Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA REPLY SUBMISSIONS - COMPENSATION

April 18, 2019

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I. Overview

> This decision concerns <u>children</u>. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.[1]

> We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this… Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.[2]

1. The Prime Minister's apology stands in stark contrast with Canada's submissions in this matter which rely on legal technicalities to obfuscate their duty to compensate this generation of First Nations children for the harms done to them by the Government of Canada's conscious and persistent application of its flawed and inequitable child and family services program and its purposeful failure to implement Jordan's Principle. In doing so, Canada deepens the harm to residential school survivors, 60's scoop survivors and the First Nations children affected by the discrimination substantiated in this case. In essence, Canada's position is that these children are not worthy of compensation; a repetition of its colonial pattern of putting its own interests ahead of the best interests of children and its commitment to reconciliation.

2. Canada attempts to argue that compensation to the victims in this case is unwarranted and lies outside the Canadian Human Rights Tribunal's (the "**Tribunal**") jurisdiction. This argument is based on conjecture, unsupported presumptions and largely overstated principles of law that are distinguishable from this case. Indeed, the Caring Society submits that this approach is largely reflective of the "old-mindset" that this Tribunal has witnessed before.[3]

3. The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "***CHRA***") imposes no bar to compensation in systemic discrimination cases; nor does it require that special compensation be granted only where a respondent has violated a previous order.[4] Instead, both the Federal Court and the Tribunal have previously identified concerns and issues for consideration where systemic

[1] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 at para. 1, Emphasis in original
[2] Statement of Apology, Book of Documents of the Canadian Human Rights Commissions (the "***<u>CBD</u>***"), Vol. 3, Tab 10
[3] See for example 2016 CHRT 16 at para. 29, 2017 CHRT 14 at para. 29, 2018 CHRT 4 at paras. 154 and 165
[4] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, section 53; 2015 CHRT 14, at para. 7; see also *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36, at paras. 214 and 218

discrimination has been substantiated. The Caring Society submits that those concerns have been addressed in this case and there remains no reason, in law or otherwise, to deny First Nations children – the victims in this case – compensation provided for under the *CHRA*.

II. Compensation Is to Be Awarded to Victims of Discrimination

4. Canada makes broad and sweeping generalized statements that this Tribunal cannot award compensation to the child victims of discrimination because the complainants are not themselves the victims of the discriminatory practice.[5] This is an erroneous claim. A review of section 53 of the *CHRA* clearly indicates that Parliament did not limit compensation to "complainants". Instead, Parliament purposefully indicated that it is the "victims" of discrimination who are entitled to compensation, with no parameters restricting such compensation to individual complainants.[6]

5. Moreover, the case law cited by Canada is far from helpful to its cause. For example, Canada cites *Canada (Secretary of State for External Affairs) v. Menghani*, for the proposition that there is a general objection to awarding specific relief to non-complainants.[7] No such general proposition can be extrapolated from this case. The Federal Court's comment is made in passing and in relation the facts of the *Menghani* case, where the alleged "victim" had no standing to bring a complaint and had not demonstrated adverse discrimination within the meaning of the *CHRA*.[8]

6. The Tribunal has already determined that First Nations children have suffered discrimination under the *CHRA* as a result of Canada's conduct and Canada did not seek judicial review of this finding. There is no question that First Nations children subject to Canada's FNCFS Program and discriminatory definition of Jordan's Principle are victims of discrimination in this case. The Caring Society submits that the *Menghani* case is therefore not applicable.

III. The Victims in this Case Have Suffered Harm

7. Canada incorrectly submits that compensation ought not to be awarded on the basis that the victims of its discriminatory conduct, namely First Nations children, have not suffered harm

[5] Respondent's Submissions, dated April 16, 2019, at paras. 10, 14, 17
[6] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, section 53
[7] *Canada (Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102
[8] *Menghani*, at paras. 62-63

and/or the Tribunal has not received sufficient evidence regarding the harm they have suffered.[9] Both the evidence and the Tribunal's findings contradict this position. Moreover, the Respondent's suggestion that underfunding did not cause specific children to be removed from their homes[10] is, in the Caring Society's submission, offensive and demonstrative of Canada's genuine lack of understanding of the discrimination in this case or the Tribunal's findings to date.

8. The harm suffered by First Nations children subject to the FNCFS Program and those denied basic and substantively equitable services under Jordan's Principle is well documented and was central to the case presented by the Caring Society. Indeed, the *Wen:De Reports* clearly outline the types of harm suffered by First Nations children in relation to same. The report documents how First Nations children suffer chronic, pronounced and increased rates of child maltreatment, in all forms, as a direct result of Canada's failure to provide preventative services or make available services under Jordan's Principle.[11]

9. Canada's own documents demonstrated the harm suffered by the child victims in this case. For example, Canada's own website posted clear evidence that First Nations children in need of child protection services could not access same under the federal program, stating "First Nations children are disproportionately represented in the child welfare system. Placement rates on reserve <u>reflect a lack of available prevention services to mitigate family crisis</u>."[12] The federal government has squarely acknowledged that its discriminatory conduct results in First Nations children experiencing direct harm and that its funding levels were directly linked to children coming into care, for which the Caring Society believes compensation is warranted.[13]

