Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 12
Date: March 17, 2021
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

- and -

Innu Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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Communities not Served by a First Nations Child and Family Services Agency

I. Context

[1] This ruling is a consent order addressing a motion by the First Nations Child and Family Caring Society of Canada (the Caring Society) for a determination that First Nations children and families living on-reserve and in the Yukon who are served by a provincial or territorial agency or service provider are within the scope of the Tribunal's current remedial orders.

[2] The Caring Society and the Assembly of First Nations (the AFN) brought a complaint against Canada on behalf of First Nations children that the Tribunal found was substantiated 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* or the *Act*) in its provision of services to First Nations children and directed Canada to cease and desist the discriminatory practice and to remedy the discrimination found *in the Merit Decision*. This includes an order for a complete reform of the First Nations Child and Family Services Program (FNCFS Program) in accordance with the Tribunal's findings. The Tribunal previously determined, as stated on a number of occasions, that it will address the issue of remedy in four different phases: immediate relief, mid-term relief, compensation and long-term relief (see for example, 2016 CHRT 10 at para. 5 and 2018 CHRT 4 at paras. 387-388). The Tribunal issued a number of decisions ordering Canada to remediate the discriminatory nature of Canada's provision of child and family services to First Nations (see especially 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 and 2018 CHRT 4).

[3] The Tribunal has retained jurisdiction to address the remaining remedial matters including long-term relief. Long-term relief is an important aspect of these proceedings that is meant to completely eradicate the systemic discrimination identified in the *Merit Decision* and that the Tribunal ordered to cease and desist. Given the lack of recent studies and data (see for example, 2018 CHRT 4 at paras. 259, 264, 411, 415, 417 and 421), the parties

have requested time to conduct those studies and to analyze them in order to make informed long-term order requests. Additionally, some parties have indicated that the implementation of immediate and mid-term relief would assist in informing the appropriate long-term remedies to be ordered by this Tribunal. Given the specific factual, legal and procedural context of this multi-faceted complex national case, the Tribunal has agreed to retain jurisdiction until long-term orders have been issued or until the parties have resolved the issues and sought a final consent order on all the outstanding matters in this case including long-term relief and reform of the FNCFS Program. This Consent Order forms part of this specific context.

[4] In the *Merit Decision*, the Tribunal outlined some of the different funding models used to deliver child and family services to First Nations. A large number of communities receive services from a delegated First Nations Child and Family Services Agency (FNCFS Agency). These are agencies that have an agreement with the province or territory in which they are located to deliver child and family services to one or more First Nations communities. Once this agreement is in place, Indigenous Services Canada (ISC) funds the FNCFS Agency in accordance with ISC's funding directives (*Merit Decision* at paras. 121-148). In other instances, the province or the Yukon is more involved in the delivery of child and family services. In general, the province or the Yukon pays for child and family services in the First Nations communities covered by these agreements and then Canada reimburses the province or the Yukon in accordance with the provisions of the agreement (*Merit Decision* at paras. 217-254).

[5] The Caring Society's motion requests a determination that First Nations children and families living on-reserve and in the Yukon, who are served by a provincial or territorial agency or service provider are within the scope of the Tribunal's current remedial orders.

[6] The Caring Society took the position that the scope of the complaint, and the *Merit Decision*, covered the FNCFS Program, the corresponding funding formula and other agreements that provide for child and family welfare services to First Nations children living on-reserve and in the Yukon. The Caring Society cites various passages in the *Merit Decision* to support the assertion that Canada was ordered to address the discriminatory

funding for child and family services provided to First Nations children through provincial and territorial agreements:

> [383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services […] However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.
>
> [394] […] the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.
>
> [458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserve.
>
> [459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.
>
> (emphasis added by the Caring Society).

[7] The Caring Society alleges that Canada has not taken appropriate measures to address the discriminatory nature of the provincial and territorial funding agreements. The Caring Society asserts that Canada has taken the position that the Tribunal's remedial orders in this matter only apply to FNCFS Agencies and do not apply to First Nations children and families who receive services from a provincial or territorial agency or service provider funded by Indigenous Services Canada.

[8] The Innu Nation raised an additional issue in its successful motion to intervene (see 2020 CHRT 31). Properly understanding the issue raised by the Innu Nation requires a general understanding of child and family services.

