actual cost.

15. The Tribunal's previous orders in this case have continually advanced the importance of "culturally appropriate" child and family services in remedying Canada's discrimination; these are services in which First Nations' unique cultural, historical, and geographic needs and circumstances are at the center.

(a) The Tribunal affirmed that First Nations involvement is essential to ensure child and family services are culturally appropriate: "The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community"[10].

(b) The Tribunal affirmed that funding for child and family services must correspond to the actual needs/circumstances of unique First Nations in order to break the "cycle of control" that started with Residential Schools[11].

(c) The Tribunal affirmed that culturally appropriate child and family services are, by definition, those in which the First Nation is directly engaged: "The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like"[12].

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[10] 2016 CHRT 2, at para 426, COO BOA Tab 2.
[11] 2016 CHRT 2, at para 425, COO BOA Tab 2.
[12] 2018 CHRT 4, at para 163, COO BOA Tab 3.

16. COO submits that the Tribunal's previous orders establish a clear directive applicable to the issue in this Motion: funding for prevention/least disruptive measures must be culturally appropriate to meet the principle of substantive equality, and to be culturally appropriate, the specific cultural, historical, and geographic needs and circumstances of unique First Nations communities must be at the center. This need is met by access to community-based prevention, as detailed in the Ontario Special Study.

17. With the prospect of long-term reform of child welfare funding for Ontario First Nations seemingly far into the future, and as "interim relief" seems to be relief that will be in place for some years yet, COO is advocating for interim relief that maximizes choice, self-determination, culturally appropriate services, and the ability for all First Nations in Ontario to access similar funding.

18. As such, COO asks that any remedy from the Tribunal for funding for prevention/least disruptive measures for First Nations not served by a FNCFS Agency directs Canada to work with Chiefs of Ontario to determine the specifics of a remedy that:

    (a) Does not perpetuate difference among First Nations in access to community-based, First Nations delivered prevention services;

    (b) Puts all First Nations in Ontario on a level playing field with access to the same funding for the same services;

    (c) Respects First Nations' choice and self-determination about service delivery models, even in the "interim relief" stage.

V. RELIEF REQUESTED

19. COO respectfully requests that the Tribunal grant the non-compliance motion, and with respect to Ontario, direct Canada and COO to work together to develop a solution that does not preclude any First Nation in Ontario from accessing funding for prevention/least disruptive measures at actual cost, even those First Nations in Ontario served by a FNCFS Agency.

All of which is respectfully submitted this 3rd day of February 2021.

Sinéad Dearman and Maggie Wente
Counsel for Chiefs of Ontario