

Court File No. A-95-23

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

and

GILBERT DOMINIQUE (on behalf of the members of the
Pekuakamiulnuatsh First Nation) and CANADIAN HUMAN RIGHTS
COMMISSION

Respondents

AFFIDAVIT OF CINDY BLACKSTOCK

I, Cindy Blackstock, of the City of Ottawa, in the Province of Ontario,
SOLEMNLY AFFIRM THAT:

1. I am a member of the Gitksan Nation and a professor at McGill University's School of Social Work. I am also the Executive Director of the proposed intervener, the First Nations Child and Family Caring Society of Canada (the "**Caring Society**") and have held this position since 2002. As such, I have personal knowledge of the facts deposed to in this affidavit, except where stated to be on information and belief, and where so stated, I believe them to be true.

2. I have worked in the field of child and family services for over thirty-five years. I hold a doctorate in social work from the University of Toronto (2009), a Master of Management from McGill University (2003), a Master of Jurisprudence in Children's Law and Policy from Loyola University Chicago (2016) and a Bachelor of Arts from the University of British Columbia (1987).

3. I have received honorary doctorates from Blue Quills First Nations University, the University of Western Ontario, the University of Saskatchewan, the University of Waterloo, Thompson Rivers University, the University of Northern British Columbia, Mount Saint Vincent, the University of Winnipeg, the University of Manitoba, Toronto Metropolitan University, Osgoode Hall Law School, St. John's College, Memorial University, Dalhousie University, the University of Ottawa, the University of Toronto, the University of Victoria, Trent University, the University of Lethbridge, Laurentian University and the University of Calgary.

4. I was appointed as an Honourary Witness by the Truth and Reconciliation Commission in 2014. I was appointed an Officer of the Order of Canada in 2018. I received Amnesty International's Ambassador of Conscience Award, the Law Society of Upper Canada's Human Rights Award and the Janusz Korczak Medal for Children's Rights Advocacy. In 2018, I was the inaugural recipient of the Children's Aid Foundation of Canada's Lynn Factor Stand Up for Kids National Award. In 2019, I was also awarded the Canadian Public Health Association's National Public Health Hero Award and in 2020 I was admitted as an Honorary Member to the Canadian Paediatric Society and received the National Indian Child Welfare Association (U.S.A.) Champion for Native Children Award. In 2021, I received the Canadian Psychological Association's Humanitarian Award and in 2022 I received the Key to the City of Winnipeg. Also in 2022, I was named Chancellor of the Northern Ontario School of Medicine. In 2023, I received the Social Sciences and Humanities Research Council Gold Medal and was named the Canada Research Chair for First Nations Child and Family Services Implementation.

5. Prior to working at the Caring Society, I was the Executive Director at the Caring for First Nations Children Society in British Columbia (1999-2002), Assistant to the Social Development Director for the Squamish First Nation (1995-1999), and a senior social worker with the Province of British Columbia (1987-1995).

6. I have also served on international committees and working groups focusing on the rights of Indigenous children with a particular emphasis on culturally based equity. Most recently, I served as a Commissioner for the Pan American Health Commission's study on Health Equity and Inequity, which had a particular focus on Indigenous peoples and persons of Afro-descent.

7. Through my various positions and education, I have gained significant knowledge regarding the intersecting and compounding barriers often experienced by First Nations children, youth and their families, the rights of Indigenous children, youth and peoples, and the development of equality and human rights in Canada and abroad, particularly as they affect First Nations children, youth, families and their communities. A copy of my curriculum vitae is attached hereto as **Exhibit "A"**.

8. I affirm this affidavit in support of the Caring Society's motion for leave to intervene in the above noted Appeal. I am authorized by the Caring Society to affirm this affidavit.

1. About the Caring Society

A. The Caring Society's Mandate

9. First founded in 1998, the Caring Society is a national non-profit organization committed to research, training, networking, policy, and public education to promote the well-being of First Nations children, youth, and families, including those living on reserve. The Caring Society believes First Nations communities are in the best position to design and implement their own child and safety and wellbeing solutions. As a national organization, it is our role to provide quality resources for First Nations communities to draw upon and to assist them in developing community-focused solutions for children, youth and families.

B. The Caring Society's National and International Work

(i) National Initiatives and Research

10. The Caring Society engages in national initiatives and research. A part of the Caring Society's research mandate is the First Nations Children's Action and Research Education Services ("FNCARES") initiative. This initiative is a partnership with the University of Alberta aiming to generate and distribute research related to First Nations children's services and children's engagement in reconciliation to inform best practices and policies benefiting First Nations children, youth, families and Nations.

