Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

REPLY OF THE ATTORNEY GENERAL OF CANADA TO THE WRITTEN REPRESENTATIONS OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY AND THE CANADIAN HUMAN RIGHTS COMMISSION

OVERVIEW

1. In his reasons for judgment dismissing the judicial review application brought by Canada from the compensation orders made by the Canadian Human Rights Tribunal (the "Tribunal"), Favel J. made it clear that his order was not to be taken as foreclosing the ability of the parties to negotiate an appropriate settlement of the claims concerned. To the contrary, he said;

> "Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those negotiations.
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> As Pitikwahanapiwin (Chief Poundmaker), a nation-builder in his own right, so aptly said:
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> > We all know the story about the man who sat by the trail too long, and then it grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail.
>
> In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.[1]

2. It is in the spirit of reconciliation that Canada has sought to resolve, through negotiation, the claims raised both before this Tribunal and in the Federal Court class actions.

3. It is well within the authority of this Tribunal to make a determination to amend its orders as necessary. Indeed, this is not the first time the Tribunal has significantly amended an order, as demonstrated by the order in 2022 CHRT 8. Although consent is not a precondition to jurisdiction, both the Commission and the Caring society agreed that the Tribunal had the authority to make that order.

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[1] Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada, 2021 FC 969 at paras 300 – 301.

4. Both the Caring Society and the Commission argue, however, that in effect this Tribunal is functus and cannot alter its previous orders except for very limited circumstances of clerical errors. Notwithstanding this position, and ignoring its argument that the Tribunal is functus, the Caring Society in its submission seeks to add a new group (First Nations children removed from their homes, families and communities and placed in non-ISC funded placements) to those who should be compensated under the order of this Tribunal.

5. The extensive background set out by the Caring Society does not address what it is at issue in this case. The question at issue is whether the Tribunal should now accept an historic settlement substantially crafted by those who are most affected by this case, which provides a very broad range of benefits to many tens of thousands of claimants as satisfying its compensation order and framework.

6. Significantly, those directly representing the First Nations rights holders, being the Assembly of First Nations, the Chiefs of Ontario and the Nishnawbe Aski First Nation, all support this motion. The Caring Society, which has not provided evidence that they have received authority to represent rights holders, is opposed.

7. The Federation of Sovereign Indigenous Nations, which first sought to oppose the motion, have now withdrawn their intervention.

THE TRIBUNAL CAN MODIFY ITS EARLIER ORDERS

8. This Tribunal has clearly indicated that it has retained jurisdiction over this matter.[2] As a result, it is not functus as it has not yet exhausted its jurisdiction. Since the Tribunal is not functus, the decision in *Chandler*[3] relied upon by the Caring Society does not apply. Simply put the Tribunal can change a previous decision if new circumstances arise. In this case, the new circumstances are the Final Settlement Agreement arrived at by all of the parties to the class action and supported by all of the parties before this Tribunal except for the Caring Society.

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[2] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7 at paras 51 – 52; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* 2022 CHRT 8 at paras 154 – 169.

[3] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

9. The issue before the Tribunal in the present motion is whether the Final Settlement Agreement satisfies the Tribunals compensation order. Whether it does so is for this Tribunal to decide.

10. If the excessively formalistic and limited interpretation of the authority of the Tribunal argued for by the Caring Society and the Canadian Human Rights Commission were accepted by the Tribunal, it would arguably become impossible for parties to negotiate a settlement which differed in any particular from a prior Tribunal order. This would leave the Tribunal hamstrung and unable to endorse the very thing the dialogic approach and Justice Favel's reasons seek to encourage. [4]

11. The proposition that because of the doctrine of "*stare decisis* this Tribunal is bound to follow the decision of the Federal Court, its reviewing court, which has already disposed of the issue before it"[5] fails to take into account the central fact that the court itself endorsed the need for negotiations among the parties. The Court called for negotiations to be encouraged and fostered, whether or not the case involves constitutional issues or Aboriginal rights.[6]

12. Further, the Federal Court made a determination that the Tribunal's decision was reasonable; this does not mean another approach is not appropriate, or indeed is not desirable. Reasonableness, in the context of judicial review, does not mean that the Court would have made the same decision as the tribunal or decision-maker below, which is granted deference. It simply means that the decision at issue falls into a "range" of reasonable outcomes.[7]

13. As the Caring Society itself appears to concede, the issue of consent is a red herring, as it is trite law that consent cannot confer jurisdiction.[8] The Tribunal either has the authority to make the order sought or it does not. The retention of jurisdiction grants the Tribunal the authority to make the order sought.

