

Let's Not Call in the Lawyers: Using the Canadian Human Rights Tribunal Decision in First Nations Education

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Abstract

In January 2016, the Canadian Human Rights Tribunal released its decision regarding the provision of Child and Family Services to First Nations living on reserves and the Yukon. The Tribunal found that the government of Canada had discriminated against First Nations children on the basis of their race. Many of the arguments made by the government of Canada to describe their actions in the provision of First Nations child and family services can be easily transferred to the provision of First Nations education programs and services to First Nations children throughout Canada. This article has replaced child and family services terms and phrases with education terms and phrases in the decision. Hopefully, the federal government of Canada will see the futility of fighting First Nations in education as they did in child and family services. It is time to provide First Nations students on reserves a comprehensive system of education.

Keywords: First Nations education, education in Canada, human rights and education

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Note: The government of Canada has changed the name of Aboriginal Affairs and Northern Development Canada (AANDC) to Indigenous Affairs and Northern Development (INAC). The department has also been known as Indian and Northern Affairs Canada (INAC). Titles used in this paper reflect the ones used in the original texts.

Introduction

On January 26, 2016, the Canadian Human Rights Tribunal [CHRT] (2016) released its decision regarding the Child and Family services available to First Nations children and families on reserve. The First Nations Child and Caring Society of Canada and the Assembly of First Nations (AFN) general position was that First Nations children and families on reserves were being discriminated against because they were just that – First Nations children and families on reserves.

The position of the Government of Canada through its department of Aboriginal Affairs and Northern Development Canada (AANDC) was that the case had no merit because it did not provide the child and family services to First Nations children and families. The federal government argued that it funded the service; it did not provide it. Despite many federal government statements requiring First Nations Child and Family agencies to provide services to First Nations children and families on reserves at provincial/territorial levels, the federal government remained steadfast in their belief that they should not be held accountable for any shortcomings or problems with the services.

The federal government of Canada's main arguments in the case may be summarized as they assert that AANDC:

1. [1] Provided the funding to First Nations child and family service agencies to provide the service. It did not provide the child and family services. AANDC saw its role as “strictly limited to funding and being accountable for the spending of those funds” (CHRT, 2016, p. 14). Their position was that “funding does not constitute a “service” (CHRT, 2016, p. 14). AANDC's described their roles and responsibilities as to “ensure”, “arrange”, “support” and “make available” (CHRT, 2016, p. 14) the provision of child and family services with First Nations child and family agencies, as well as provincial/territorial agreements;
2. [2] Utilized provincial/territorial levels of child and family services programs as templates for First Nations child and family agencies to follow. In 2006, AANDC's website described the objective of The First Nations Child and Family Services Program as “to ensure that the services provided to them are comparable to those available to provincial residents in similar circumstances” (CHRT, 2016, p. 25);
3. [3] Acknowledged that their role was to assist First Nations in “providing access to culturally sensitive child and family services” (CHRT, 2016, p. 25).

However, the Canadian Human Rights Tribunal found that what was important was that AANDC “does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserves” (CHRT, 2016, p. 171). AANDC's funding mechanisms “have resulted in denials of services and created various adverse impacts for many First Nations children and families on reserves (CHRT, 2016, p. 172). The Tribunal also found that AANDC's funding formulas for child and family services on reserves were “based on flawed assumptions about children, that do not accurately reflect the service needs of many on-reserve communities” (CHRT, 2016, p. 172).

The CHRT noted that AANDC's child and family services funding formula “has not been significantly updated since the mid-1990's resulting in underfunding and inequities for First Nations children and families on reserves” (CHRT, 2016, p. 149). While espousing provincial

comparable in child and family services, AANDC did not utilize provincial/territorial financial strategies or expertise and was “unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula” (CHRT 2016, p. 174).