11. The Caring Society is a nationally recognized leader in reconciliation education through our Reconciling History initiative, which is a partnership between Beechwood Cemetery, former Truth and Reconciliation Commissioner Marie Wilson, historian John Milloy, Project of Heart and the Assembly of 7 Generations. We erect historically accurate plaques of those involved in residential schools who are buried at Beechwood. We then translate the research into free learning materials for children and youth across Canada and conduct free public education tours. In 2021, over 2,000 people attended the free Reconciling History walks narrated by First Nations, Metis and Inuit youth partnered with historians at Beechwood Cemetery on Orange Shirt Day (September 30, now also known as the National Day for Truth and Reconciliation). It has become an annual event and in 2022, the City of Ottawa in partnership with the Caring Society erected the first historical plaque on residential schools in the city.

12. In addition to numerous education resources on reconciliation for all age groups, the Caring Society created and delivers the Touchstones of Hope program, which is a reconciliation framework that supports and promotes First Nations communities and allies in developing and implementing culturally based vision of healthy families, youth and children. The Touchstone of Hope program is a key framework used by many First Nations across Canada, and by Indigenous Peoples in the United States and in Taiwan. It was also cited as a best practice in the Truth and Reconciliation Commission's final report.

13. The Caring Society conducts numerous public education lectures and events. For example, our public education activities in 2021 included 85 public education events to audiences in Canada and around the globe and we appeared in over 250 media pieces.

14. With respect to our public engagement and policy activities, the Caring Society works closely with First Nations child-serving agencies and Nations, assisting them in working with local and national governments to address the needs of the community.

15. The Caring Society has also been heavily involved in advocating for the rights of First Nations children and families in court and administrative proceedings. This involvement has taken the form of co-filing a historic case with the Assembly of First Nations pursuant to the Canadian Human Rights Act, serving as an expert witness and intervening in proceedings, which will be described in more detail below.

(ii) International Work

16. One of the Caring Society's key goals is to ensure the experiences of First Nations children and families are included in international discussions relevant to services and matters that affect First Nations children, youth, and families. The Caring Society has prepared and presented submissions to the United Nations, including: the United Nations Committee on the Rights of the Child ("UNCRC"), the United Nations Permanent Forum on Indigenous Issues, the Committee on Economic, Social and Cultural Rights, the Universal Periodic Review, and the Subgroup on Indigenous Child Rights.

17. In my capacity as the Caring Society's Executive Director, I have made presentations in South Africa, New Zealand, Norway, Ireland, Taiwan, Australia, Switzerland, Colombia, Mexico, Sweden, the United Kingdom, and the United States, making important connections with Indigenous Peoples and international child rights organizations.

18. The Caring Society works actively to promote the United Nations Convention on the Rights of the Child, particularly as it applies to First Nations children in Canada. In my capacity as Executive Director of the Caring Society, I convened the Indigenous Sub-Group, which consisted of child rights and Indigenous rights experts from all over the world, that assisted the UNCRC in developing and drafting General Comment 11 on Indigenous Children and their Rights. The General Comment was adopted by the UNCRC in 2009.

19. The Caring Society follows and comments on Canada's implementation of its obligations pursuant to the United Nations Convention on the Rights of the Child through its publications and ongoing research, and has presented reports and submissions to the UNCRC, the Universal Periodic Review, the Committee on the Elimination of all forms of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Inter-American Commission on Human Rights addressing Canada's systemic underfunding of public services for First Nations children, youth and families.

2. The Caring Society's Legal Interventions

20. As part of its mandate to promote the rights of the First Nations children, youth, and their families, and given the impact that legal decisions can have on their rights and realities, the Caring Society has engaged in several legal interventions to promote First Nations children's rights and to try to assist courts in their determination where these rights are affected. These interventions include:

- (a) The Caring Society was granted leave to intervene by the Québec Court of Appeal in the Reference to the Court of appeal of Québec in relation with the Act respecting First Nations, Inuit and Métis Children, Youth and Families, Québec (Attorney General) v Canada (Attorney General) (Court File No. 500-09-028751-196, 2022 QCCA 185). The Caring Society filed a factum on April 30, 2021 and presented arguments at the September 14-16, 2021 hearing, making submissions regarding the

scope of the federal government's responsibility in relation to the well-being of First Nations children; the responsibility of both the federal and provincial governments in relation to the well-being of First Nations children due to Jordan's Principle; and the importance of First Nations' self-government to achieving equitable outcomes in First Nations child and family services. The Caring Society is a respondent on the Attorney General of Quebec's appeal to the Supreme Court of Canada (Court File No. 40061) from the Québec Court of Appeal's decision and an intervener as-of-right on the Attorney General of Canada's appeal.

