Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and the ASSEMBLY OF FIRST NATIONS

Complainants

– and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

– and –

ATTORNEY GENERAL OF CANADA (representing the Minister of Indian and Northern Affairs)

Respondent

– and –

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

SUBMISSIONS of the CANADIAN HUMAN RIGHTS COMMISSION on the Caring Society's Motion on Jordan's Principle

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BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

ATTORNEY GENERAL OF CANADA (representing the Minister of Indian and Northern Affairs)

Respondent

and

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION ON THE CARING SOCIETY'S MOTION ON JORDAN'S PRINCIPLE

OVERVIEW

1. These are the Commission's written representations in response to the motion and submissions filed by the First Nations Child and Family Caring Society of Canada ("Caring Society") regarding Jordan's Principle. As described further below, the Caring Society seeks various relief, including Orders that Canada immediately adopt an approach to Jordan's Principle that complies with the Tribunal's decisions, and take various steps to inform stakeholders and the general public about the compliant approach.

2. As explained further below, the Commission submits that the Tribunal should (i) find that Canada has not taken adequate steps to date to satisfy the initial remedial orders with respect to Jordan's Principle, and (ii) make a final order that requires Canada to adopt and adequately publicize a compliant approach to Jordan's Principle, within specified timeframes.

Related Submissions

3. These submissions should be read together with the separate submissions to be filed by the Commission in response to the motions filed by the Caring Society, the Assembly of First Nations ("AFN"), the Chiefs of Ontario ("COO") and the Nishnawbe Aski Nation ("NAN") (together, the "Moving Parties"), generally seeking:

   a. Orders declaring that INAC has failed to cease and/or remedy the discriminatory practices identified in the Tribunal's decisions;

   b. Orders requiring that INAC work and consult with some or all of the Moving Parties and/or the Commission to eliminate the discriminatory practices, including by funding the design and conduct of various studies and/or needs assessments;

   c. Orders requiring that INAC fund the actual costs of certain services, make specific changes to certain funding formulas, and/or pay the debts or deficits of certain Agencies; and

   d. Orders requiring INAC to report back to the Tribunal and/or the Parties and Interested Parties regarding steps taken and progress to date.

PART I – Background

4. In its Notice of Motion with respect to Jordan's Principle, and the written submissions filed with respect to its motions, the Caring Society asks the Tribunal to make the following Orders relating to Jordan's Principle:

   a. Canada immediately cease relying upon and perpetuating definitions of Jordan's Principle that violate the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16;

   b. Canada immediately cease imposing service delays due to policy review or case conferencing;

   c. Canada immediately implement reliable systems to ensure that all possible Jordan's Principle cases are identified as such, regardless of whether the reporter knows the case is a Jordan's Principle case;

d. within 15 days of the Order, Canada (i) post a compliant definition of Jordan's Principle on the home pages of INAC and Health Canada, with links to specialized topic pages, and (ii) take out full-page advertisements in various newspapers, and make a televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition, and advising of the existence of a newly-created 24-hour toll-free reporting line for Jordan's Principle cases;

e. within 30 days of the Order, Canada contact all stakeholders who received communications including the definition of Jordan's Principle that violates the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16, and to immediately advise these stakeholders in writing that Jordan's Principle includes all jurisdictional disputes involving all First Nations children resident on and off reserve;

f. within 30 days of the Order, Canada revisit any agreements concluded with third party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle, which includes all jurisdictional disputes involving all First Nations children;

g. within 45 days of the Order, Canada consult with the Complainants and Interested Parties to develop public education materials relating to Jordan's Principle, and ensure their proper distribution to certain stakeholders, including in First Nations languages; and

h. Canada track its performance in delivering its Child First Initiative, and report the results to the Tribunal at regular intervals.

