Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

MOTIONS REGARDING CANADA'S FAILURE TO COMPLY WITH THE CANADIAN HUMAN RIGHTS TRIBUNAL'S ORDERS REGARDING IMMEDIATE RELIEF

REPLY OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

MARCH 17, 2017

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CBC's CONNIE WALKER: [...] What action has been taken in response to [the Human Rights Tribunal] ruling?

CAROLYN BENNETT: Well, thank you so much for the question and we are really proud of the work that we're doing on the complete overhaul of the system. The system right now has perverse incentives where honestly there's more money to agencies, the more children that are apprehended. We have almost 50 per cent of kids in care in Canada, Indigenous children, when its' four per cent of the population. This has to change and this is the kind of work we're doing on the ground to make those changes.

[...]

CBC's CONNIE WALKER: So I want to talk about what happened in Wapekeka First Nation. Two young girls died by suicide there earlier this month after applying for money to deal with what they felt was a suicide pact in the community that didn't arrive. Why didn't your government find a way to provide that funding for that community?

CAROLYN BENNETT: I think that that money should have gone. And when it got turned down, I wish that they knew that Dr. Philpott and myself, we would have been able to do that. Each of these decisions is made in a region and I think that was a mistake and I know Dr. Philpott's working to right that mistake right now.[1]

The role of these motions in the remedial process designed by the Tribunal

1. After it made its decision on the merits of the complaint in January 2016, the Tribunal indicated that the implementation of its order that Canada cease its discriminatory practices would be addressed in three phases: (i) immediate relief; (ii) mid-term and long-term relief aimed at the comprehensive reform of the First Nations Child and Family Services Program ("FNCFS Program"); and (iii) compensation. We are still, almost fifteen months later, at the first of these three phases.

2. In order to achieve the *Canadian Human Rights Act*'s goals in the context of this complaint (to provide First Nations children and their families an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have), the Tribunal has correctly and reasonably adopted a flexible process. Throughout that process, the Tribunal requested additional information from the Respondent and issued certain remedial orders. However, the Tribunal has not yet addressed all the requests for immediate relief made by the Caring Society.

3. The Caring Society is not seeking the "enforcement" of the Tribunal's January 26, 2016 decision and subsequent April 26, 2016 and September 15, 2016 remedial orders. It is simply seeking remedies in a process that has not yet reached its conclusion. In order to facilitate this process, and to take into account information that was submitted to the Tribunal after its decision on the merits, the Caring Society has brought motions restating its requests for immediate relief.

4. As a result, the Caring Society does not bear any "burden of proof." In fact, it would be unjust for the Caring Society, having proved that the Respondent has discriminated against First Nations children and their families in a systemic way, to bear a "burden of proof" again and again at each of the three stages of the remedial process laid out by the Tribunal to show that that discrimination is continuing in the absence of further orders. Such a burden would unduly delay

[1] Cross-Examination of Cassandra Lang, February 7 and 8, 2017 [Lang Cross Examination"], Exhibit 16: Transcript of CBC Interview January 26, 2017.

the process and would allow the Respondent to undermine a decision for which it did not seek judicial review.

5. With respect to the weighing of the evidence on this motion, the Tribunal must be mindful that the Respondent, and not the Moving Parties, is in the privileged position of having access to the necessary information.[2] While the imbalance of access to information exists in many human rights complaints, it is particularly acute in the context of this motion, which is being heard after the hearing on the merits has been completed and for which there are no ongoing obligations of disclosure.[3] It would be unjust in such a context, and not in keeping Parliament's direction that "[p]roceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow",[4] to require the Caring Society to prove continuing discrimination, time and time again, on a balance of probabilities.

6. Because of the flexibility of the process and its ongoing nature, it is appropriate for the Tribunal to make findings of non-compliance with its previous orders. The Caring Society agrees with paragraphs 14-16 of the Canadian Human Rights Commission's ("Commission") March 7, 2016 submissions in this regard. Such findings would be a highly relevant factor in deciding whether the binding orders sought by the Caring Society are appropriate, in contrast to the overly deferential approach urged by the Commission. If the Respondent has not fully complied with previous orders, it defies reason to think that a consultative process will lead to the elimination of discrimination.