- (b) The Caring Society was granted leave to intervene by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. The Caring Society made submissions regarding the impact of administrative decision-making on First Nations children and families. The Caring Society stressed the importance of maintaining a focus on the best interests of the child in evaluating the reasonableness of decisions impacting children.
- (c) The Caring Society was granted leave to intervene by the Supreme Court of Canada in *Canadian Human Rights Commission v Attorney General of Canada*, 2018 SCC 31. The Caring Society made submissions regarding the importance of ensuring that the *Canadian Human Rights Act* (“*CHRA*”) is interpreted in a manner that confers the broadest protections to First Nations children, youth, and families, arguing in particular that the conferral of Registered Indian status entails eligibility to a range of services and benefits related to the recognition of one's identity, thus falling within the definition of “service” under the *CHRA*.
- (d) On May 11, 2022, the Caring Society was granted leave to intervene at the Court of King's Bench of Manitoba in *Manitoba Human Rights*

Commission v The Government of Manitoba, et al and *The Government of Manitoba v Manitoba Human Rights Commission, et al* (Court File Nos. CI20-01-28360 and CI20-01-28403). This application for judicial review addresses the provision of services to children living on-reserve by Manitoba. The Caring Society will make submissions regarding the scope and impact of Jordan's Principle in the provincial sphere. These applications for judicial review will be heard October 16-18, 2023.

- (e) The Caring Society was granted leave to intervene at the Federal Court of Appeal in *Alliance for Equality of Blind Canadians v Canada (Attorney General)* (Court File No. A-242-21, 2023 FCA 31). The Caring Society made submissions regarding the importance of complainant status for third-party organizations in protecting the interests of marginalized groups under the *Canadian Human Rights Act* and noted the Canadian Human Rights Tribunal's treatment of similar issues in the First Nations Children's Discrimination Complaint (noted below).
- (f) The Caring Society was granted leave to intervene at the Federal Court in *Shiner (in her personal capacity and as guardian of Josey K. Willier) v Canada (Attorney General)* (Court File No. T-492-16, 2017 FC 515). The Caring Society made submissions regarding the relevance of the right to equality and the best interests of the child in discretionary decisions impacting First Nations children. In particular, the Caring Society argued that Canada must not, by its laws, policies and discretionary decisions reinforce the perverse incentives created by its child welfare program funding formulas, which lead to removing First Nations children from their homes and communities. The application for judicial review was dismissed in *Shiner v Canada (Attorney General)*, 2017 FC 515. This decision was appealed to the Federal Court

of Appeal, where the Caring Society was also granted intervener status. The appeal was settled prior to the hearing.

- (g) The Caring Society was granted leave to intervene at the Federal Court of Appeal in *Canada (Attorney General) v Pictou Landing Band Council et al* (Court File No. A-158-13, 2014 FCA 21). The Caring Society made submissions regarding: (i) the proper interpretation and scope of Jordan's Principle; (ii) the inappropriateness of narrowly construing Jordan's Principle, and the potential impact of such an approach on First Nations children living primarily on reserve; and (iii) the impact of narrowly construing Jordan's Principle on Canada's obligations under the United Nations Convention on the Rights of the Child. Canada discontinued its appeal on July 11, 2014, prior to the hearing.
- (h) The Caring Society was granted leave to intervene by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61. The Caring Society made submissions regarding the remedial role of human rights legislation in relation to historically disadvantaged groups, such as First Nations Peoples; the inappropriateness of strictly requiring a formal comparator groups analysis and the potential impact of such an analysis on the *sui generis* situation of First Nations Peoples in the context of a human rights complaint; and the need for, and appropriateness of, cross-jurisdictional analysis in assessing certain claims of discrimination.

3. The Caring Society's Interest in the Present Appeal

21. The Caring Society seeks leave to intervene in this Appeal because this Court's decision will have a significant First Nations children, youth, and families. The decision under appeal will directly affect human rights principles implemented over time, the Caring Society's continuing litigation, its efforts to elaborate Jordan's

Principle, and the advocacy role that the Caring Society will be able to play in the future. This appeal could also create obstacles for First Nations seeking to challenge the discriminatory effect of programs with an ameliorative aspect, by allowing the government to escape scrutiny of discriminatory practices under the *CHRA* on the basis that the practice is part of an ameliorative program or makes improvements, and, thus, should be subject to deference.

