Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 95
Date: August 2, 2024
File No.: T1340/7008

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

- and -

Nishnawbe Aski Nation

- and -

Amnesty International

- and -

First Nations Leadership Council

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Context

[1] In 2016, the Tribunal released its *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 2 [Merit Decision] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve and in the Yukon in a systemic way not only by underfunding the FNCFS Program but also in the manner that it designed, managed and controlled it. One of the worst harms found by the Tribunal was the FNCFS Program creating incentives to remove First Nations from their homes, families and communities. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice in the best interest of children. The Tribunal ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the *1965 Agreement* in Ontario to reflect the findings in the Merit Decision. The Tribunal determined it would proceed in phases for immediate, mid-term and long-term relief so as to allow immediate change followed by adjustments and finally, sustainable long-term relief informed by data collection, new studies and best practices as identified by First Nations experts, the specific needs of First Nations communities and of First Nations Agencies, the National Advisory Committee on child and family services reform and the parties.

[2] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings. In 2020 CHRT 20, a decision upheld by the Federal Court in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969 (CanLII), [2022] 2 FCR 614, this Tribunal stated that:

> Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[3] The issue of urgent services under Jordan's Principle was discussed by this Tribunal in previous rulings (See, 2017 CHRT 35 at para. 10; 2019 CHRT 7 at paras. 58, 81-82, 87 and 89; and 2020 CHRT 36 at para. 44).

[4] The Tribunal remains seized on all its previous orders except its compensation orders, to ensure that they are adequately implemented to eliminate the systemic racial discrimination found and that it does not reoccur in the future.

[5] On June 3, 2024, the BC First Nations Leadership Council (FNLC) filed a Motion Record (the motion) seeking leave and an order from this Tribunal to intervene in these proceedings, as an interested party. The FNLC wishes to participate in the Jordan's Principle compliance motion filed by the First Nations Child and Family Caring Society of Canada (Caring Society) on December 12, 2023 and in the cross motion filed by the Canada on March 15, 2024 (the motions).

[6] BC is home to 204 First Nations, representing approximately one third of all First Nations in Canada, each with their own cultures, languages, laws, and traditions. The FNLC was formed in 2005 by a historic Leadership Accord and is a collaborative political working

relationship between the Union of BC Indian Chiefs (UBCIC), the First Nations Summit ("FNS") -, and the BC Assembly of First Nations ("BCAFN"). UBCIC, BCAFN and FNS have come together to address issues of common concern to First Nations peoples in British Columbia ("BC").

[7] Since its inception, the FNLC has engaged in strategic policy discussions with the governments of Canada and BC, seeking a common vision for systemic change by advocating for a government-to-government relationship based on respect and recognition of First Nations peoples' rights. This has included acting jointly as intervenors on a number of matters, engaging in legislative and policy reform at the provincial and federal level, and sitting at bilateral and trilateral tables with the governments of Canada and BC.

[8] Since the Tribunal issued its decision in 2016 CHRT 2 (the "Merit Decision"), the UBCIC Chiefs-in-Assembly have issued several resolutions directing the UBCIC Executive to ensure the implementation of the Tribunal's orders and the negotiations toward a Final Settlement Agreement on long-term reform of the First Nations Child and Family Services program and Jordan's Principle.

[9] As part of the resolutions, the Chiefs have resolved that long-term reform properly acknowledge and reflect the distinct and unique needs of First Nations in BC, and are conducted on the basis of free, prior and informed consent.

[10] The parties in this case were asked to provide their views on how this motion should proceed. Further, the parties were provided with an opportunity to provide submissions on the motion. Finally, the First Nations Leadership Council was provided with an opportunity to reply.

II. Parties' submissions

[11] The FNLC does not seek standing in these proceedings beyond the current motion and cross-motion.

[12] The FNLC confirms that it seeks to make written and oral submissions that will be limited to the issues before the Panel in the motion and the cross-motion. Canada has

proposed that the FNLC be limited to written submissions of 15 pages. The FNLC requests the permission to provide written submissions of no more than 25 pages, consistent with what the Panel has granted to other interested parties in the past. This will allow FNLC to make a useful and distinct contribution to the proceedings. The FNLC does not seek to adduce any new evidence.

[13] The FNLC brings this application because of the potential significant effect of the orders made by this Tribunal on its constituency of First Nations in British Columbia. The FNLC submits their expertise and perspective will be of significant assistance to the Tribunal.

