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By E-Mail

December 17, 2010

Maryse Choquette
Registry Officer
Canadian Human Rights Tribunal
11th Floor, 160 Elgin Street
Ottawa, Ontario
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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 response to the AFN Submissions on Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples ("Declaration"), dated December 9, 2010.

Analysis and Application to the Complaint

Canada endorsed the Declaration on November 12, 2010 in a manner fully consistent with its Constitution and laws by issuing a Statement of Support in which it reaffirmed its commitment to promoting and protecting the rights of Aboriginal peoples at home and abroad. As noted in the Statement of Support, the Declaration is an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances.

The Declaration is not a legally binding instrument. It was adopted by a non-legally binding resolution of the United Nations General Assembly.[1] As a result of this status, it does not impose any international or domestic legal obligations upon Canada. As Canada noted in its public statement of support, the Declaration does not change Canadian laws. It represents an

[1] See: United Nations Charter, Articles 10, 13(1).

expression of political, not legal, commitment. Canadian laws define the bounds of Canada's engagement with the Declaration.[2]

The issue before the Tribunal on this motion is whether the Tribunal has jurisdiction to hear the complaint. The AFN's submissions regarding the Declaration do not address the issue of jurisdiction but rather speak to its general views regarding the Declaration. With respect, Canada's endorsement of the Declaration is simply not relevant to the issue of whether the Tribunal has jurisdiction to hear the complaint.

As such, Canada continues to rely upon its earlier written submissions and says the Declaration does not alter the *Constitution Act, 1867,* the common law or the clear provisions of the *Canadian Human Rights Act*.[3]

Consequently, it would be incorrect for the Tribunal to find that the Declaration gives it jurisdiction to hear the complaint and to use the Declaration to override Canada's existing domestic legal framework, including the jurisdictional limitations set out in the Constitution, the common law and the *Canadian Human Rights Act*.

Moreover, the jurisprudence the AFN purports to rely upon does not assist their argument. In *Reference re Public Service Employees Act (Alta)*[4], the Supreme Court had to consider whether the right to strike was protected under section 2(b) of the *Charter*. The substantive *Charter* analysis in this 1987 decision of the Supreme Court has been supplanted by more recent decisions of the Court.[5] In any event, the 1987 decision considered the effect on *Charter* interpretation of international treaties which, unlike declarations, are legally binding instruments that Canada has signed and ratified.[6]

The Declaration is irrelevant to a determination of the jurisdiction of the Tribunal. The AFN's complaint asks the Tribunal to determine issues outside its jurisdiction.[7] Canada's endorsement of the Declaration does not affect that defect.

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2 Canada's Statement of Support, November 12, 2010. Available at: http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp; Question 1, Frequently Asked Questions on the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010. Available at: http://www.ainc-inac.gc.ca/ap/ia/dcl/faq-eng.asp

3 *Reply of the Attorney General of Canada*, dated May 21, 2010, pp. 7-8, paras. 21-25.

4 [1987] 1 S.C.R. 313.

5 *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, [2007] 2 S.C.R. 391.

6 *Supra*, paras. 69-71, 76. See also: *R. v Hape*, cited in Canada's *Reply, supra*, footnote 3, at paras. 53-54.

7 *Submissions of the Attorney General of Canada*, dated May 5, 2010, pp. 29-32, paras. 115-126.

The AFN also referred to the Supreme Court judgment in *Reference re Quebec Succession.*[8] That unanimous judgment of the Court dealt with whether the Province of Quebec has a right to unilateral succession. In its reasons, the Court wrote about the underlying principles animating the whole of the Constitution, one of which includes federalism.[9]

The Supreme Court observed that federalism is the response to underlying social and political realities that recognizes the diversity within Confederation and allows provincial governments to develop their societies within their spheres of jurisdiction.[10] The Court recognized differences between provinces as a rational part of the political reality in the federal process.[11]

In its previous submissions before the Tribunal, Canada has relied not only on the principle of federalism but on the terms of sections 91 and 92 of the *Constitution Act, 1867,* which determine the jurisdiction of the federal and provincial levels of government.[12] The Supreme Court has said within the context of a section 15 (1) *Charter* claim that the division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction.[13] There can be no question that unequal treatment arising solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a section 5 discrimination claim - whose only basis is that such exercise of power allegedly creates distinctions based upon province of residence. That is what has occurred here.[14]

The Court's attachment to the federalism principle can even be found in the *Reference re Public Service Employees Act* case where McIntyre J. wrote that provinces play their "classic federal role as laboratories for legal experimentation with industrial relations ailments".[15]

The same situation applies here with respect to child welfare services. Moreover, to the extent that the Declaration deals with equality and non-discrimination, the determination of such issue before the Tribunal must be based on the principle of federalism in the application of the *Canadian Human Rights Act.* As noted by the AFN in its submissions, the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights.[16]

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8 [1998] 2 S.C.R. 217.
9 *Supra*, paras. 55-60.
10 *Supra*, paras. 57-58.
11 *Supra*, para. 58.
12 Canada's *Submissions*, *supra*, footnote 7, p. 32, paras. 125-126 and cases cited therein.
13 See: *R. v S. (S.)* cited at Canada's *Submissions*, supra, footnote 7, p. 32, para. 126.
14 Canada's *Submissions*, *surpra*, footnote 7, p. 29, paras. 111-114.
15 *Reference re Public Service Employees Act (Alta), supra,* para. 182.
16 AFN Submissions dated December 9, 2010, p. 11, para. 38.

The Declaration does not amend Canada's constitution nor change the internal mechanisms for resolving discrimination issues within Canada. The *Canadian Human Rights Act* requires more than funding to establish a discriminatory practice and the Tribunal cannot use the Declaration to ignore the fact that Canada is a federal state.

Conclusion

Canada's endorsement of the Declaration has no impact on the issue of the jurisdiction of the Tribunal. The AFN is asking the Tribunal to find that the Declaration gives it jurisdiction to hear the complaint and to use the Declaration to override Canada's existing domestic legal framework. Such proposition cannot be correct. The Declaration does not change Canadian laws. The case law relied upon by the AFN does not support this argument – it supports Canada's instead.

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

Respectfully submitted,

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JT/snc

Enclosure

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