22. The decision under judicial review builds on significant human rights advancements for First Nations children, youth, and families that the Caring Society was directly involved in achieving. Specifically, for more than a decade, the Caring Society and the Assembly of First Nations (“**AFN**”) have successfully litigated a discrimination complaint against Canada pertaining to the government’s discriminatory practices in funding child and family services for First Nations children and families including Canada’s failure to implement Jordan’s Principle (the “**First Nations Children’s Discrimination Complaint**”). This litigation led to numerous decisions benefiting First Nations children, youth and families from the Canadian Human Rights Commission (“**CHRC**”), the Canadian Human Right Tribunal, the Federal Court, and the Federal Court of Appeal.

23. For context, many First Nations children and families receive government funding through the First Nations Child and Family Services Program (the “**FNCFS Program**”). Many of these children and families receive the FNCFS services through First Nations Child and Family Services Agencies (“**FNCFS Agencies**”), many of which are incorporated entities funded by Canada.

24. The Caring Society and the AFN brought a complaint under s. 5 of the *CHRA*, which alleged that Canada discriminated against First Nations children and families living on reserve in the Yukon based on race and/or national or ethnic origin because of its policies and practices, including the provision of inequitable and insufficient funding.

25. This human rights litigation has been a significant undertaking for the Caring Society. At times during the hearing on the merits, budgetary constraints led the Caring Society to lay off staff to continue funding the complaint. The litigation impacted me at a personal level as well, as detailed in the CHRT's June 5, 2015 decision awarding me \$20,000 due to Canada's retaliatory conduct towards me. The Privacy Commissioner of Canada also found, on October 29, 2013, that the federal government breached my rights under the *Privacy Act* by monitoring social media sites on which I was active and tracking my personal movements. Government of Canada documents demonstrate that Canada engaged in this conduct in a failed attempt to get the case dismissed on vexatious or frivolous grounds. As a result of Canada's retaliatory behaviour, Frontline Defenders, an international NGO safeguarding human rights defenders provided me with training and supports. Canada's retaliatory behaviour also aimed to discourage other individuals from filing human rights complaints. This monitoring began in or about 2010, within the same time period as proceedings before the Tribunal related to a motion to strike the Caring Society and the AFN's complaint.

26. In a historic decision issued in 2016, the CHRT found that Canada discriminated against First Nations children, youth, and families in two ways. First, Canada discriminated by providing inadequate and flawed funding for child and family services, hindering the delivery of culturally appropriate services, incentivizing the placement of First Nations children into care, and failing to consider the unique needs of First Nations children, youth and families. Second, Canada discriminated by taking an overly narrow approach to Jordan's Principle, resulting in service gaps, delays, disruptions, and denials. From 2016 to 2022, the Tribunal made more than 20 non-compliance and procedural orders relating to Canada's failure to fully implement the Tribunal's 2016 order. Canada's failure to end this discrimination had real and devastating consequences on the affected individuals: for example, Canada's non-compliance was linked to the deaths of three children in 2018.

27. To be clear, in the First Nations Children's Discrimination Complaint, the Tribunal found that First Nations children and families were the victims of Canada's

discrimination in a “worst-case scenario”. Canada’s choice to provide funding for First Nations children’s services despite not delivering the services in question, did not prevent the Tribunal from recognizing the individual children, youth and families who experienced discrimination because of Canada’s conduct. The Tribunal found sufficient that the Government provided funding and exerted significant influence over the provision of those services and had the power to remedy inadequacies.

28. As I explained earlier, the Caring Society is genuinely interested in this Appeal. This Appeal gives rise to issues that fall squarely within the Caring Society’s mandate and the extensive work that it has done to advocate for the rights of First Nations children, youth and families. The Caring Society will dedicate the necessary, experience, skills, and resources to assist the Court to the best of its abilities.

4. The Caring Society’s Proposed Intervention

29. As outlined in its Written Representations on this motion, the Caring Society’s proposed submissions, if it is granted leave, will differ from those that are anticipated to be raised by the Respondents. The Caring Society will not raise new issues and it will not adduce any evidence.

30. On July 26, 2023 the Caring Society wrote to the parties to advise of its intention to seek leave to intervene (and on which topics) and, on August 8, 2023, the Caring Society shared a draft of its motion for leave to intervene materials with the parties to the appeal. The Caring Society shared its materials with the parties in an attempt to obtain their consent to its intervention and has been in discussions with them.

31. The Caring Society will not seek any costs either on this motion or on the Appeal, if leave to intervene is granted, asks that no costs be awarded against it.

Affirmed by Cindy Blackstock at the City of Ottawa, in the Province of Ontario, before me at the City of Ottawa on August 22, 2023, in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.



Commissioner for Taking Affidavits
(Or as may be)

David P. Taylor
LSO #: 63508Q

Cindy Blackstock