The issue of provincial/territorial comparability of services was central to the federal government's position. The Tribunal found that while espousing provincial/territorial comparability, AANDC had “difficulty defining what it means and putting it into practice, mainly because its funding authority and interpretation thereof are not in line with provincial/territorial legislation and standards” (CHRT, 2016, p. 173). AANDC's difficulties in child and family services may also be linked to the lack of child welfare expertise on the part of federal officials. The Tribunal noted that AANDC officials were not “expert in the area of child welfare” (CHRT, 2016, p. 173) and were not “experts in child welfare” (CHRT, 2016, p. 174).

The lack of professional expertise in child and family services had several consequences for First Nations children and families. One consequence would be AANDC's inability to comprehend what types and range of child and family services were required, namely, what constituted a comprehensive and effective child and family services system. The simple solution for the unqualified AANDC officials was to turn to the provincial/territorial child and family systems as the model to follow. A funding formula was then developed which would initially provide the basics of the provincial/territorial models. However, in a short time, it would be apparent that AANDC's funding model had problems.

AANDC appeared to be more focused on the funding aspects of child and family services rather than the provision of these services. Such actions compared unfavourably with the provincial/territorial governments as the Tribunal noted that “provincial/territorial child and family services legislation and standards are ensured with ensuring service levels that are in line with sound social work practice and that meet the best interest of children” (CHRT, 2016, p. 174). In other words, the provinces/territories were using their child and family expertise and knowledge to develop and update legislation, programs, services, as well as funding levels to provide appropriate child and family programs and services. The federal government was unable to match the provinces/territories actions as it lacked the provincial/territorial child and family knowledge, expertise, legislation, programs, and services.

The Tribunal found that First Nations child and family service agencies were to “deliver the FNCFS [First Nations Child and Family Services] program in accordance to provincial legislation and standards while adhering to the terms and conditions of federal funding agreements” (CHRT, 2016, p.24). However, the federal government's use of provincial/territorial comparability of First Nations child and family services without provincial/territorial funding levels, professional knowledge and expertise resulted in the Tribunal finding that “AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people on reserve” (CHRT 2016, p. 174). The Tribunal also found that AANDC's strategy was “premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on reserves” (CHRT 2016, p. 175).

The Tribunal noted that AANDC's regional offices had a role in the provision of child and family services on First Nations. Their role was to “to interact with Recipients, Chiefs, and Councils, Headquarters, the reference province of territory”; “to manage the program and funding on behalf of Canada and to ensure that authorities are followed”, and “to ensure

Headquarters that the program is operating according to authorities and Canada's financial management requirements" (CHRT 2016, p. 24).

The government had been informed that there were problems with AANDC's provision and funding of child and family services and program for First Nations people on First Nations. The Tribunal referred to the 2008 Report Auditor General of Canada Report (2008) on this topic. The Auditor General was concerned that the "current funding practices do not lead to equitable funding among Aboriginal Nations communities" (Auditor General of Canada, 2008, p. 2).

The Tribunal reported that the Auditor General of Canada Report (2008) found that AANDC's "funding formula is outdated and does not take into any costs associated with modification to provincial legislation or with any changes in the way services are provided" (CHRT, 2016, p. 20). Despite requiring the provision of provincial child and family services, AANDC had little knowledge if the "services delivered on reserve comply with provincial legislation and standards. Funding levels are pre-determined without regard to the services the agency is bound to provide under provincial legislation and standards" (p. 14-15). The Tribunal noted that the 2008 Report had found "no standards" (p. 13). It also found that "funding formula is not responsive to factors that can cause wide variations in operating costs" (p. 20) and that these problems were known to AANDC officials.

In summary, the Tribunal had found three areas of concern in the federal government's provision of child and family services to First Nations children and families on First Nations throughout Canada. These areas were: (1) provincial/territorial comparability; (2) lack of expertise on departmental officials; and (3) insufficient funding.

Provincial Comparability for First Nations Education

The use of provincial/territorial levels of child and family services as templates for First Nations child and family agencies to adhere to are quite similar to federal government statements on First Nations education. A former Minister's of Indian Affairs stated that "It is my department's objective to provide for a level of education which is comparable to that provided by neighbouring school jurisdictions (INAC, 1986, p. 2).

