Information Sheet

Canadian Human Rights Tribunal

The “old mindset” that led to discrimination

Updated February 2021

Background

On January 26, 2016, the Canadian Human Rights Tribunal (“Tribunal”) ruled in favour of First Nations children (2016 CHRT 2, “the Decision”), finding that the First Nations Child and Family Services Program (“FNCFS”) delivered by the Department of Indigenous and Northern Affairs Canada (“INAC”), and its related funding models and federal-provincial agreements, is discriminatory contrary to section 5 of the Canadian Human Rights Act. The Tribunal further found that INAC’s failure to properly implement Jordan’s Principle, a measure to ensure First Nations children receive the services they need when they need them, was discriminatory on the ground of race and national ethnic origin.

The Tribunal retained jurisdiction and ordered Canada to immediately cease its discriminatory practices in regard to the First Nations Child and Family Services Program and to immediately, fully, and properly implement Jordan’s Principle. Since the Decision in January 2016, the Tribunal has issued 16 additional orders (as of February 2021), many of them non-compliance orders against Canada. The Tribunal has referenced the perpetuation of the “old mindset” within the government of Canada that led to discrimination more than 17 in its orders. The Tribunal may issue further orders to ensure Canada fully and properly complies with the *Decision* and non-compliance and procedural orders.

2016 CHRT 16 (September 14, 2016)

Paragraph 29

The Panel is concerned to read in INAC`s submissions much of **the same type of statements and reasoning** that it has seen from the organization in the past…

The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC’s **old mindset** that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this **old mindset** and that led to discrimination.

2017 CHRT 14 (May 26, 2017)

Paragraph 47

…the *Decision* found **Canada’s similarly narrow definition** and approach to Jordan’s Principle to have contributed to service gaps, delays and denials for First Nations children on reserve.

Paragraph 49

The justification advanced by [Canada] for the focused approach to Jordan’s Principle is **the same one advanced by Canada in the past** and underscored by the Panel in the *Decision*…

Paragraph 73

…Canada seems to want to **continue proffering similar policies and practices** to those that were found to be discriminatory.

Paragraph 77

Canada's current approach to Jordan's Principle is **similar to the strategy it employed from 2009-2012** and as described in paragraph 356 of the *Decision*.

Paragraph 78

In this sense, the evidence shows that Canada's funding of $382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. **Similar to Canada's past practice**, it is a yearly pool of funding that expires if not accessed.

Paragraph 93

The Panel finds Canada's new Jordan's Principle process to be very **similar to the old one**…

Paragraph 94

The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs **similar to what the Panel found to be problematic** in the *Decision*.

Paragraph 97

The new Jordan's Principle process outlined above is **very similar to the one used in the past**, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families.

2018 CHRT 4 (February 1, 2018)

Paragraph 55

In so far as Canada's position is that it cannot unilaterally make decisions, the Panel finds Canada has done so: namely **to maintain the *status quo*** in some areas even when the needs of specific communities or groups have been clearly identified and expressed…

Paragraph 154

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Paragraph 165

As stated above, the *CHRA*'s objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.

Paragraph 300

The Panel discussed this at length in the *Decision*, highlighting many politicians and Program Managers **saying the same thing over and over**: we need the provinces at the table, we need to gather information, we need to work with our partners, we have to seek approvals, other programs may cover this, etc. This has been going for years, yet the Panel found discrimination.

2019 CHRT 7 (February 21, 2019)

Paragraph 63

On this point, **the Caring Society's position is that Canada's refusal** to apply Jordan's Principle to S.J.'s case based on her lack of (and ineligibility for) *Indian Act* status **is rooted in a deeply colonial ideology and practice, consistent with the "old mindset" the Tribunal has repeatedly identified as problematic** during the compliance phase of this complaint. S.J. does not have *Indian Act* status due to Canada's restrictions regarding the descendants of persons, like S.J.'s mother,

who have status pursuant to subsection 6(2) of the *Indian Act*.

Paragraph 73

Finally, **no one seems to have turned their minds to the needs of the child and her best interests**. There is no indication that a substantive equality analysis has been employed here. Rather **a bureaucratic approach was applied** for denying coverage for a child of just over 18 months…

2019 CHRT 39 (September 6, 2019)

Paragraph 10 (Panel references 2018 CHRT 4 at, para. 388)

Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to **ensure the discrimination is eliminated and mindsets are also changed**. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.

Paragraph 13

The gaps and adverse effects [suffered by First Nations children and families] are a **result of a colonial system** that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real needs and substantive equality

Paragraph 74 (illustrates Canada is still trying to define the harm and how to fix it in its own terms)

The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination.

Paragraph 155 and 171

The Panel references previous rulings and the "old mindset".

Paragraph 197

The Panel agrees that **remedies under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they **serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns**. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

Paragraph 231 (in reference to correlation between Canada's previous and current actions)

The Panel finds that **Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior** towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report.

For more information on the case go to
www.fnwitness.ca or contact info@fncaringsociety.com

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