[9] As the Tribunal noted in the *Merit Decision*, child and family services are provided to First Nations children in accordance with the legislation of the province or territory in which the First Nation is located (para. 5). This creates the possibility for inconsistencies in the legislative framework applicable to different First Nations children. The Innu Nation identifies one such inconsistency.

[10] For context, child and family services are divided into two major streams: prevention and protection. Prevention involves providing supports to a family so that a child can have a safe and healthy environment with their existing family. It may involve personal counselling, mentoring by an Elder, access to childhood development programs or parenting skills programs. Protection involves removing a child from a home, at least on a temporary basis, because the risks to the child are too great to manage in the existing home environment (*Merit Decision* at paras. 115-120). The Innu Nation has established an agency to provide prevention services that is separate from how the Innu Nation communities receive child protection services. The Innu Nation alleges that Newfoundland and Labrador's child and family services legislation does not recognize prevention services. Accordingly, the province is unable to sign an agreement with the Innu Nation's child and family services agency in order for the agency to be recognized under Canada's FNCFS Program as a FNCFS Agency. The Innu Nation submits that Canada accordingly takes the position that it cannot fund the agency to provide prevention services (see 2020 CHRT 31 at para. 14).

[11] As summarized, the issues in this motion address funding structures. However, the underlying issue remains whether First Nations children and families are being denied equal access to services based on their race. A core question is whether the funding models discussed in this ruling prevent First Nation child and family service providers from protecting the best interests of First Nations children in accordance with the principles of substantive equality and in a culturally safe and appropriate manner.

A. Procedural History

[12] This motion was scheduled for a hearing on March 10, 2021. All parties except Canada provided written submissions in accordance with a timetable established by the

Tribunal. On the date of Canada's submission deadline, Canada advised the Tribunal of the proposed draft consent order to settle the motion and requested that the hearing date be vacated. The Tribunal requested additional information from the parties in order to properly consider the requested order. The additional information was subsequently provided by the parties and considered by the Tribunal alongside the Draft proposal for a Consent Order. After careful consideration of the proposed Draft Consent Order and additional information, the Panel agrees with the Draft proposal for a Consent Order.

B. Draft Order

[13] The operative provisions of the order, as approved by the Panel, are included in the order section of this decision. A brief summary is provided here.

[14] The draft order briefly reviews the Panel's previous orders in the *Merit Decision*, 2016 CHRT 10, 2016 CHRT 16, and 2018 CHRT 4 directing Canada to remedy the discrimination identified in this case.

[15] The draft order would require Indigenous Services Canada in consultation with the AFN and the Caring Society to promptly develop an interim funding model for First Nations communities that receive services under the FNCFS Program but not through a FNCFS Agency. Funding would be retroactive to January 26, 2016. Further consultation would follow to ensure the funding meets the First Nations needs until long-term reform is implemented. Funding would ensure substantive equality, the best interests of the child, and ensure inflation, population growth, remoteness and governance capacity are accounted for. The interim funding model would apply until one of the following occurs: a Nation-to-Nation agreement respecting self-government encompassing child and family services is established; a Nation specific agreement is reached that is more advantageous to the First Nation; program reform is completed in accordance with best practices; or unforeseen circumstances require other adjustments (2018 CHRT 4 at para. 413). There will be a needs assessment to support long-term reform.

II. Party Submissions and Correspondence

[16] By letter dated February 25, 2021, Canada requested approval of the Draft Consent Order on behalf of itself, the Caring Society and the AFN. Canada elaborated that the resolution is based on data obtained from Canada's payment of actual claims to FNCFS Agencies retroactive to 2016, funding allocated in Budgets 2016 and 2018, the need to build governance and capacity, and finally on-reserve population. Canada highlighted that the immediate relief accounts for population increases, remoteness and inflation. The study will support long-term reform.

[17] The Nishnawbe Aski Nation (NAN) expressed its consent in a separate correspondence.