In 2003, INAC's Elementary/Secondary Education National Program Guidelines (INAC, 2003) was clear in describing the objective of the education program. The objective was of INAC's Education Program was "to provide eligible students living on reserves with elementary and secondary education programs comparable to those that are required in provincial schools by the statutes, regulations or policies of the province in which the reserve is located" (p. 3). The guidelines also required First Nations schools to "ensure that programs comparable to provincially recognized programs of study are provided, and that only provincially certified teachers are employed" (p. 4).

Provincial comparability was the goal of the federal government with regards to programs and services for First Nations with disabilities. The federal department of Human Resources and Skills Development Canada [HRSKC] (2008) in a report on the federal government's inclusive policies and action that in the area of First Nations the goal was to ensure "access to services comparable to other Canadian residents" (p. 91). Later, the report described the objective INAC's Special Education Plan (SEP) as "to improve the educational achievement levels of First Nations students on reserve by providing access to special education programs and services that are culturally sensitive and meet the provincial standards in the locality of the First Nation" (HRSKC, 2008, p. 94).

In the area of special education, the government of Canada required First Nations schools to look to the provinces for standards. For example, statements requiring First Nations schools to provide provincial levels of special education services to First Nations students may be found in federal documents. These include the requirement that First Nations schools must: “provide eligible students with education programs and services of a standard comparable to that of other Canadians within the locality of the First Nation” (INAC 2002, p. 5); and “providing for access to special education programs and services that are culturally sensitive and meet the provincial standards in the locality of the First Nation” (AANDC, 2013, p. 2). In 2016, INAC’s Special Education Program - High-Cost Special Education Program (INAC, 2016a) emphasized provincial standards for First Nations schools to follow as the program was described as helping “eligible First Nations students with high-cost special needs to access quality programs and services that are culturally sensitive and reflective of generally accepted provincial or territorial standards” (p. 1).

In 2004, the Auditor General of Canada (2004) reported that “Under the current departmental policy, First Nations schools are required, at a minimum, to follow provincially recognized programs of study, hire provincially certified teachers, and follow education standards that allow students to transfer to an equivalent grade in another school within the province in which the reserve is located” (p. 3). An evaluation by AANDC on their provision of elementary and secondary education on First Nations also stressed provincial education comparability as “[T]he primary objective of elementary/secondary education programming is to provide eligible students living on reserve with education programs comparable to those required in provincial schools by statutes, regulations or policies of the province in which the reserve is located” (AANDC, 2012, p. 1).

In summary, the federal government of Canada and its department of Indigenous and Northern Affairs (INAC) require First Nations schools offer provincial education and special education programs and services. Provincial education programs and services were the templates that First Nations schools were required to follow.

AANDC/INAC - Lack of Educational Expertise

The 2004 Auditor General of Canada’s report (2004) also expressed concerns over the ability of the federal department to effectively manage First Nations education as there was a “lack of reliable and consistent information on education costs limits the Department’s ability to manage the education programs effectively” (p. 9). The questions regarding education information has led to confusion as the department as it “does not know whether funding levels provided to First Nations are sufficient to meet the education standards it has set and whether the results achieved are in line with the resources provided” (p. 15).

In 2010, the Standing Senate Committee on Aboriginal Peoples began a ‘Study of First Nations Primary and Secondary Education’ (Standing Senate Committee on Aboriginal Peoples, 2010a). The Committee was studying: a) Governance and Delivery Systems; b) Tripartite Education Agreements; and, c) Possible Legislative and/or Policy Frameworks. The Committee held proceedings in Ottawa and across Canada. They heard witnesses from the federal government, provincial governments, provincial school divisions, First Nations, and Innu education representatives.

On April 13, 2010, the Committee heard from Ms. Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships, Indian and Northern

Affairs Canada (Standing Senate Committee on Aboriginal Peoples, 2010b). Ms. Cram acknowledged the low level of educational expertise within her department. She compared provincial education ministries with her department. Provincial ministries “have expertise” (p. 9), while Indian Affairs “could not possibly have the level of expertise provided by the province” (p. 9). Finally, Ms. Cram admitted that her department does “not claim to have huge expertise in post-secondary or kindergarten-to-Grade-12 education” (p. 9).