Immediate relief remains necessary

7. Immediate relief is necessary. Without it, the ongoing detrimental and discriminatory impacts identified by the Tribunal in its January 26, 2016 decision and subsequent orders will continue to be lived by the children affected by the Respondent's FNCFS Program and lived by the children requiring the full implementation of Jordan's Principle. Any delay results in serious and frequently irrevocable harms to First Nations children and their families. Children only have one childhood.

8. The alternative suggested by the Commission urges the Tribunal to order the Respondent to "consult" with the Complainants and other parties to identify some form of redress and then to report to the Tribunal. Put simply, this approach constitutes an abandonment of immediate relief and would move the Parties directly into the next phase of the Tribunal's remedial process (mid-term and long-term relief aimed at the comprehensive reform of FNCFS Program).

9. This is unacceptable. This approach disregards the best interests of over 165,000 First Nations children and their right to live free of the Respondent's discriminatory conduct, which continues to foreclose their equitable opportunity to grow up safely at home and access government services on the same terms as other children.

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[2] *Ontario Human Rights Commission v Simpson-Sears,* [1985] 2 SCR 536, 1985 CanLII 18 at para. 28.

[3] *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 11 at para 11.

[4] *Canadian Human Rights Act,* RSC 1985, c H-6, s 48.9(1).

10. Moreover, a further delay in immediate relief in favour of "consultation" will allow Canada to continue to economically benefit from its discriminatory conduct against First Nations children. While the aim of human rights remedies should not be to punish respondents in breach of their obligations, human rights tribunals have also stated that remedies should not be so trivial so as to give respondents a license to discriminate.[5] Ordering Canada to fully address all of the items of immediate relief, forthwith, will ensure that there is no longer a financial incentive for the Respondent to continue its discriminatory conduct towards First Nations children.

"Separation of powers"

11. Both the Commission and the Respondent assert that a deferential approach to remedies is mandated pursuant to the doctrine of separation of powers, the budgetary implications of the remedies sought, or the fact that the remedies sought involve policy changes. These arguments are plainly wrong.

12. The concept of "separation of powers" is often traced to Montesquieu's Esprit des Lois (1748). The purpose of the doctrine was to prevent abuses of power by dividing power among several entities, namely the legislative, executive and judicial branches of the State.

13. The separation of powers doctrine is also often associated with the "checks and balances" inherent in the United States Constitution. In Canada, the "Constitution does not insist on a strict separation of powers".[6] To the contrary, the judicial branch has an overarching *duty* to apply the Constitution and the law, precisely in order to protect the rights of citizens against abuses of power. This duty is based in the constitutional principles of the rule of law and constitutionalism, which ensure that "the law is supreme over the acts of both government and private persons."[7] As a result, the Supreme Court of Canada has held that the "separation of powers" does not somehow shield the executive or legislative branches of government from the judicial branch's power to review the legality of their decisions, whether the challenge is based on the Charter[8] or on ordinary law,[9] much less a quasi-constitutional law like the *Canadian Human Rights Act.*

14. As Binnie J. aptly said in *Newfoundland (Treasury Board) v NAPE*, "whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed."[10] Here, the boundaries have been enacted by Parliament in the *Canadian Human Rights Act* and the Tribunal is the referee. It is inconceivable that the separation of powers evoked by the Respondent would prevent the Tribunal from exercising the jurisdiction Parliament has conferred on it.

15. The Respondent's argument at paragraph 139 of its March 14, 2017 submission misunderstands the Tribunal's role, and the majority of the Supreme Court of Canada's conclusion in *Ontario v Criminal Lawyers' Association of Ontario*. In that case, the majority held that "[t]he ability to order the government to make payments out of public funds must be grounded in law

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[5] *Buckingham-Vanderlei v. Walker,* 2010 HRTO 1338.
[6] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 233, para. 15; see also *Re Residential Tenancies Act*, [1981] 1 SCR 714 at 728.
[7] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 258, para. 71.
[8] *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381 at 423-429, paras. 100-116.
[9] *Wells v Newfoundland*, [1999] 3 SCR 199 at 220-221, paras 51-54.
[10] *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381 at 429, para. 116.