[18] The Innu Nation indicated that it did not object to the draft order, in particular given the possibility of individual First Nations to reach a separate agreement as incorporated from paragraph 413 of 2018 CHRT 4. The Innu Nation noted that the draft order did not specifically address who was recognized as a FNCFS Agency. The Innu Nation maintained that who qualifies as a FNCFS Agency is not easily identifiable, not consistent, insufficiently flexible to account for regional circumstances, creates barriers that do not serve the best interests of the child, and fails to account for legislation including the *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

[19] In response to the Panel's request for further clarification, the Caring Society indicated that the terms of the Draft Consent Order were reached shortly before Canada's deadline for responding to the motion. The Draft Order was agreed to by the Caring Society, the AFN and Canada. It was also circulated to the other parties. The Caring Society elaborated that it supported the proposed Draft Consent Order because it did not find Canada's efforts to date to reform child and family services for First Nations communities not serviced by a FNCFS Agency to be sufficient. The Caring Society indicated the Tribunal should retain jurisdiction over the matters in the Consent Order given that it contemplates ongoing long-term reforms. In regards to the Innu Nation's comments on determining FNCFS Agencies, the Caring Society agreed it was an issue and recommended that the

model applied in Prince Edward Island where provincial delegation is not required be extended to the Innu Nation.

[20] The AFN indicated that it would appreciate the Tribunal's continued retention of jurisdiction on the matters covered in the Consent Order. In particular, the AFN identified that the parties would discuss the funding model for First Nations who did not receive services between 2016 and the date of the order and that this issue may require further direction from the Panel, including approving any agreement reached by the parties. The AFN indicated it supports the Innu Nation's request to consider who is recognised as a FNCFS Agency and is supportive of the model applied to Prince Edward Island.

[21] Canada indicated that the Tribunal did not need to retain jurisdiction as Canada was required to fully comply with the Consent Order. Canada submitted that in the event the parties do not believe Canada is in compliance, they could raise the issue at the Consultation Committee on Child Welfare and bring concerns to the Tribunal if they cannot be addressed collaboratively. Canada also indicated that it welcomed discussing the issues raised by the Innu Nation.

[22] The Commission reaffirmed its role as a full party and indicated it had only seen the proposed Draft Consent Order shortly before it was submitted to the Tribunal. However, the Commission was encouraged that an agreement was reached and was now in a position to consent to the proposed order. The Commission understood the Draft Consent Order to address immediate and medium-term relief and therefore felt it appropriate for the Tribunal to retain jurisdiction until long-term reform is accomplished. To retain jurisdiction would be consistent with the Panel's previous approach and in the public interest. The Commission further indicated that the issue of how an organisation is determined to be a FNCFS Agency is not addressed in the proposed Consent Order. The Commission supports the suggestions provided by Canada to address who qualifies as a FNCFS Agency.

[23] The Chiefs of Ontario (COO) indicated that they were not canvased on the contents of the Draft proposal for a Consent Order. The COO indicated they agreed with the other parties on the issue of the Tribunal's retained jurisdiction on this issue.

[24] The NAN indicated that while it reviewed the proposed Draft Consent Order. It takes no position on the substantive issue as this motion does not affect NAN First Nations. The NAN indicated that it understood the Draft Consent Order to be interim pending long-term reform. The NAN indicated that the approach to remoteness in the interim order should not be taken as a precedent either nationally or for the NAN. The NAN expected remoteness approaches to be further advanced at the Remoteness Quotient Table. The NAN further agreed with the Innu Nation that more effort is necessary to determine the criteria for a FNCFS Agency.

III. Analysis

[25] As context for the Consent Order, the Caring Society, the AFN and the Respondent recognize:

> This Tribunal's January 26, 2016 order (2016 CHRT 2) that Canada cease its discriminatory practices and reform the FNCFS Program to reflect the findings in that decision.
>
> This Tribunal's April 26, 2016 order (2016 CHRT 10) requiring Canada to immediately take measures to address the findings in its January 26, 2016 decision.
>
> This Tribunal's September 14, 2016 order (2016 CHRT 16) that Canada update its policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision.
>
> This Tribunal's understanding in making its September 14, 2016 order (2016 CHRT 16) that reform of Canada's policies, procedures and agreements to comply with the Tribunal's findings in its January 26, 2016 decision would be achieved over the longer term, with certain interim measures being put in place until that time.
>
> The principles set out for immediate relief in the Tribunal's February 4, 2018 order (2018 CHRT 4), in particular those at paragraphs 127, 168, 415, 417, 421, 423 and 430.