The Committee also heard from government officials, as well as First Nations representatives, about the level of education expertise and knowledge on the part of AANDC officials. Ms. Bastien, expressed her frustration at the education qualifications and expertise of Indian Affairs officials as she believed that “... those who work at the department’s education sector should be experts in the field. It is very frustrating when we meet people who work in First Nations education at the department and who have no educational know-how” (Standing Senate Committee on Aboriginal Peoples, 2010c, p. 6).

In summary, education bureaucrats from the federal government of Canada and its department of Indigenous and Northern Affairs (INAC) were not well qualified in education. They lacked the necessary education expertise required to establish, develop, and maintain the education system for First Nations students living on First Nations throughout Canada.

AANDC/INAC - Inadequate Funding for Education

On June 8, 2010, the Standing Senate Committee on Aboriginal Peoples (2010b) heard representatives from First Nations organizations who spoke of funding issues and the resulting poor results. Ms. Lise Bastien, Director, First Nations Education Council, spoke of her concerns regarding “the inadequate funding” (Standing Senate Committee on Aboriginal Peoples, 2010b, p. 4). She was also concerned that the First Nations education funding formula went “... back 22 years. It has never been reviewed” (p. 8). The result of the poor funding was evident as there was “...no money for libraries, and nothing for professional training...nothing for technology... or for sports and leisure” (p. 8).

A week later, June 15, 2010, the federal government’s funding of First Nations schools was discussed at a Standing Senate Committee on Aboriginal Peoples meeting. Ms. Roberta Jamieson, President and Chief Executive Officer, National Aboriginal Achievement Foundation, spoke of the “obvious disparity” (Standing Senate Committee on Aboriginal Peoples, 2010c, p. 10) between the federal funding differences between First Nations schools (\$8000.00 per student) and the amount received by nearby provincial schools that received First Nations students (\$15,000 per student). She also described First Nations schools as being “chronically underfunded” (p.10).

The Chair of the Committee acknowledged the funding disparities in First Nations education by stating “I do not think there is any dispute about inadequate funding” and “There is no dispute that funding is currently inadequate” (Standing Senate Commission on Aboriginal Peoples, 2010d, p. 10). The issue of inadequate federal funding of First Nations schools was acknowledged in an evaluation of the elementary and secondary education programs on First Nations (AANDC ,2012). The report found that federal government’s funding to First Nations schools did not account for the “actual cost variability applicable to the needs and circumstances of each community or school, and particularly the cost realities associated with isolation and small population” (p. 44).

In summary, there can be no question regarding the adequacy of funding for First Nations

schools. First Nations schools lack funding for education programs and services that provincial and territorial schools take for granted. First Nations schools are not funded adequately.

Similarities – First Nations Child and Family Services and Education

Much of what has been written in the Canadian Human Rights Tribunal's recent decision (CHRT, 2016) regarding First Nations child and family services can be applied to the federal government's education program for First Nations children living on reserves (Table 1). The government is constitutionally responsible for both programs. Both programs strive to provide culturally appropriate services. Federal headquarters and regional offices manage both programs. Government bureaucrats are generally not qualified in either area (e.g., child and family services, education). Funding is also similar. The government provides the funding, while the First Nations provide the services or programs. Both programs use provincial programs as templates to follow, but without provincial funding levels. Funding formula for both programs are outdated.

The federal government also describes their role in both education and child and family services in funding or financial terms. For example, the federal government's statements on their responsibilities for First Nations education are quite similar to their statements on child and family services. Their responsibilities for First Nations education are limited to funding, e.g., "financial responsibility" (INAC, 2006, p 3, "funds" (Government of Canada, 2016, p. 1; Human Resources and Skills Development Canada, 2008, p. 91), "provides core funding" (INAC, 2016b, p. 1), and "provides funding" (INAC, 2016c, p. 1). In 2010, a deputy minister from AANDC described his department as being "basically a funder. We provide funding to First Nations and other organizations that deliver the programs and provide the services" (Standing Senate Committee on Aboriginal Peoples, 2010d, p. 9).