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[4] Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada, 2021 FC 969 at para 300.
[5] Caring Society Written Submissions at para 105.
[6] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 300.
[7] *Canada (Minister of Citizenship and Immigration) v.* Vavilov, 2019 SCC 65 at para 83.
[8] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 (CanLII), [2007] 2 SCR 86, at para 88.

The distinction which the Caring Society attempts to draw between amendments which aim to seek clarification and facilitate the implementation of remedial orders and those which require a new order that decides "differently " is without substance and cannot be supported. Of note, this Tribunal's order in 2022 CHRT 8 went beyond simply clarifying clerical errors as both the Commission and the Caring Society have argued is the limit of this Tribunal's jurisdiction. [9]

14. The 2022 CHRT 8 order made substantive changes to this Tribunal's previous orders. It ordered Canada to fund at actual costs post majority care; fund additional research by Institute of Fiscal Studies and Democracy; fund on an ongoing basis adjusted for inflation prevention measures at $2500 per person for those persons on reserve and in the Yukon; and, finally, it set March 31, 2022, as the end date for compensation for removed children and their caregiving parents and grandparents.

15. The broad quasi-constitutional authority of the Tribunal, which the Caring Society agrees exists, is more than sufficient to encompass jurisdiction to make the order sought.

16. Throughout this proceeding, the Tribunal has expressly retained its continuing jurisdiction over the matters before it and as the Caring Society notes, fostered dialogue between the parties. This approach, which the Caring Society purports to wholeheartedly support, is antithetical to the limits that are sought to be placed on the Tribunal's authority here.

17. Examining the body of decisions by the Tribunal in relation to this matter demonstrates that the Tribunal does not consider itself to be *functus officio* and, rather, views itself as capable of supervising the implementation of its orders and amending them as needed. As the Tribunal stated in 2020 CHRT 7 at paragraphs 51-53:

> (51) The Panel in its Compensation Decision, has clearly left the orders open to possible amendments in case any party, including Canada, wanted to add or clarify categories of victims/survivors or wording amendments to the ruling similar to the process related

[9] See also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 6.

to the Tribunal's ruling in 2018 CHRT 4 and also informed by the process surrounding the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35.

While this practice is rare, in this specific ground-breaking and complex case it is beneficial and also acknowledges the importance of the parties' input and expertise in regards to the effectiveness of the Panel's orders.

[52] The Panel explicitly retained jurisdiction over compensation (see Compensation Decision at para. 277), including on a number of issues as part of the compensation process consultation, welcoming any comments, suggestions and requests for clarification from any party in regards to moving forward with the compensation process and the wording or content of the orders. For example, whether the categories of victims/survivors should be further specified or new categories added (see Compensation Decision at para. 270).

[53] This is a clear indication that the Panel was open to suggestions for possible modifications of the Compensation Decision Order, welcoming comments and suggestions from any party.

18. No settlement is perfect.[10] This settlement, however, represents the significant efforts of the parties to engage in the dialogic approach, as encouraged by the Federal Court. Settlements necessarily include balancing of benefits and compromises, and in this case the benefits are clear.

19. The proposition put by the Caring Society that the Tribunal "should stake its territory" by refusing to allow "settlement agreements reached in the context of a civil claim to invalidate rulings made by human rights tribunals"[11] misapprehends what is being sought here.