5. The Caring Society and the other Moving Parties have already provided detailed submissions that review the factual background relevant to the request for these Orders. On an encouraging note, they have described evidence indicating that increased funding for Jordan's Principle cases has begun to flow, since the Tribunal's initial decision was released.[1]

6. At the same time, the Moving Parties have also described (i) the Tribunal's initial findings with respect to the proper scope and meaning of Jordan's Principle[2], (ii) Canada's failures to implement those findings[3], (iii) the Tribunal's subsequent

[1] See, for example, the evidence described in the following passages: Caring Society Submissions, at para. 18; AFN Submissions, at para. 57; COO Submissions, at para. 7; and NAN Submissions, at para. 29.
[2] See, for example, the evidence described in the following passages: Caring Society Submissions, at para. 78; AFN Submissions, at para. 9; COO Submissions, at para. 41; and NAN Submissions, at para. 24.
[3] See, for example, the evidence described in the following passages: Caring Society Submissions, at paras. 81-86; AFN Submissions, at para. 61; COO Submissions, at para. 41; and NAN Submissions, at para. 43.

implementation rulings, stressing the need for immediate compliance[4], and (iv) recent evidence, taken from affidavits and cross-examinations completed with respect to the current motion, showing that Canada continues to put forward varying definitions of Jordan's Principle that do not reflect the straightforward approach required by the Tribunal's initial ruling.[5]

7. The Caring Society and the other Moving Parties have also described evidence that highlights the critical importance of ensuring the full implementation of Jordan's Principle. Specifically, they have described the tragic events that took place in Wapekeka First Nation, where two 12-year old Indigenous girls – Jolynn Winter, and Chantel Fox – took their own lives in January of 2017. Although the Nation had requested emergency mental health funding from the regional office of Health Canada's First Nation and Inuit Health Branch (FNIHB) months earlier, in part based on word of a suicide pact in the community, the request was denied – apparently without any consideration of whether funding might have been made available through Jordan's Principle. During cross-examination, Health Canada's affiant on these motions confirmed that the request could have qualified for such funding.[6]

8. In all the circumstances, the Commission does not propose in these Submissions to provide another restatement of the background facts. Instead, the Commission generally adopts and endorses the statements of facts provided by the Moving Parties.

PART II – Questions at Issue

9. The Commission submits that the Caring Society's motion with respect to Jordan's Principle gives rise to the following questions:

   a. What authority does the Tribunal have to consider motions relating to the implementation of its previous decisions?

   b. Should the Tribunal find that Canada has failed to comply with its rulings relating to Jordan's Principle?

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[4] See, for example, the evidence described in the following passages: Caring Society Submissions, at paras. 85-86; AFN Submissions, at para. 12; and COO Submissions, at para. 58.

[5] See, for example, the evidence described in the following passages: Caring Society Submissions, at para. 117; AFN Submissions, at para. 63; and COO Submissions, at para. 41.

[6] See, for example, the evidence described in the following passages: COO Submissions at para. 58; and NAN Submissions at para. 36.

c. Should the Tribunal make any additional orders to help ensure that effective remedies are forthcoming?

PART III – Arguments

A. Authority of the Tribunal

10. The *CHRA*[7] is remedial legislation that aims to eradicate discrimination. It is to be given a broad and liberal interpretation that best facilitates this objective. With this in mind, the Federal Court has held that the Tribunal can properly use the wide powers in s. 53(2) of the *CHRA* to award effective remedies, and to retain a broad jurisdiction to return to specified matters to ensure that the ordered remedies are forthcoming. Underlying this conclusion is a recognition that it will often be desirable for a Tribunal decision to simply set guidelines, and leave it to the parties to work out the details of a remedy, in accordance with those guidelines. In such circumstances, to deny the Tribunal's power to reserve jurisdiction and oversee implementation would be overly formalistic, and would defeat the remedial purpose of the legislation.[8]

11. Where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In such circumstances, the Tribunal does not change its initial decision, nor does it implement a different remedy than was originally provided. Indeed, the Tribunal would overstep its jurisdiction if it were to extend the scope of a reconvened inquiry to include matters that were not raised or dealt with at the original hearing.[9]

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[7] *Canadian Human Rights Act,* R.S.C., 1985, c. H-6 (*CHRA)* [Caring Society's Book of Authorities, Vol 1, Tab 1]