The Decision

The Canadian Human Rights Tribunal listened to the positions of both sides. The Tribunal reviewed previous court decisions and the *Constitution Act, 1867*. Finally, a decision was made. The Tribunal found "First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and family services by AANDC" (CHRT, 2016, p. 176).

In the Summary of findings the Tribunal found that "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 that are meant to be in accordance with provincial/territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. 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" (CHRT, 2016, p. 148-149).

The Tribunal ordered the federal government to "cease its discriminatory practices and reform the FNCFS Program and 1995 Agreement to reflect the findings of this decision" (CHRT 2016, p. 175). The federal government was also directed to "refocus the policy of the program to respect human rights principles and sound social work practice" (CHRT 2016, p. 175). The Assembly of First Nations requested "compensation for children, parents, and siblings impacted

by the child welfare practices on reserve” (CHRT, 2016, p. 180). The Tribunal suggested that any compensation consider Amnesty International’s “physical and psychological damages, including emotional harm.” (CHRT, 2016, P. 180). In other words, the Canadian Human Rights Tribunal found that the federal government of Canada had discriminated against First Nations families and children based on their race. They were not receiving adequate or sufficient child and family services because they were First Nations people who lived on reserves in Canada.

Table 1.

**SIMILARITIES BETWEEN AANDC'S CHILD AND FAMILY SERVICES
AND EDUCATION**

AANDC CHILD AND FAMILY SERVICES

1. Constitutional responsibility of the Government of Canada
2. AANDC headquarters and regional offices have roles to manage the program
3. First Nations provide direct service
4. Provides funding
5. Use terms such as ensure, arrange, support and or make available to describe their role in First Nations child and family services
6. Provincial/territorial programs and services as guides
7. Uses outdated funding formula
8. Inadequate funding (does not match provincial/territorial funding)
9. Provide culturally appropriate child and family services
10. Lack of expertise in child and family services

AANDC EDUCATION

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2. AANDC headquarters and regional offices have roles to manage the program
3. First Nations provide direct service
4. Provides funding
5. Use terms such as financial responsibility, funds, or funder to describe their role in First Nations education
6. Provincial/territorial programs and services as guides
7. Uses outdated funding formula
8. Inadequate funding (does not match provincial/territorial funding)
9. Provide culturally appropriate education programs and services
10. Lack of expertise in education

A Challenge

Change First Nations Child and Family Services to First Nations Education

If First Nations children and families are discriminated against on the basis of their race in the

provision of child and family services, then many of the statements and positions of the participants in the case can be transposed to First Nations education on reserves. The federal government of Canada should be very concerned about First Nations across Canada using this decision to argue that First Nation students on reserves are being discriminated against on the basis of their race in the provision of education programs and services by the federal government.

What I have done. I have reviewed the decision of the Canadian Human Rights Tribunal (2016). Paragraphs and statements that I believe are related to First Nations education have been selected. Child and family services terms and titles were replaced with education and First Nations Education Programs terms and titles. INAC replaced AANDC. First Nations Child and Caring Society was replaced by the Assembly of First Nations. Other phrases such as 'and in the Yukon' were deleted. Portions of the Canadian Human Rights Tribunal's (2016) decision follow. The changes or inclusion of education and education related terms have been bolded. The numbers within brackets are the numbers of the paragraphs within the original decision.

Canadian Human Rights Tribunal (2016). *Assembly of First Nations v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*.

[6] Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the Assembly of First Nations (the AFN), allege **Indigenous and Northern Affairs Canada (INAC)** discriminates in providing **education** to First Nations on reserve, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint)

[35] The Panel finds **INAC** is involved in the provision of **education** services to First Nations... Specifically, **INAC** offers the benefit or assistance of funding to “ensure”, “arrange”, “support”, and/or “make available” **education** services to First Nations on reserves ...With specific regard to the **First Nations Education** Program, the objective is to ensure the delivery of culturally appropriate education services, in the best interest of the child. In accordance with legislation and standards of the reference provincial/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and with **First Nations Education** Program authorities. This benefit or assistance is held out as a service by **INAC** and provided to First Nations in the context of a public relationship.

