Department of Justice Canada | **Ministère de la Justice Canada**

Atlantic Regional Office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

Bureau régional de l'Atlantique
Pièce 1400, Tour Duke
5251, rue Duke
Halifax (Nouvelle-Écosse) B3J 1P3

Telephone: (902) 426-5959
Facsimile: (902) 426-8796
E-Mail: jonathan.tarlton@justice.gc.ca

Our File: / Notre dossier: AR-17-82297

Your file: / Votre dossier:

By E-Mail

December 23, 2010

Maryse Choquette
Registry Officer
Canadian Human Rights Tribunal
11th Floor, 160 Elgin Street
Ottawa, Ontario
K1A 1J4

Dear Ms. Choquette:

Re: *FNCFCS et al v Attorney General of Canada*
Tribunal File No.: T1340/7008

Further to the Chair's direction dated December 1, 2010, below is Canada's reply to the submissions of the AFN, Caring Society and Canadian Human Rights Commission received on December 17, 2010.

Analysis and Application to the Complaint

The complaint does not fall within the jurisdiction of the Tribunal. The recent judgments of the Supreme Court have determined that child welfare is not integrally bound up with a federal work, undertaking, service or business, to bring it within the jurisdiction of Parliament for the purpose of labour relations. Because child welfare is not a "matter" coming within section 91 of the *Constitution Act, 1867,* it cannot be the subject of a complaint before a federal human rights tribunal in this case. Funding through the exercise of the federal spending power cannot, by itself, form the basis of a complaint either as the impugned funding is not a "service" within the meaning of section 5 of the *Canadian Human Rights Act.*

The Caring Society's submissions regarding the *Financial Administration Act* are not supported by relevant case law. The Supreme Court has said that public authorities exercising powers under the *Financial Administration Act* are subject to specified duties of an "internal government nature" and are not carrying out duties or performing services which, in any meaningful sense can be said to be owed to all the public alike.[1]

Moreover, the parties' reliance on the federal spending power as the basis for federal human rights jurisdiction continues to overlook the fact that such power is limited to giving money and

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[1] *Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell,* [1999] 3 S.C.R. 281, para. 22.

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imposing conditions to safeguard the use of federal funds and cannot be used to regulate matters of provincial jurisdiction, such as child welfare. The mere spending of federal money cannot bring a matter which is otherwise provincial into federal competence.[2]

In addition, the recipients of such funding are not individuals who are entitled to bring complaints under the *Act*. Consequently, the other parties' submissions and case law do not withstand serious scrutiny and are clearly distinguishable here.

The prohibition of discrimination is a "matter" primarily concerning "property rights and civil rights", "matters of a merely local and private nature" or "local works and undertakings" – all three being classes of subjects listed in section 92 of the *Constitution Act, 1867*.[3] The Caring Society's assertion that there is "no presumption that human rights law falls within provincial jurisdiction"[4] is taken out of context.

The Supreme Court's judgment in *Scowby v Glendinning*[5] recognizes the facts of that case were very unusual. The case dealt with a provision of the *Saskatchewan Human Rights Code* concerning a compliant under the *Code* for arbitrary arrest. The majority found the province had purported to define the boundaries within which an arrest or detention is authorized - normally a type of action taken by the Parliament of Canada in the exercise of its exclusive sovereignty over criminal law - was inapplicable to arrest or detention under the provisions of the criminal law.[6]

The Supreme Court also said that most protections granted by provincial human rights codes relate to property and civil rights, or to matters of merely local or private nature. They deal, for example, with questions of discrimination in housing and employment, and equal access to goods and services. These legislative protections are valid not because they affirm interests such as liberty, or human dignity, but because the activities legislated - for example housing, employment, and education, are themselves legitimate areas of provincial concern under ss. 92 and 93.[7] Child welfare is another legitimate area of provincial concern.

Therefore, human rights legislation in Canada which prohibits discrimination with respect to employment, residential and commercial accommodation, goods, services, facilities and public accommodation is essentially within the legislative jurisdiction of the provinces. Where, however, the employment, service, facility, accommodation is integrally bound up with a federal work, undertaking, service or business, it is within the jurisdiction of Parliament, because it is then (and only then) a "matter" coming within section 91 of the *Constitution Act, 1867*.[8]

That is why the Supreme Court's recent judgments in *NIL/TU,O* and *Native Child* are helpful and support Canada's motion. They confirm that child welfare is not integrally bound up with a federal work, undertaking, service or business. Given that the Supreme Court has determined that child welfare entities are clearly provincial undertakings, it cannot be disputed that they do

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[2] *Submissions of the Attorney General of Canada* dated May 5, 2010, p. 20, para. 74.

[3] W. S. Tarnopolsky, *Discrimination and the law: including equality rights under the Charter*. Toronto, Ont. : Carswell/Thomson Reuters , 1985, p. 3.56-4.

[4] Caring Society's Submissions, page 2 and footnote 5.

[5] *Scowby v Glendinning*, [1986] 2 S.C.R. 226.