[8] *Grover v. Canada (National Research Council – NRC),* [1994] F.C.J. No. 1000 at paras. 31-33 (T.D.); *Canada (Attorney General) v. Moore*, [1998] F.C.J. No. 1128 at paras. 48-50 (T.D.). For a more recent Tribunal decisions citing these decisions with approval, see: *Warman v. Beaumont,* 2009 CHRT 32, [2009] C.H.R.D. No. 32 at paras. 5-6; and *Berberi v. Attorney General of Canada,* 2011 CHRT 23 at paras. 12-16 (result upheld 2013 FC 921).

[9] *Grover v. Canada (National Research Council – NRC), supra* at paras. 37 and 45; *Canada (Attorney General) v. Moore, supra* at paras. 55 and 70; and *Milazzo v. Autocar Connaisseur Inc*., 2005 CHRT 5, [2005] C.H.R.D. No. 3 at paras. 20-21.

12. Based on the foregoing, the Commission submits that the Tribunal in this case has validly retained the authority to (i) make a finding about whether Canada has complied with its previous rulings with respect to Jordan's Principle, (ii) clarify or supplement the original Decision, if necessary or appropriate to provide additional guidance to the parties on how to implement the original remedies, and (iii) extend the period for which it will remain seized of issues concerning implementation, if considered appropriate.

13. It bears emphasizing that the Tribunal does not have the statutory authority to enforce its own Orders. That power is assigned to the Federal Court, pursuant to s. 57 of the *CHRA*. Instead, the ultimate task of the Tribunal is to arrive at an Order that is clear and unambiguous, in terms of content and timeline.

14. In considering whether to make additional orders regarding implementation, the Tribunal should bear in mind general principles regarding the appropriate separation of powers between quasi-judicial decision-makers and policy-making bodies. As the B.C. Human Rights Tribunal has stated, a key proposition in this regard is that where there could be multiple ways of remedying a discriminatory practice, decision-makers should generally leave the precise method of remedying the breach to the body charged with responsibility for implementing the Order.[10]

B. The Tribunal Should Find that Canada is Not Yet in Full Compliance

15. The Commission is encouraged by the evidence that increasing numbers of Jordan's Principle cases have come to be identified, and increased funding has flowed, since the release of the Tribunal's Main Decision. It also appeared evident from her testimony that Health Canada's affiant was committed to the proper implementation of Jordan's Principle. These are positive developments.

16. At the same time, as demonstrated in the submissions of the Caring Society and the other Moving Parties, there is also compelling evidence that (i) Canada has been using and distributing unduly narrow and non-compliant definitions of Jordan's Principle, (ii) adequate systems are not yet in place to ensure that Jordan's Principle cases are recognized and treated as such, (iii) high-ranking officials are not sufficiently informed

[10] *Moore v British Columbia (Ministry of Education)*, 2005 BCHRT 580, [2005] B.C.H.R.T.D. No. 580 at para. 1012 (upheld, but remedies varied, by SCC).

about Jordan's Principle and its implications, and (iv) accurate and consistent information about Jordan's Principle is not being communicated to government bureaucrats, stakeholders, or the public.

17. In the circumstances, the Commission submits that, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal's rulings regarding Jordan's Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

C. The Caring Society's Requests for Additional Orders

(i) Definition of Jordan's Principle

18. The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the initial Decision. In this regard, considering the rulings already made by the Tribunal to date,[11] the Commission suggests that any definition of Jordan's Principle must include the following key principles:

- Jordan's Principle is a child-first principle.
- When a government service is available to all other children, and a jurisdictional dispute arises regarding the provision of the service to a First Nations child, the government department of first contact will pay for the service, and can later seek reimbursement from another department/government, after the child has received the service.
- The government department that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.
- Jordan's Principle applies to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments), and to jurisdictional disputes between departments within the same government.
- Jordan's Principle applies equally to all First Nations Children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports.

[11] Tribunal's Orders, 2016 CHRT 2 at paras. 351, 381-382 and 481; 2016 CHRT 10 at para. 33; and 2016 CHRT 16 at paras. 107-120 and 160(B)(i).