[78] The fact that **INAC** does not directly deliver First Nations education services on reserve, but funds the delivery of those services through **First Nations education authorities** or the provincial/territorial governments, does not exempt them from its public mandate and responsibilities to First Nations people. **INAC** argues that **education** services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, that position does not take into consideration Parliament's exclusive legislative authority over “Indians, and lands reserved for Indians” by virtue of section 91(24) of the *Constitution Act, 1867*.

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programming and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programming/funding approach does not diminish **INAC** constitutional responsibilities. In a comparable situation argued under the Canadian Charter of Rights and Freedoms (the Charter), the Supreme Court stated in *Eldridge* at paragraph 42:

...the *Charter* applies to private citizens in so far as they act in furtherance of a specific government program or policy. In these circumstances, while it is a private actor that actually implements the program, it is the government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[84] Similarly, **INAC** should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of **education** services to **First Nation Education Authorities** or the provinces/territory. **INAC** should not be allowed to escape the scrutiny of the CHRA because it does not directly deliver **education** services on reserve.

[85] As explained above, despite not actually delivering the service, **INAC** exerts a significant amount of influence over the provision of those services. Ultimately, it is **INAC** that has the power to remedy inadequacies with the provision of **education** services and improve outcomes for children and families residing on First Nations reserves. This is the assistance or benefit **INAC** holds out and intends to provide to First Nations children and families.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of **education** services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The **First Nations Education Program** and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the **First Nations Education Program** through policy and other administrative directives....

[113] As a result, and for the reasons above, the Panel finds **INAC** provides a service through the **First Nations Education Program** and other related provincial/territorial agreements.

[388] In terms of ensuring reasonably comparable **education** services on reserves to the services

provided off reserve, the **First Nations Education Program** has a glaring flaw. While **First Nations Education authorities** are required to comply with provincial/territorial legislation and standards, the **First Nations Education Program** funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems....

[457] Through the **First Nations Education Program** and other related provincial/territorial agreements, AANDC provides a service intended to “ensure”, “arrange”, “support” and/or “make available” child and family services to First Nations on reserve. With specific regard to the **First Nations Education Program**, the objective is to ensure culturally appropriate **education** services to First Nations children and families on reserve that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case, demonstrates that AANDC does more than just ensure the provision of **education** services to First Nations, it controls the provision of these services through its funding mechanisms to the point where it negatively impacts child and families on reserve.

[458] INAC's design, management, and control of the **First Nations Education Program**, along with its corresponding funding formulas and other related provincial/territorial agreements have had resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- * The design and application of the **Band-Operated Funding Formula (BOFF)**, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel), hindering the ability of **First Nations Education** authorities to provide provincially/territorially mandated **education** services, let alone culturally appropriate services to First Nations children and families.
- * The failure to adjust funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living.

[459] The **First Nations Education Program**, corresponding funding formulas, and other related provincial/territorial agreements only apply to First Nations people living on-reserve. 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 **education** 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.

[460] INAC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds

INAC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, **INAC** did not raise a statutory exception under sections 15 or 16 of the CHRA.

[461] Despite being aware of the adverse impacts resulting from the **First Nations Education Program** for many years, **INAC** has not significantly modified.

Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, **INAC** has sparingly implemented the findings of those reports. While efforts have been made to improve the **First Nations Education Program**, including additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate **education** services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. **INAC** has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with provincial/territorial legislation and standards. Despite not being experts in the area of **education** and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, **INAC** insists that **First Nations Education** authorities somehow abide by those standards and provide reasonably comparable **education** services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, **INAC** adopts an ad hoc approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of **BOFF**. **INAC** makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost model it knows is flawed. **INAC** tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the **First Nations Education** Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in **education**, **INAC's** authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound **education** practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable **education** services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the **First Nations Education Program**.