and a court's inherent or implied jurisdiction is limited by the separate roles established by our constitutional structure [emphasis added]."[11]

16. *Criminal Lawyers' Association* must be read bearing in mind the point it actually decided: the scope of a court's *inherent or implied jurisdiction.*

17. The Caring Society does not argue that the Tribunal has an implied jurisdiction to order the Respondent to make expenditures out of public funds. To the contrary, the Caring Society says that section 53(2)(b) of the *Canadian Human Rights Act*, which allows the Tribunal to order the Respondent to "make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the [discriminatory] practice."[12]

18. Section 53(2)(b) of the *Canadian Human Rights Act* is precisely the type of "authority flowing from [...] a statutory provision" that grounds the Tribunal's ability to "order the government to make payments out of public funds" in a way that "respects the institutional roles and capacities of the legislature, the executive [...], and the judiciary".[13]

Deference

19. There is no language in the *Canadian Human Rights Act* that supports the Commission's claim that the Tribunal's remedial powers must be exercised more cautiously because the Respondent is the federal government. While some provincial human rights laws do include narrow exceptions that apply only to government respondents in certain limited circumstances, this is not the case for the *Canadian Human Rights Act*'s remedial provisions.[14] Indeed, this Tribunal, and human rights tribunals across Canada, routinely issue remedial orders against government respondents that require the expenditure of public funds.[15]

20. In the absence of express language that the Respondent's governmental identity ought to limit the Tribunal's discretion under section 53(2), the Tribunal's remedial powers must be

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[11] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 15.

[12] *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2)(b).

[13] All citations in this paragraph referenced are to *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 15.

[14] By way of example, section 47(2) the Ontario *Human Rights Code*, RSO 1990, c H.19, states that "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act." Similarly, section 25(2.1) states that "the right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder."

[15] See for example, *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360, where the Ontario Human Rights Tribunal ordered Ontario to provide retroactive and ongoing funding of the special diet allowance for the lead complainants and *Hogan v Ontario (Health and Long-Term Care)*, 2005 HRTO 49 where the Ontario Human Rights Tribunal ordered Ontario to fund sex-reassignment surgery. The Canadian Human Rights Tribunal in particular has issued remedial orders that required the spending of public funds far that exceed the value of the remedial orders sought by the Moving Parties. See for example, the Treasury Board pay equity case was settled for $ 3.2 billion following two Canadian Human Rights Tribunal decisions. For details see "The Public Sector Equitable Compensation Act and the Reform of Pay Equity", available online at https://www.canada.ca/en/treasury-board-secretariat/services/innovation/equitable-compensation/public-sector-equitable-compensation-act-reform-pay-equity.html.

interpreted broadly and in accordance with the *Canadian Human Rights Act*'s overarching objective of eradicating discrimination. It is not open for the Tribunal to read in exceptions or limitations in the *Canadian Human Rights Act* that were not expressly included by Parliament.[16]

21. Moreover, there is no principled reason why the Government of Canada ought to be subjected to a lower degree of human rights scrutiny than other respondents, such as, for example, a small family owned printing company,[17] a small trucking company,[18] or the government of Ontario.[19] In fact, in the context of the Moving Parties' motions, the Tribunal ought to give little deference to the Respondent when exercising its remedial discretion: Canada has proven itself to be, time after time, either unable or unwilling to cease its discriminatory conduct against First Nations children. Indeed, the Tribunal found as fact that the Respondent was aware of its discriminatory conduct and its harmful impact on First Nations children for decades, but failed to take action.[20]

22. Consistent with these findings, the evidence in this motion also indicates that the Respondent has failed to take the steps necessary to address all of the items of immediate relief identified. For example, the Respondent has failed to implement measures as simple as as ensuring that the staff responsible for implementing the Tribunal's orders have read the Tribunal's decisions.[21]

23. In a context where a respondent has been given the opportunity to address the Tribunal's findings of discrimination, but has failed to do so, further deference is not warranted, particularly in light of the serious and irreparable harm caused to First Nations children by this discriminatory conduct. There is no mechanism to recover a childhood lost to the child welfare system. There is no mechanism to recover the life of a child that has been lost because of a lack of public services that are available to children living off-reserve.