(ii) Immediate Changes to Processing of Cases

19. The Caring Society has asked for orders that Canada immediately (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases.

20. The Commission agrees that these requests properly flow from the Tribunal's findings of discrimination, and the evidence gathered in respect of these motions. It would therefore be appropriate for the Tribunal to provide additional guidance to Canada to ensure that these steps are taken. Because these are matters where Canada could arguably choose from among multiple different methods of compliance, it is likely not appropriate to order the specific means by which Canada should achieve the objectives. Instead, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

(iii) Publicizing the Compliant Approach

21. The Commission agrees with the Caring Society that it would be appropriate for the Tribunal to supplement its initial Order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, First Nations, Child and Family Services Agencies, and the general public, about its compliant approach to Jordan's Principle.

22. At first glance, the Caring Society's proposals in this regard appear reasonable, and the Commission has no objection to them. However, the Commission reserves the right to make further comment about these matters at the hearing of these motions, once it has had a chance to receive and review Canada's submissions in response.

(iv) Public Education and Consultation

23. The Commission notes that the Caring Society has asked for an Order requiring Canada to consult with the Complainants (i.e., the Caring Society and AFN) and Interested Parties (i.e., COO and NAN) about the preparation of public education materials, to be published within 45 days of the Order.

24. In *Canada (Attorney General) v. Johnstone*,[12] the Federal Court of Appeal struck out a Tribunal order that required the Canada Border Services Agency to adopt policies "satisfactory" to the Commission and the complainant. It found that s. 53(2)(a) did not specifically allow for such a remedy, and that the Tribunal had not provided any explanation for its authority to impose such a requirement – with the result that the outcome was unreasonable, in the sense that it lacked justification, transparency and intelligibility.

25. The *Johnstone* ruling might arguably be read as calling into question the Tribunal's authority to order that a respondent consult with anyone other than the Commission when implementing public interest remedies. However, with all due respect to the Court of Appeal, the Commission submits that s. 53(2)(a) should allow for Orders requiring consultation with the Caring Society and the other Moving Parties, in the context of this proceeding. This is the case for several reasons.

26. First, allowing for such consultation will promote reconciliation with Indigenous peoples. Indeed, bearing in mind constitutional changes, apologies for historic wrongs, and the reports of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC), the Supreme Court of Canada has declared in *Daniels* that "…reconciliation with all of Canada's Aboriginal peoples is Parliament's goal."[13] Directly including the voices of the Complainants and Interested Parties in the development of educational materials relating to Jordan's Principle will further this objective, giving voice to those who have historically been excluded from decision-making processes that fundamentally affect Indigenous children and communities. Section 53(2)(a) of the *CHRA* should be expansively interpreted to allow this to happen.

27. Second, there can be no doubt that the Caring Society, and the other proposed consultees, have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children.

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[12] *Canada (Attorney General) v Johnstone*, 2014 FCA 110, [2014] F.C.J. No. 455.
[13] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 9, at para. 37.

28. As a final note, if the Tribunal grants the Caring Society's request for an order requiring consultations and the distribution of public education materials, the Commission asks that it be included among those to be consulted, alongside the other consultees. This would be consistent with the express wording of s. 53(2)(a), and an appropriate reflection of the role that the Commission has played, and continues to play, in seeking to eliminate the discriminatory practices identified in the Tribunal's Decisions.

(v) ***Future Reporting***

29. The Commission notes that the Caring Society has asked for an Order that Canada track its performance in delivering its Child First Initiative, and report back to the Tribunal on its progress at regular intervals. The Commission takes no position on this request, other than to suggest that if such an Order is to be granted, the Tribunal include specifics about (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to provided, and (iii) the length of time for which the reporting obligation is to continue.

All of which is respectfully submitted this 7th day of March, 2017.

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LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 53(2) and 57

Case Law

Berberi v. Attorney General of Canada, 2011 CHRT 23[2011] C.H.R.D. No. 23

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