

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2024 CHRT 96

Date: August 9, 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

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Context

[1] The Caring Society brought a non-compliance motion regarding Canada's implementation of Jordan's Principle before this Tribunal. Canada also brought a cross-motion seeking a different approach (the motions). In the course of the motions' proceedings, one day prior to their filing deadline, the Attorney General of Canada (AGC), brought a written request to the Tribunal to seek confidentiality orders to protect sensitive information regarding third party children, caregivers and families. the AGC sought a confidentiality order for 5 categories of information included in the AGC's affidavits and materials and provided redacted copies and unredacted confidential copies to the parties and the Tribunal.

[2] In keeping with the requirements of the *CHRA* found at section 48.9 (1) stipulating that proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (in this case the Tribunal continues to apply the old Rules of Procedure (03-05-04)), the Tribunal issued an interim confidentiality order covering the unredacted materials filed by the AGC to avoid any disruption to the established schedule and to allow all the parties to provide their submissions on the AGC's confidentiality order requests.

[3] Upon consideration of all the submissions, this Tribunal issued a ruling on 4 of the 5 categories of confidentiality order requests, (See 2024 CHRT 92). The Tribunal also requested additional information from the Caring Society before ruling on one outstanding category of confidentiality order requests. The outstanding category concerns the initials of the caregivers of children, details of the children's specific personal and medical details and situations and the precise references to where this information can be found in the materials filed in evidence essentially linking the AGC's evidence to other evidence in the materials filed that could allow anyone from the public to link the information together.

II. Category 1: Paragraphs 24-29 of Ms. St-Aubin's Affidavit

[4] In sum, the AGC submits that the Indigenous Services Canada (ISC) is concerned that the combined effect of the disclosure of these details on the public record could be injurious to the involved individuals. Ms. Matthews' Affidavit makes reference to potential child endangerment, which on its own is highly sensitive and personal. The public interest supports the redaction of this highly specific and sensitive information. Further, this and other information provided in Ms. Matthews' Affidavit (such as the regional location and need for particular type of care), together with the information contained in paragraph 24 of the St-Aubin Affidavit, if unredacted, could lead to the identification of the individuals involved. Disclosure could result in undue hardship.

[5] As mentioned in 2024 CHRT 92, the Caring Society does not agree that the redactions in paragraph 24 of Ms. St.-Aubin's affidavit, which point to portions of Ms. Mathews' affidavit describing proceedings before the Federal Court pose any risk of undue hardship to the individual noted in that paragraph. Ms. Mathews' affidavit is not the subject of a confidentiality order, the proceedings before the Federal Court are matters of public record and, indeed, are also noted in paragraph 27 of Ms. St-Aubin's affidavit in a sentence over which the Attorney General proposes no redactions.

[6] The Caring Society is not opposed to the redacted portions in paragraphs 25-29 of Ms. St-Aubin's affidavit.

[7] The Tribunal determined that the children and their caregivers' information referred to above is not only included in paragraph 24 but is also included in paragraphs 25-29 of Ms. St-Aubin's affidavit. Paragraphs 24 to 29 of Ms. St-Aubin's affidavit are currently under an interim confidentiality order.

[8] This Tribunal grants the confidentiality order requested by the AGC for paragraphs 24-29 of Ms. St-Aubin's affidavit. This ruling replaces the interim confidentiality order which covered paragraphs 24-29 of Ms. St-Aubin's affidavit.

III. Previous questions and comments from this Tribunal

[9] The two cases referred to in paragraphs 24 to 29 of Ms. St.-Aubin's affidavit are before the Federal Court (one was on abeyance until April 22, 2024), under the two caregivers' full names not just initials. However, no other information is available to determine if the health condition of the children will be disclosed publicly or if the children will be identified with their full names, their initials or simply as "the child". At this time, the information in the Court files is limited. Therefore, it is unclear what information is in the public record. The Tribunal is unaware what will be mentioned in the Federal Court's rulings. The Tribunal takes judicial notice that the firm Conway Baxter Wilson is named as representing the caregivers in the two cases. The lawyer in one case is Counsel Wilson and the other lawyer is Counsel David P. Taylor. Given that Conway Baxter Wilson has one of their lawyers, David Taylor representing the Caring Society before the Tribunal, the Panel wonders if Counsel David Taylor is in a position to let the Panel know if the caregivers have consented to share all the information related to the children they care for and contained in Ms. Mathews' affidavit with the Tribunal and the Federal Court? This specific question is exceptional and only raised in response to the Caring Society's comments that the information about the two cases proceeding before the Federal Court is of public record. This is not to be interpreted as the Tribunal's usual process.

[10] The Caring Society followed up on the question directed to their counsel.

[11] The Caring Society confirms that David Taylor is acting as counsel for the applicant on both files in front of the Federal Court and noted that any indication that David Wilson (another lawyer at his firm) is counsel for one of the applicants is likely an error in the Federal Court's online registry reporting system.

[12] Counsel Taylor confirms that both caregivers were consulted and provided their consent regarding the information included in Ms. Mathews' affidavit, and regarding the new information provided by way of reply in Dr. Blackstock's affidavit.

[13] Regarding the Federal Court, counsel Taylor advises that information related to the child cared for is contained in the court file in in three documents: (1) the Certified Tribunal

Record; (2) the applicant's affidavit; and (3) the applicant's memorandum of fact and law. The Certified Tribunal Record is the subject of a confidentiality order pursuant to Rule 151 of the Federal Courts Rules. A redacted version of the CTR forms part of the public court record. Exhibits to Dr. Blackstock's second affidavit demonstrate the types of redactions applied. The applicant's affidavit and the applicant's memorandum of fact and law are not the subject of confidentiality orders.