[14] The FNLC worked with the Government of Canada on the development of the federal *Act respecting First Nations, Inuit and Métis children, youth and families, SC 20 19 c. 24.* Two of the objectives of this law are to affirm the inherent right of self-government and contribute to the implementation of the *UN Declaration on the Rights of Indigenous Peoples,* GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007), [UNDRIP]. The constitutionality of that enactment, and the significance of *UNDRIP* in Canadian law, were considered at length by the Supreme Court of Canada in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5. The FNLC was an intervenor in that case.

[15] The FNLC submits that it has extensive experience and expertise in the interpretation and implementation of *UNDRIP* into domestic law in Canada and BC.

[16] Moreover, the FNLC submits that there are currently 35 First Nations and First Nations organizations in BC with contribution agreements with Canada for Jordan's Principle enhanced service coordinators, and a Jordan's Principle enhanced service coordinator hub.

[17] Through its direct and collective work on child and family services reform and Jordan's Principle, the FNLC submits that it has developed considerable knowledge and expertise regarding the challenges facing First Nations children, families, and communities, including as related to the provision of child and family services and Jordan's Principle, and the specific issues raised in the Motions.

[18] The BCAFN, an organization of the FNLC, has had additional involvement with specific issues related to long-term reform of the FNCFS program and Jordan's Principle. Part of this work included hosting several gatherings with First Nations leadership in BC, and the production of an engagement report (the "Engagement Report") in 2022. The Engagement Report highlighted that the BC-region has the highest level of denials in Canada, long waiting periods, and lack of communication, leading to breakdowns in trust between Jordan's Principle applicants and community staff administering Jordan's Principle. The report further highlighted that while some Nations may want to assume responsibility for the administration of Jordan's Principle, many may not want to assume those duties, or may not have the capacity to do so. Through these engagements, First Nations in BC have highlighted specific issues that are of relevance to the issues before this Tribunal.

[19] The FNLC, with the governments of Canada and BC, established the Tripartite First Nations Child and Family Working Group ("TWG"). Work at TWG has included the FNLC's work on the development of the Federal Act and BC's Bill 38, providing strategic policy direction on matters impacting First Nations children and families, and the development of a new fiscal framework to support First Nations child and family service provision and jurisdiction in BC.

[20] The discussion paper Developing a New Funding Model and Approach for First Nations Children & Families, published by the FNLC as part of the TWG, specifically outlined that:

> A funding model and approach for BC will both inform and align with broad national considerations such as the negotiations on long-term reform of ISC's First Nations Child and Family Services program and a renewed approach to Jordan's Principle.

[21] In developing a renewed funding approach for First Nations child and family services in BC, the FNLC has been mandated to ensure the specific needs, interests and priorities of First Nations in BC are reflected in tripartite discussions and agreements through the TWG, and in the ongoing work and discussions that are occurring at the national level.

[22] The FNLC has had extensive involvement in the legal and systemic reform of the child and family services system in British Columbia, focused on ensuring the inherent right of First Nations to care for their children is recognized and upheld.

[23] Moreover, the FNLC has been actively involved in advocacy efforts to achieve support and receive sufficient resources for First Nations jurisdiction over the health and wellbeing of children. In addition to its participation and work at the TWG, the FNLC has been involved in advancing the interests of First Nations in BC in relation to children and families through various other tables and processes, including, but not limited to: participation at the British Columbia Jordan's Principle Committee, established in 2021 (…).

[24] In sum, all parties agree that the FNLC has an interest in the motions and that they bring a different perspective. The parties' submissions focus on the limitations that the Tribunal should impose on the FNLC. The parties rely on this Panel's previous rulings granting interested party status and the different limitations ordered as authoritative and the most relevant to this motion.

[25] Even if the parties agree, the Tribunal must go through the legal analysis and specific factual matrix to determine if the FNLC should be granted interested party status.

III. Applicable Law

[26] The FNLC filed its motion under the Tribunal's new rules. The Tribunal agrees with the parties that this motion ought to proceed under the Tribunal's old rules of procedure (03-05-04). The Old Rules have recently been revised in Canadian Human Rights Tribunal Rules of Procedure, 2021, SOR/2021-137 (the "New Rules"). Given that this case is ongoing and was initiated under the Old Rules, the Old Rules will continue to govern this motion.