[6] *Supra*, paras. 16, 18.

[7] *Supra*, para. 4.

[8] Tarnopolsky, *supra*, footnote 3.

not provide a service that is within the jurisdiction of Parliament. Canada's only involvement is to provide funding to those entities. Such funding does not meet the definition of a service under the *Act* for the reasons we have already set out in our Submissions and Reply.

The *Arnold* case[9] is not helpful and can be distinguished because the parties did not contest the jurisdiction of the Canadian Human Rights Commission to deal with the complaint, they admitted the impugned actions of the respondent were carried out under another Act of Parliament and met the definition of a "service" under s. 5 of the *Canadian Human Rights Act.*[10] None of those facts or admissions are present here. Also, because the complainant was a person - and not an agency or other non-natural entity - there was no dispute of his being an "individual" for the purposes of the *Act.*

The *Eldridge* case is also of little value or assistance here because the actors involved in that proceeding were all within provincial jurisdiction.

The parties' reliance on these cases also ignores another relevant and helpful line of authority, going back to the Supreme Court's 1989 judgment in *Andrews*, i.e. that the related concepts of discrimination and equality under s. 15(1) of the *Charter* are comparative and can only be attained and discerned by comparison with others in the social and political setting in which the question arises.[11] Comparison is essential in discrimination cases.[12] Equality does not mean the same outcome for everyone.

Just as our hypothetical female claimant could hardly claim wage discrimination in the federal jurisdiction because an employer in the provincial jurisdiction pays their female employees more for the same kind of work, were funding considered a "service" (which is not admitted), the consideration of federal and provincial funding that is proposed here could not provide the proper basis for the comparison as envisioned by the Supreme Court.[13] Canada is a federal state and the Supreme Court has said that division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical jurisdictional distinctions.[14]

To the degree that the federal spending power involves the application of federal law through legislation such as the *Financial Administration Act,* such legislation does not amount to a distinction which is based upon a "personal characteristic" for the purposes of s. 15(1) of the *Charter* and the other parties have put forward no principle or reason to depart from that proposition here. The Supreme Court has also said differential application of federal law can be a legitimate means of forwarding the values of a federal system and that is also the case here. As noted by the Court in *NIL/TU,O,* here the federal government has responded in a way that enhances co-operative federalism.

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9 Caring Society's Submissions, page 3, footnote 8.

10 *Arnold v Canada (Human Rights Commission)* [1997] 1 F.C. 582, 1996 CanLII 3822 at p. 10.

11 *Reply of the Attorney General of Canada* dated May 21, 2010, pp. 1-2, paras. 1-4.

12 *Supra*, pp. 2-3, paras. 5-10.

13 *Supra*, p. 2, para. 4.

14 *R. v S. (S)* cited in Canada's *Reply*, *supra*, at p. 2, paras. 6-7.

Canada continues to rely on its submissions concerning the *Shubenacadie* case[15] and says the Commission's reliance on certain comments by the Federal Court of Appeal is misguided. Those comments regarding the applicable head of power – i.e. the spending power or s. 91(24) - are *obiter dicta* and only concerned the Band's administration of its social assistance program. The Court of Appeal did not have to consider the allegation that the federal government provided a service by funding the Band because the Tribunal determined that such funding was not a service. The correctness of that determination was never challenged on the subsequent judicial review application argued before the Federal Court, Court of Appeal or the Supreme Court of Canada.

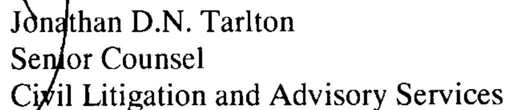
Conclusion

Canada's argument goes to the scope of the *Canadian Human Rights Act,* the jurisdiction of a federal human rights tribunal and the appropriateness of that body to adjudicate a complaint about the federal funding of a provincial undertaking. It is not about immunity. The complainants' ostensible concern is that child welfare agencies are putting too many Indian children into care. If that is so, then they must acknowledge the statements of the Supreme Court and their own witnesses that the standards and authorities for doing this are provincial. Federal funding under Directive 20-1 does not change this fact. These agencies do not provide a service that is integrally bound up with a federal work, undertaking, service or business. The funding they receive does not constitute a service either. The consideration of federal and provincial funding that is proposed here does not provide the proper basis for the comparison as envisioned by the Supreme Court.

Accordingly, federal human rights legislation does not apply here and the Tribunal lacks the jurisdiction to hear the complaint.

For the above reasons, we ask that Canada's motion to dismiss the complaint be granted.

Respectfully submitted,



Jonathan D.N. Tarlton
Senior Counsel
Civil Litigation and Advisory Services

JT/snc

Enclosure

c.c. David Nahwegahbow
Paul Champ
Michael Sherry
Owen Rees/Patti Latimer/Vanessa Gruben
Daniel Poulin/Samar Musallam

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15 Canada's *Submissions*, *supra*, footnote 2, p. 20, paras. 72-73.