10. The harm suffered by First Nations children in this case is manifest as articulated by the Tribunal throughout its decision in 2016 CHRT 2.[14] Moreover the Tribunal acknowledged "the

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[9] Respondent's Submissions, dated April 16, 2019, at paras. 15-22

[10] Respondent's Submissions, dated April 16, 2019, at para. 16

[11] *Wen:De*, *We Are Coming to the Light of Day*, CBD, Vol. 1, Tab 5, at pp. 62-75, 106. See also 2008 Report of the Auditor General of Canada to the House of Commons – Chapter 4, First Nations Child and Family Services Program, CBD, Vol. 3, Tab 11 at p. 16

[12] October 2002 Fact Sheet Web Page – First Nations Child and Family Services, CBD, Vol. 4, Tab 38

[13] See also Evaluation of the First Nations Child and Family Services Program, March 2007, CBD, Vol. 4, Tab 32 | Renewal of the First Nations Child and Family Services Program, November 2, 2012, CBD, Vol. 13, Tab 289 | Evaluation of the First Nations Child and Family Services Program – Final Report, February 28, 2007, CBD, Vol. 14, Tab 367

[14] 2016 CHRT 2 at paras. 366, 367, 384, 385, 386, and 458

suffering of those First Nations children and families who are or have been denied equitable opportunity to remain together or to be reunited in a timely manner."[15]

11. Harm in this case cannot be quantified through the lens of lost wages or other economic hardship. Instead, many First Nations children lost their childhoods, their culture, their connection to their families and community, and for some, their lives. Awarding special compensation in this case goes some way to acknowledge that harm and that suffering. The Respondent suggests that the Complainants should have called individual children, many of whom are descendants of residential school survivors, to testify about the harms they experienced by being denied services or being removed from their families due to Canada's discriminatory conduct. This is absurdly inhumane and likely explains why Canada itself chose not to call First Nations children to testify.

IV. Compensation is Appropriate in This Systemic Discrimination Case

12. Canada submits that compensation to the victims of its discriminatory conduct should not be granted in this case on the basis that the discrimination is systemic.[16] This is not a general proposition of law and the authorities and articles cited by Canada ought to be reviewed with caution.[17] For example, in *Re: C.N.R. and Canadian Human Rights Commission*, the Federal Court did not close the door regarding compensation in group cases, but rather commented that individual compensation may not be possible because "individual victims are not always readily identifiable".[18] This is a question of practicalities germane to group cases where victims are unknown to the respondent or to the Tribunal, and not a statement of principle that such compensation lies outside the ambit of the *CHRA*.

13. The issue of identification is not present in this case: Canada requires an Indian Registry number to issue payment pursuant to the FNCFS Program and collects identifying information for Jordan's Principle requests.

14. The Caring Society further submits that its request for compensation cannot be examined through the lens of class action considerations. First, the class action filed with the Federal Court

[15] 2016 CHRT 2 at para. 467
[16] Respondent's Submissions, dated April 16, 2019, at paras. 15-22
[17] See for example Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J. Hum Rts 1 at p. 33
[18] *Re: C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) at para. 10

is not yet certified and there is no evidence to suggest that an order of this Tribunal will detrimentally impact the rights of the class members. Second, the Caring Society's requested relief is not seeking to limit, define or impose rights or responsibilities on victims in this case. This is in stark contrast to the motion brought in *Commission des droits de la personne et des de la jeunesse c. Quebec (Procureur general)*, a case relied on by the Respondent, where hundreds of victims objected to the remedy sought by the Commission.[19]

15. The Caring Society agrees that the remedy in this case must flow from the complaint and the form of discrimination, as articulated by the Supreme Court of Canada in *Moore v. British Columbia (Education)*.[20] In this case, the Government of Canada made a discriminatory decision, based on its colonial and racist policies, to save money at the expense of First Nations children: it used money as its tool of discrimination by failing to adequately fund the FNCFCS Program and implement Jordan's Principle. Indeed, as noted in the Caring Society's closing oral submissions in October 2014,[21] Canada knew, or ought to have known, its conduct was discriminatory and should not be able to benefit from this unlawful conduct. Special compensation is therefore directly responsive to the discrimination substantiated in this complaint.

16. Finally, it is concerning that Canada cites Bill C-92 in paragraph 43 of its submissions as evidence of its work to redress its discriminatory conduct whilst not advising the Tribunal that, when the Bill was introduced in the House of Commons, the Minister failed to make any reference to this case, the Tribunal's decisions, or Canada's obligations arising from the Tribunal's orders.[22]

All of which is respectfully submitted this 18th day of April, 2019.

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[19] *Commission des droits de la personne et des de la jeunesse c. Québec (Procureur général)*, 2007 QCTDP 26

[20] *Moore v. British Columbia (Education),* [2012] 3 S.C.R. 360, at para. 64

[21] Closing Submissions of Mr. Rob Grant, Counsel for the First Nations Child and Family Caring Society of Canada, October 21, 2014, Transcript of Proceedings for Canadian Human Rights Tribunal Docket T1340/7708, Vol. 67, at pp. 215-219

[22] See https://openparliament.ca/debates/2019/3/19/seamus-oregan-1/