[27] The Tribunal agrees with the Commission that for purposes of this motion, there are no material distinctions between the New Rules and the Old Rules. This Tribunal can decide this motion under the Old Rules and the related case law, including the Panel's past rulings granting interested party status to other organizations in the context of this case.

[28] Further, the Tribunal agrees with the parties that the most relevant case law on the question of interested party status is the previous case law in these proceedings given that it's the same case with the identical factual and evidentiary matrix:

> The Panel stresses the importance of considering the context and specific facts of the case in all proceedings before the Tribunal including interested parties' status. Otherwise, it may lead to legalistic, technical and unjust outcomes. Furthermore, the Parties cannot ignore the previous interested party rulings in this case. The approach taken in those rulings is the most relevant and authoritative to this motion given that this is the same case with the same historical context (See 2022 CHRT 26, at para. 38).

[29] This Tribunal recently provided an extensive review of all the interested party requests in these proceedings in 2022 CHRT 26. The Tribunal will not reiterate all its extensive reasons here. The Tribunal continues to rely on its previous rulings and reasons, including the reasons in 2022 CHRT 26.

[30] The *CHRA* contemplates interested parties in s. 50(1) and 48.9(2)(b) and accordingly confirms the Tribunal's authority to grant a request to become an interested party. The procedure for adding interested parties is set out in Rule 8 of the Tribunal's Old Rules (03-05-04). Consequently, the Tribunal has the jurisdiction to allow any interested party to intervene before this Tribunal in regard to a complaint.

[31] The onus is on the applicant to demonstrate how its expertise will be of assistance in the determination of the issues. Interested party status will not be granted if it does not add significantly to the legal positions of the parties representing a similar viewpoint (…). (*Canadian Association of Elizabeth Fry Societies and Acoby v. Correctional Service of Canada*, 2019 CHRT 30 at para. 34).

[32] Furthermore, the Tribunal should adopt a case-by-case holistic approach in considering requests for interested party status. It must also take into account its responsibility under s.48.9(1) of the *CHRA* to conduct proceedings expeditiously and informally in determining the extent of an interested party's participation (*See 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. 3 ("First Nations Caring Society").

[33] In determining the request for interested party status, the Tribunal may consider amongst other factors if:

A) the prospective interested party's expertise will be of assistance to the Tribunal;

B) its involvement will add to the legal positions of the parties; and

C) the proceeding will have an impact on the moving party's interests.

[34] In 2022 CHRT 26, at paragraph 31, this Tribunal discussed the test above:

> (…) while the criteria listed above and developed in *Walden* are still helpful in similar contexts, "in *Attaran v. Citizenship and Immigration Canada*, 2018 CHRT 6 (Attaran), the Tribunal held that what is required is a holistic approach on a case-by-case basis. It cited with approval *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 (NAN)." *Letnes v. RCMP and al*, 2021 CHRT 30 at para. 14. Therefore, the Tribunal case law shows that the analysis must be performed not strictly and automatically, but rather on a case-by-case basis, applying a flexible and holistic approach. *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),* 2022 CHRT 16 at para. 35.

IV. Analysis

- **The FNLC has expertise and knowledge that will be of assistance to the Tribunal and further the determination of the motions**

[35] In 2022 CHRT 26, at paragraph 37, this Tribunal discussed what constitutes a proper assistance to the Tribunal in determining the matter:

> analyzing the expression "further the Tribunal's determination of the matter" the Tribunal considers the legal and factual questions it must determine, the adequacy of the evidence and perspectives before it, the procedural history of the case, the impact on the proceedings as well as the impact on the parties and who they represent. The Panel also considers the nature of the issue and the timing in which an interested party status seeks to intervene. Moreover, if adding another interested party will positively or negatively impact the Tribunal's role to appropriately determine the matter. Finally, the Tribunal will consider the public interest in the matter.

[36] The Tribunal finds the FNLC's experience and expertise on these matters is directly related to arguments about the ongoing implementation of Jordan's Principle as well as issues and arguments raised by the parties respecting the long-term reform of the First Nations Child and Family services program in British Columbia. The FNLC's experience and expertise will be of benefit to the Tribunal in considering the issues of backlogs and urgent requests given that the FNLC submits that the BC-region has consistently experienced some of the highest levels of backlogged Jordan's Principle requests. Moreover, the FNLC alleges this resulted in First Nations children in BC being disproportionately impacted by Canada's non-compliance with the Tribunal's orders.