24. The Respondent's clear approach to this motion and to the preceding orders of the Tribunal is to simply say to the Tribunal and to the Moving Parties: "trust us". For more than ten years prior to the filing of this Complaint, after government funded studies, reports from the Auditor General, and accounts from First Nations Child and Family Services Agencies ("FNCFS Agencies") regarding the detrimental impacts of the discriminatory FNCFS Program, the Caring Society trusted that the Government of Canada would do the right thing. That trust has yet to be rewarded.

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[16] *Dopelhamer v Workplace Safety and Insurance Board*, 2009 HRTO 2056 at para 9. Regarding this matter in particular, the Federal Court already held that the CHRA ought to be interpreted in a manner to confer and not deny victims of discrimination protection. *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 360, aff'd 2013 FCA 75.

[17] *Brockie v. Brillinger (No. 2)*, [2002] 222 DLR (4th) 174.

[18] *Milano v Triple K Transport*, 2003 CHRT 30.

[19] *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360.

[20] *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 2 at paras 150-215.

[21] Cross-Examination of Lee Cranton on February 17, 2017 ["Cranton Cross Examination"] at p 78, line 21 to p 79, line 10.

25. The evidence is clear that now is not the right time to relinquish the remedial powers of the Tribunal in favour of a promise that will not be kept.

"Engagement" and consultation

26. The Commission rightly reminds the Tribunal of the dark history of the Respondent's policy-making that did not involve Indigenous peoples and of the oppressive and tragic consequences of that exclusion.[22] The Commission is also right to underline the importance of consultation in legal and policy matters involving Indigenous peoples.[23]

27. However, the Caring Society cannot support the Commission's request that Tribunal order further consultation instead of providing First Nations children with immediate relief. The Moving Parties are united in their belief that delaying immediate relief to allow for "consultations" will continue to perpetuate harm against First Nations children.

28. For its part, the Respondent asserts that it needs to "engage" with a variety of stakeholders, other than the parties to this complaint, before fully addressing the issues identified for immediate relief, before undertaking a reform of the FNCFS program, or before taking other measures aimed at eliminating discrimination.[24]

29. The Tribunal should not to allow itself to be distracted by references to "engagement" and "consultation", which in the context of this case the Caring Society submits are references to words rather than meaningful interactions.

30. First, in the present state of Canadian constitutional law, the duty to consult is a doctrine that is made available to Indigenous peoples who have not yet made full proof of their rights.[25] Where Indigenous peoples have proven their rights, for instance to Aboriginal title, the standard required of the State is ***consent***.[26] The doctrine underlying the duty to consult is an alternative, not a substitute, to a rights-based approach.

31. These motions are based on rights that have been fully proved. As a result, the remedies available to the Caring Society should not be limited to something akin to the duty to consult, which was designed to address *potential* rights.

32. Second, the processes of "engagement" put in place by the Respondent or suggested by the Commission fall well short of the Canadian and international standards governing consultation with the indigenous peoples. While the present context is not suited to a full review, the Caring Society wishes to emphasize a number of obvious shortcomings.

a. The goal of consultation is to obtain Indigenous peoples' free, prior and informed consent. This is made clear by articles 19 and 32 of the United Nations *Declaration*

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[22] Canadian Human Rights Commissions Submissions addressing motions filed regarding the FNCFS Program and 1965 Agreement, dated March 7, 2016 at para 33.

[23] Canadian Human Rights Commissions Submissions addressing motions filed regarding the FNCFS Program and 1965 Agreement, dated March 7, 2016 at para 32.

[24] Submissions of the Attorney General, dated March 14, 2017, paras 55-59.

[25] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at 529, paras. 34-35.