[26] In light of the above and consistent with the Tribunal's detailed findings in the *Merit Decision* which included other related provincial/territorial agreements and other funding methods, all subsequent rulings and the Tribunal's approach to remedies described above

and, pursuant to section 53 (2) of the *CHRA*, the Panel finds it has statutory authority to make the consent order requested by the AFN, the Caring Society and Canada.

[27] The Panel previously reviewed Canada's responsibility to remedy the discriminatory practice in this case:

> In its [*Merit*] *Decision* and rulings, the Panel found that Canada was responsible for funding to cover the costs of providing family and child welfare services to First Nations on reserves. It found that this responsibility included funding to cover the costs of providing services to First Nations children on reserves in need of care, in a manner that was culturally appropriate and substantively equal to the manner that the services were provided to non-First Nations children in Canada. It found that the basis upon which Canada was calculating and providing the funding was flawed in various respects, resulting in insufficient funding (i.e. underfunding) to provide the services in the manner hereinbefore described, and to meet the needs of First Nations children on reserve. It found that Canada was underfunding the services now being requested by the Moving Parties to be paid on an actual cost basis as immediate relief in this case. It found that Canada knew that it was underfunding the services and that the underfunding of prevention services, in particular, while Canada fully funded maintenance and apprehension expenses, created a perverse incentive to remove far too many First Nations children on reserve from their homes and families. It found that this underfunding of services was one of the discriminatory practices engaged in by Canada in this case, and that Canada needed to take immediate steps to eliminate this discriminatory underfunding and to fully reform the Program in the longer term.
>
> (2018 CHRT 4 at para. 215).

[28] Moreover,

> Canada has accepted the Tribunal's [*Merit*] *Decision* and rulings that it is discriminating against First Nations children by underfunding the services and that both immediate steps and longer-term reform need to be undertaken to eliminate this discriminatory underfunding of services to First Nations children on reserve.
>
> (2018 CHRT 4 at para. 216).

[29] As the Panel previously indicated,

> All of the parties agree that the Tribunal's remedial powers are to be interpreted broadly to give effect to the objectives of the *CHRA* in eliminating

> discrimination when there has been a determination by the Tribunal that discrimination has occurred and an order to cease has been made, in order to ensure that the discrimination does not continue.
>
> (2018 CHRT 4 at para. 217).

[30] Furthermore, the Panel previously wrote:

> It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now'' (see 2018 CHRT 4 at para. 387).

[31] The Panel also wrote that:

> constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council*) (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the *Act* is structured so as to encourage this flexibility.
>
> (See 2016 CHRT 10 at para.15).

[32] The Panel also said that

> Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].
>
> (2016 CHRT 10 at para. 16).

[33] In the initial *Merit Decision*, the Panel indicated its approach once a complaint is substantiated:

> As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General),* 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented.
>
> (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).
>
> It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission*), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).
>
> (*Merit Decision* at paras. 468-9).

[34] The Panel further addressed its remedial authority in 2018 CHRT 4:

> The Panel provided an overview of the Tribunal's broad and flexible remedial authorities in 2016 CHRT 10 (paras. 10-19) which was not judicially reviewed.
>
> Moreover, in making its orders the Tribunal is operating under its Statute that permits it to address past discriminatory practices, and prevent future ones from occurring. This is provided for in the *Act* under section 53 (2) (a): that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (...).
>
> (2018 CHRT 4 at paras. 31-32, emphasis omitted).

[35] As noted in 2018 CHRT 4 at paragraph 40, "[t]he Tribunal made extensive findings in [the *Merit Decision*] and provided very detailed reasons as to how it arrived at its findings." As noted in the *Merit Decision*, "[t]hose findings demonstrate that "AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of

services and created various adverse impacts for many First Nations children and families living on reserves" (*Merit Decision* at para. 458, emphasis added). Moreover, "[t]he Tribunal also found that "[t]he failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families" (2016 CHRT 2 at para. 458, emphasis added). Later, "[t]he Panel specifically mentioned that reform must address the findings in the [*Merit*] *Decision*. This case is about underfunding, policy, authorities and, the National Program that were found to be discriminatory" (see 2018 CHRT 4 at para. 40). The lengthy *Merit Decision* is authoritative in this case and the findings referred to above can be found in the *Merit Decision* and will not be repeated here. The Tribunal outlines the above to support that it has authority to issue this Consent Order since the subject matter of this Consent Order forms part of the evidence and findings in this case.