[37] The Tribunal finds the FNLC can also offer knowledge and expertise on how climate emergencies, including wildfires and floods, affect urgent requests under Jordan's Principle in BC, and can propose solutions to address this issue which is an issue raised in these motions.

[38] Finally on this point, the Tribunal finds that the FNLC has demonstrated its ability to assist this Tribunal in the determination of the motions. Given the history and complexity of this case, this criterion is of great importance in this case.

- **The FNLC will bring a unique perspective**

[39] The Tribunal finds the FNLC can help ensure that the diverse perspectives of First Nations in BC are considered with respect to the issues raised in the motions at the Tribunal. Given the implementation of Jordan's Principle in BC through First Nations Service Coordinators, as well as the context of First Nations jurisdiction over child and family services in the province, FNLC and its member organizations have the ability to provide the specific perspectives and direct experience of BC First Nations.

- **FNLC's involvement will add to the legal positions of the parties**

[40] The FNLC has decades of experience in advocating for and advancing the specific interests of First Nations in BC, based upon their unique and distinct realities. Moreover, as already mentioned above, the FNLC has worked with the government on an *Act respecting First Nations, Inuit and Métis children, youth and families.* The Tribunal finds that the FNLC can provide legal submissions about the specific conditions of First Nations in BC.

Furthermore, the Tribunal finds that the FNLC's knowledge and expertise will add to the legal position of the parties by providing the important and specific perspective of First Nations in BC on the issues raised in the Motions.

- **Impact on FNLC's interests**

[41] The Tribunal finds that First Nations in BC, who form the membership of the FNLC organizations, have a significant interest in any orders made by this Tribunal as sought in the Motions, given that First Nations children and families in BC will be directly impacted by those orders. As mentioned above, the FNLC alleges that First Nations children in BC are disproportionately impacted by Canada's non-compliance with the Tribunal's orders.

V. Conclusion

[42] The Tribunal is satisfied that the test for interested party status applied by this Tribunal including in the Tribunal's past rulings on interested party status in these proceedings has been met. The Tribunal finds that the FNLC will be of assistance to this Tribunal in determining the motions, will bring its unique perspective, will add to the legal positions of the parties and the motions' proceedings will have an impact on the FNLC's interests.

VI. Order

[43] Pursuant to section 50(1) of the *CHRA* and Rules 3 and 8(1) of the Tribunal's Rules of Procedure (03-05-04), the Tribunal grants the Motion.

The Tribunal grants the First Nations Leadership Council interested party status with some limitations.

The limitations are as follows:

- The FNLC's status and participation will be limited solely to the Caring Society's motion and Canada's cross-motion (the motions) currently before the Tribunal.
- The FNLC's status and participation will be limited to participating in CMCC's related to the motions, making submissions, and appearing at the related hearing on the motions.

- The FNLC will not be permitted to adduce any further evidence, raise new issues, or otherwise supplement the record of the parties. The FNLC's participation and submissions will be limited to the Tribunal's current evidentiary record. The FNLC's participation and submissions will be limited to the issues currently before the Tribunal by way of the motions at issue.

- The FNLC may not cross-examine the affiants and may not request postponements to the motions' schedule.

- The FNLC will not delay the proceedings and must file its written submissions when directed. Given the time constraints any delay will be deemed a renunciation by FNLC to participate in the proceedings.

- The FNLC's status and participation will be limited to 25 pages of written submissions and must not repeat the positions of the other parties. If another aspect of a party's position is shared by the FNLC, the FNLC may indicate clearly that it adopts the same position on this aspect. The FNLC will bring a different perspective than the other parties and will provide its unique perspective and will aim to further the Panel's determination of this matter. The FNLC will add to the legal positions of the parties. The FNLC will not participate in other issues that are in front of the Tribunal in this case.

- The FNLC will have an hour to present their oral submissions. This does not include the time for the Panel's questions, if any, and the FNLC's answers to the Panel's questions. This right to oral arguments can be reduced, limited or denied by this Panel if the written submissions are deemed repetitive of the other parties' submissions and/or not adding to the legal positions of the parties and not bringing a different perspective than that of the other parties. In that case, the Panel will consider the FNLC's written submissions as part of its deliberations alongside the submissions and oral arguments of the other parties.

- The parties will be provided with an opportunity to respond to the FNLC's submissions on the motions.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 2, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: August 2, 2024

Motion dealt with in writing without appearance of parties

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