[26] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 2, 76, 88, and 90.

on the Rights of the Indigenous Peoples. The Supreme Court of Canada, while refraining from requiring actual consent in each case, nevertheless mandated that consultations must be undertaken with an intention of substantially addressing Aboriginal concerns.[27] In this case, the Respondent has never indicated that it will seek the consent of Indigenous peoples, nor do the consultations envisaged by the Commission refer to the goal of consent.

b. Consultation should involve representatives chosen by Indigenous peoples themselves. According to the Inter-American Court of Human Rights, "consultation in good faith is incompatible with practices such as attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community."[28] Canadian law makes it clear that consent of one Indigenous group does not dispense with the duty to consult another Indigenous group that is affected by a project.[29] Here, the complaint has been brought by the Assembly of First Nations, which is the recognized political association representing First Nations across the country, and the Caring Society, which represents FNCFS Agencies tasked with the delivery of child and family services across the country. Yet, the Respondent insists on "engaging" a variety of other persons or institutions, in order to avoid negotiating with the parties to this complaint.

c. Consultation requires the disclosure of relevant information before a decision is made.[30] In this case, most of the initiatives that the Respondent relies on were announced unilaterally, without any information being given to the Complainants.

Reallocation

33. In reply to the Commission's submissions regarding reallocation,[31] the Tribunal has not yet concluded that an order relating to reallocation should not be granted.[32] While the Tribunal did indeed conclude that "reallocation" 'may' be outside the four corners of the complaint, it does not logically follow that the Tribunal cannot issue an order prohibiting the reallocation of funds. Indeed, the Panel noted the findings it had made regarding the adverse impacts of the Respondent's

[27] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at 532, para. 42.
[28] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACHR Series C, No. 245, para. 186, online: http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.
[29] See, e.g., *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.
[30] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at 532-533, para. 43.
[31] Canadian Human Rights Commissions Submissions addressing motions filed regarding the FNCFS Program and 1965 Agreement, dated March 7, 2016 at paras 49-51.
[32] Canadian Human Rights Commissions Submissions addressing motions filed regarding the FNCFS Program and 1965 Agreement, dated March 7, 2016 at paras 50-51.

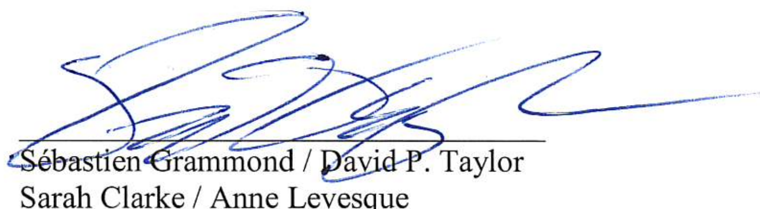
reallocation practices in its January 26, 2016 decision,[33] and urged Canada to eliminate its reallocation practices in its September 15, 2016 remedial order.[34]

34. Despite the concerns already expressed by the Tribunal regarding the Respondent's reallocation practices issue, Canada has clearly continued to reallocate funds from other INAC programs in order to fund its FNCFS Program. In total, it has reallocated over $25 million from other INAC programs since Budget 2016.[35]

35. In the event that this Tribunal is of the view it cannot make an order prohibiting Canada to reallocate funds from other INAC programs towards child welfare, the Caring Society respectfully requests that the Tribunal make an order requiring Canada to pay the actual costs of certain expenses of FNCFS Agencies and specify that the funds used to pay the cost of these expenses may not be drawn from other INAC programs. Such an order is in keeping with this Tribunal's discretion to carefully craft effective remedies in order to eliminate discrimination,[36] including discrimination that may be caused as a collateral effect of the Respondent's implementation of the Tribunal's remedies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 17, 2017



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[33] *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 2 at para 390.

[34] *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 16 at para 61.

[35] See Lang Cross Examination at p 167, lines 3-6; RFI-CL-20; Lang Affidavit at para 4; Lang Cross Examination at p 166, lines 2-18; Lang Affidavit at para 5; Lang Cross Examination at p 170, lines 1-6; RFI-CL-20; Lang Affidavit at para 9; RFI-CL-20; Lang Affidavit at para 9; and Lang Cross Examination, at p 170, lines 5-22. See paragraphs 40-43 of the Caring Society's February 28, 2017 submissions for more details.

[36] *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84.