[36] Moreover,

> Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease and desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare)* T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [Action Travail des Femmes]).
>
> (2018 CHRT 4 at para. 34).

[37] Subsequently, the Panel noted that

> [i]ndeed, the *Supreme Court in Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question.
>
> (2018 CHRT 4 at para. 51).

[38] Furthermore,

> the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of Courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system.
>
> (2018 CHRT 4 at para. 53).
>
> In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past.
>
> (2018 CHRT 4 at para. 50, emphasis omitted).

[39] A similar approach to remedies was taken in the *McKinnon v. Ontario (Ministry of Correctional Services),* [1998], OHRBID, No 10, 1998 CanLII 29849 (ON HRT), 32 CHHR D/1 and [2002] OHRBID, No 22 decisions from the HRTO informed by the specific facts in the case and affirmed on appeal (see *Ontario v. McKinnon*, 2004 CanLII 47147 (ONCA)). The Tribunal relied on this case in 2018 CHRT 4 (see paras. 24 and 388). The Tribunal held that "[a]kin 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" (2018 CHRT 4 at para. 388).

[40] In a recent decision, *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839 the Ontario Divisional Court discussed the case at hand and commented on the monitoring and updating of funding policies, programs and formulas in systemic cases to ensure substantive equality:

> The Tribunal's findings in this regard are reasonable. Indeed, they are consistent with the SCC's decision in *Moore* and the Canadian Human Rights Tribunal's decision in *Caring Society*, two cases concerning systemic discrimination in government funding policies. *Moore* and *Caring Society* make clear that governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH's position that it can wait before acting until midwives – a deeply sex-segregated profession that is highly susceptible to

> systemic gender discrimination in compensation – have proven that the MOH's conduct constitutes sex discrimination.
>
> (*Association of Ontario Midwives* at para.189, footnotes omitted).

[41] Finally, the above follows the original approach to remedies taken by this Panel in its previous rulings.

IV. Order

[42] Pursuant to section 53 (2) of the *CHRA* the Tribunal orders that the Caring Society's August 7, 2020 motion be resolved on the following basis:

1. Within 30 days of the Tribunal's Issuance of the Order, Indigenous Services Canada will develop a plan in consultation with the Caring Society and the Assembly of First Nations to implement an interim revised funding model (attached to this Order as Appendix A) for First Nations communities that received services pursuant to the FNCFS Program, but did not receive those services from a FNCFS Agency between 2016 and the date this Order is made.

2. Further consultation with the parties and consultation with the affected First Nations not served by a FNCFS Agency to ensure that the interim revised funding model meets their needs pending long-term reform, shall follow implementation of the interim revised funding model.

3. The interim revised funding model shall provide funding retroactive to January 26, 2016 within 90 days of the Tribunal's order to eligible First Nations that have an updated or new agreement in place with Indigenous Services Canada. Where eligible First Nations do not presently have such agreements in place, Indigenous Services Canada will take positive measures to enter into agreements with those First Nations.

4. The interim revised funding model shall be sufficiently flexible to ensure that the principles of substantive equality (bearing in mind communities' historical, cultural and geographical needs and circumstances) and best interests of the child are respected, and that it accounts for inflation, population growth, the challenges faced by remote First Nations and the need to support governance and capacity development for the delivery of child and family services in these communities.

5. The interim revised funding model shall be in effect until one of the 4 options mentioned in para. 413 of this Tribunal's February 4, 2018 order (2018 CHRT 4) occurs.

6. To support long-term reform and to ensure that the interim revised funding model is consistent with the principles in paragraph 4 above, in consultation with the Caring Society and the Assembly of First Nations, Canada will support a needs assessment

exercise of each First Nation not served by a FNCFS Agency to identify their needs as they relate to prevention, operations, and to further identify gaps that need to be closed as part of long-term reform.