20. The parties in no way seek to invalidate the orders, rather they seek to have the Tribunal recognize the ability of parties representing rights holders and claimants to reach consensus as to how best to move forward towards reconciliation by delivering significant benefits to a broad range of claimants while respecting the spirit and thrust of the Tribunal orders.

THE SETTLEMENT IS FAIR, REASONABLE AND SHOULD BE APPROVED BY THIS TRIBUNAL

21. It is not suggested that the settlement is aligned in every particular with the compensation orders. The Caring Society concedes at paragraph 60 of its submissions that the Tribunal itself

[10] *Tk'emlúps te Secwépemc First Nation v. Canada*, 2021 FC 988 at para 64.
[11] Caring Society Written Submissions at para 140.

noted that "not all supports, products and services currently approved under Jordan's Principle will meet the definition and that some measure of reasonableness is required."[12]

22. The Assembly of First Nations together with Moushoom class counsel, who are the Federal Court appointed counsel representing the classes in the class actions, have designed an approach to compensating the claimants in a manner that is proportionate to harms suffered and focuses its attention first on those most affected, the children removed from their homes and families and those most significantly affected by a denial, delay, or a gap in essential services. In doing so, the AFN consulted with First Nations leadership across Canada,[13] and also with the Caring Society.[14] Canada fully supports the decisions made by these parties. As noted above, so too do those directly representing the First Nations rights holders before this Tribunal.

23. The settlement extends the availability of compensation back to 1991, some fifteen years prior to the period covered by the Tribunal orders. By doing so, it ensures that many more tens of thousands of those affected will receive redress for the discrimination found by the Tribunal. As well, the settlement will potentially provide compensation to removed children and those significantly affected by a denial, delay, or a gap in essential services, which is proportionate and goes beyond the amounts ordered by the Tribunal.

Non-ISC funded placements

24. At paragraph 121 of their submission, the Caring Society suggests that First Nations children removed from their homes, families and communities and placed in non-ISC funded placements are intended to be compensated under the terms of the Tribunal's order. Such children are not compensated under the settlement.

25. This is an entirely new proposition and one not raised at any point in the proceedings leading to the issuance of the compensation order. The Caring Society should not be permitted

[12] Caring Society Written Submissions at para 60, citing to *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15 at para. 148.
[13] Affidavit of Janice Ciavaglia, affirmed July 22, 2022 ["Ciavaglia Affidavit"], at para 46.
[14] Ciavaglia Affidavit at para 51.

to assert this new issue at this late date in the proceedings as a reason not to accept that the settlement satisfies the Tribunal's compensation orders.

26. By seeking to add what amounts to a new group of individuals who should be covered by this Tribunal's order, the Caring Society seeks to fundamentally alter the existing order of the Tribunal.

27. This group was not identified in previous argument before the Tribunal and consequently no evidence or argument has been made before this Tribunal on this point.

THE MOTION IS NOT PREMATURE

28. The Caring Society submits that this motion is premature because there are steps yet to be taken leading to the implementation of the settlement, primarily dealing with the details of the Jordan's principle assessment methodology and the distribution protocol, which is scheduled to be reviewed by the Federal Court on December 20, 2022.

29. It is clear from the explanation set out in the affidavit of Janice Ciavaglia that the parties are proceeding on a phased basis that includes ongoing consultation with experts, rights holders and claimants in order to ensure that when finalized and approved by the Court, there will be broad acceptance by First Nations and claimants of the process. Canada supports this approach and submits that the motion is not premature as the interests of potential claimants will be adequately considered by the Federal Court in its review of the methodology and protocol.

30. Since the opt out process approved by the Federal Court gives claimants until February 19, 2023, to opt out, claimants will have the ability to become aware of the full details of the methodology approved by the Court before making the decision as to whether to opt out.

31. Since acceptance by the Tribunal of the settlement as satisfying its order is a pre-condition to implementation of the settlement, claimants will also be aware of the decision made by the Tribunal before they must determine whether to opt out of the settlement.

Dated: September 14, 2022

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LIST OF AUTHORITIES

Jurisprudence

British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23 (CanLII), [2007] 2 SCR 86

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