[465] **INAC's** reasonable comparability standard does not ensure substantive equality in the provision of **education** services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require **INAC** to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of **education** services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of **education** services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

[467] The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner promptly. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current **education** practices on reserves.

A. Findings of discrimination

[473] Indeed, throughout this decision, and generally at paragraph 458 above, the Panel has outlined the main adverse impacts it has found in relation to the **First Nations Education Program** and other related provincial/territorial agreements. As race and/or national or ethnic origin is a factor in those adverse impacts, the Panel concluded First Nations children and families living on reserve are discriminated against in the provision of **education** by **INAC**. The Panel believes these findings address the **Assembly of First Nations'** request for declaratory relief.

Summary and Recommendations

Some thoughts on the Canadian Human Rights Tribunal's decisions. First, it is difficult to acknowledge that Canada has been found to be discriminating against its own people. Canada e.g., federal ministers and bureaucrats, must always act honourably in their interactions and negotiations with First Nations. However, the CHRT's decision demonstrates that they have failed miserably.

Second, the CHRT's decision demonstrates that the federal government cannot get out of its constitutional responsibilities in First Nations education by delegating these responsibilities to First Nations education authorities, provincial/territorial governments or school boards/divisions. They cannot use words like 'funds', and 'financial responsibility' to limit their responsibility. The decision is quite clear that despite the federal governments limiting statements of their

responsibilities, the education of First Nations children on reserves is the constitutional responsibility of the federal government.

The federal government and its department of Indigenous and Northern Affairs Canada (INAC) should carefully read the Canadian Human Rights Tribunal's decision on First Nations child and family services to see the futility of fighting First Nations and/or their representatives in the area of education. Such actions would benefit all sides.

The First Nations students would have access to a First Nations controlled comprehensive system of education (e.g., personnel, procedures, programs and services). Finally, after nearly 150 years, the federal government of Canada would be acknowledging their constitutional role in education in Canada. First Nations children would begin to receive the education the signatories of the numbered treaties had hoped for their children and grandchildren.

I would like to suggest to the Assembly of First Nations (AFN), as well as the federal government of Canada to resist the urge to 'lawyer up' in arguments and challenges of providing education programs and services to First Nations students living on reserve. Much of what was written about the government's position, e.g., funding only not providing a service, use of provincial/territorial templates, inadequate funding, poor results, and a lack of expertise, can be easily transferred to INAC's position in education.

Read the words again – 'AANDC is ordered to cease its discriminatory practices' and 'the Panel concluded First Nations children and families living on reserve are discriminated against ...' The Canadian Human Rights Tribunal found that the government of Canada had discriminated against its own citizens. These words must not be quickly forgotten.

One must not forget that this discrimination was perpetuated on a minority that has a special relationship with the federal government. Treaties were signed with them. Our constitution has special provisions for them. Despite all these statements, guarantees, and promises, First Nations children were discriminated against because of their race – being First Nations children. How is this possible?

The decision casts a dark shadow over Canada. How can the federal government of Canada lecture other countries for on their treatment of their citizens when this decision becomes well known in the international community?

What should be done in First Nations education? It's time for the federal government to actually listen and work with First Nations people to develop a comprehensive education system. This system must be adequately funded. First Nations schools must be reimbursed for the actual costs of education. Second and third level education services (e.g., specialists, programs, and services) must be made available for First Nations schools, education authorities, and tribal councils.

Words of caution – be careful. Federal officials must be silent at these education meetings with First Nations peoples. They must not be able to control these meetings. They do not have the education expertise or knowledge needed to develop such a system. They have developed and supported the current education system for First Nations students. Even their own reports indicate it is not achieving desired results. In short, their current system has been a failure.

Let's not call in the lawyers and start the same process as was done for First Nations child and family services for First Nations education. We don't have time. We could lose a generation of First Nations students. Canada cannot afford to lose another generation of these students.

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