V. Retention of Jurisdiction

[43] Pending long term relief on consent or otherwise and consistent with the approach to remedies taken in this case and referred to above and, upon the AFN, the Caring Society, the COO and the Commission's request, the Panel retains jurisdiction on the Consent Order contained in this ruling. The Panel will revisit its retention of jurisdiction once the plan developed by Canada in consultation with the Caring Society and the AFN to implement an interim revised funding model has been filed with the Tribunal or as the Panel sees fit in light of the upcoming evolution of this case.

[44] This does not affect the Panel's retention of jurisdiction on other issues and orders in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
March 17, 2021

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: March 17, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton, Patricia MacPhee, Kelly Peck, Max Binnie and Meg Jones, counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian Falconer, Molly Churchill and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

Judith Rae, counsel for the Innu Nation, Interested Party

Appendix A

Measures to settle the motion for immediate relief for Non-Agency Communities

Methodology

- The methodology is an interim step to ensure First Nations children in non-agency communities receive funding is consistent with delegated First Nations agency funding per 2016 CHRT 2 and subsequent orders.
- The analysis of the claims for actual expenditures by delegated First Nations agencies enabled the identification of a "per capita" amount. In reaching this figure, ISC examined all claims from delegated First Nations agencies, including claims for prevention, intake and investigation, building repairs, legal fees, and claims for all costs for small agencies.
- To ensure funding is consistent with delegated First Nation agency funding related to prevention, the per capita figure reflective of recent budget initiatives was ***added***. Budget 2016 provided $40.4 million annually to delegated First Nations agencies for prevention. This represents a per capita amount of **$90**.
- Budget 2018 provided $15.6 million annually to ***small agencies*** and for prevention. This represents a per capita amount of **$35** ($15,600,000/446,219).
- The CWJI funding stream introduced in Budget 2018 was not included in this methodology, because these funds were not allocated to agencies.
- To establish funding for a particular community, the per capita amount is multiplied by the on-reserve population of that community, as furnished by the Department's research and socio-economic unit that provides information on Indigenous peoples in Canada. The data is taken from the Indian Registration System.
- To ensure the funding will keep pace with future population growth, population figures are increased by 1.1% in future years which represents the average growth rate since 2015, and increased by an addition 0.01%
- To reflect the need for communities to support ***basic governance and capacity*** to implement prevention and early intervention activities, funding for ***administrative costs*** (i.e. an administration fee) have also been added. These numbers are based on the ***on the total operations budgets for the delegated First Nations agencies*** under the FNCFS Program in 2016-17, 2017-18 and 2018-19 respectively (as per the Public Accounts of Canada).[1] This excludes CHRT actual claims, which have already been factored in the calculation. Given that the last Public Accounts available are from 2018-2019, the per capita amount is carried forward in future years.
- An additional 10% has been added to all First Nations for remoteness and/or other factors related to location; and 2% has been added for inflation in future years.
- Interest applied to the amounts for fiscal years 2016-17, 2017-18, 2018-19 and 2019-20 is calculated at the monthly average of the Bank of Canada interest rate in those years.

[1] Note: Delegated First Nations agencies did not have access to the actuals reimbursement process in 2016/17 or 2017/18 and were subject to a "ramp up" approach following Budget 2016. While these budgets were later supplemented by requests for retroactive reimbursement and Budget 2018 accelerated the ramp up funding, 2016/17 and 2017/18 operation budgets would only reflect funding available at that time.

- These additions have resulted in a new per capita amount of **$947**.

First Nation Needs Assessments to inform structural and durable program reform

As this is designed to be a transitional measure, there remains a need for technical and research expertise with knowledge of First Nations child and family services and Indigenous practices with respect to data collection and intellectual property, to continue to support efforts toward comprehensive structural and durable program reform.

To this end, we propose that ISC provide $25,000 to each First Nation not served by a delegated First Nations agency to conduct a needs assessment, to identify their needs as they relate to prevention, operations, and to further identify gaps between the current and desired state. While the amount of funding is consistent with the needs assessment funded for agencies further to the orders of 2016, ISC, in consultation with the parties and agreed upon experts, will ensure consistency, reliability and validity in data collection. The expected completion date for these needs assessments is Fall 2021. The new program will be in operation by April 30, 2023.