[14] Counsel Taylor indicates that as the Panel has noted, the proceedings in one of the two Federal Court cases were in abeyance until April 22, 2024. The Certified Tribunal Record has been delivered in that matter, but not filed. It also contains information related to the child cared for. It is the intention of the applicant in that matter to seek a confidentiality order similar to the other Federal Court case discussed above if that matter proceeds. This Tribunal will not include the Federal Court case numbers in this ruling to avoid linking the cases to these proceedings and creating a mosaic effect that will be discussed further below.

IV. Analysis

[15] The Tribunal discussed the applicable law in 2024 CHRT 92 and relies on this framework for this ruling. This ruling is to be read with 2024 CHRT 92 given the category 1 of the ruling that is now being addressed here.

[16] The Tribunal went through the analysis set out in section 52 of the *CHRA* and the test developed by the Supreme Court of Canada (SCC) in *Sherman Estate v Donovan*, 2021 SCC 25 [Sherman Estate] for all 4 categories in 2024 CHRT 92. Given that the open court principle is qualified as a constitutional right by the SCC, it is also relevant to the Federal Court's analysis and of the application of rule 151 of the Federal Courts Rules, SOR/98-106.

[17] Rule 151 of the Federal Courts rules address motions for confidentiality order requests:

- (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

[18] Of note, even if Rule 151 requires a motion, the Federal Court accepted an informal request by way of a letter in its consideration of the confidentiality request referred above by Counsel Taylor.

[19] The Federal Court ruled as follows:

CONSIDERING the facts and submissions relevant to the request as set out in the said letter, and the consent of both parties;

AND CONSIDERING that in the circumstances the Court is satisfied that a confidentiality order should issue to protect disclosure of those portions of the CTR which contain sensitive personal identifying information of the Applicant, her minor children, and the children's father;

THIS COURT ORDERS that:

1. The Applicant's informal request is granted.
2. The unredacted certified tribunal record shall be sealed from the public record.
3. The public copy of the certified tribunal record shall be redacted to protect the sealed information, as agreed by the Applicant and Respondent.
4. The Applicant shall transmit a redacted version of the certified tribunal record by no later than January 16, 2024.

[20] While the Tribunal does not have the specific details of the sensitive personal identifying information that was ordered confidential by the Federal Court this Tribunal finds the Federal Court's ruling and reasons to be helpful. This is not determinative on the outcome of the confidentiality requests before this Tribunal. However, the references to the Federal Court cases in the AGC's materials filed with this Tribunal and their part in the mosaic effect is discussed below.

[21] The Tribunal will now go through the analysis for category 1 of the confidentiality order requests, including paragraphs 24-29, of Ms. St-Aubin's affidavit.

- i. **Does the Court openness pose a serious risk to an important public interest? Is there a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public?**

[22] Yes. The individuals' initials, coupled with specific reference to case-specific details and the information filed by the Caring Society in their materials, may lead an informed reader to make a deduction as to the individuals' identities and the identities of the children involved in the Jordan's Principle requests. The persons involved including the children are third parties and their right to privacy is at risk.

[23] These individuals would not be able to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. Moreover, the risk to this interest is serious given the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individuals' biographical core in a manner that threatens their integrity.

[24] The Tribunal finds there is a real and substantial risk that the disclosure of personal information and medical information will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.

[25] The cases deal with personal and complex medical matters for the children involved. The Tribunal finds the potential for harm can be predicted with reasonable certainty in this case. The materials filed at the Tribunal also posted online and read together will make the identification of the persons possible absent an order under section 52 (1) (c) of the *CHRA*.

[26] Of note, the Federal Court granted confidentiality orders related to the Certified Tribunal Record for one of the two cases on the basis that some materials contain sensitive personal identifying information pertaining to the Applicant, her minor children, and the children's father. Only a redacted version of the CTR forms part of the public court record.

[27] Prior to the obtention of the response to the Tribunal's questions above, the Caring Society mentioned that the information contained in their affidavits related to the proceedings before the Federal Court was a matter of public record. The Tribunal now

understands that the caregivers gave their consent on the information to be provided in the Caring Society's materials filed with this Tribunal and the unredacted portions of the Federal Court materials. The Tribunal does not view this as a consent of full public disclosure at the Federal Court given the confidentiality order requests.

[28] Furthermore, even if both caregivers were consulted and provided their consent regarding the information included in Ms. Mathews' affidavit, and regarding the new information provided by way of reply in Dr. Blackstock's affidavit, there is insufficient evidence to establish that a full consideration of the mosaic effect was performed. Moreover, there is insufficient evidence to find that the information in Ms. Matthews's affidavit was reviewed alongside the AGC's materials and the references to the Federal Court cases with their numbers included in the Caring Society's materials. In other words, the Tribunal has insufficient evidence or information to establish that the caregivers have also considered the AGC's materials as part of their consent since the Caring Society's materials were filed prior to the AGC's and prior to the Tribunal's interim confidentiality orders.

[29] This is especially important given that as mentioned above, the same caregivers who are applicants at the Federal Court, requested or will request, in the case of the second caregiver, confidentiality orders.

ii. Is the order sought necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?

[30] Yes. The Tribunal finds that, as described by Canada relying on the Federal Court's decision in *Canada (Attorney General) v. Khawaja*, 2007 FC 490, there is a real risk for the "mosaic effect" to materialize. The redaction of the individuals' initials, Federal Court case numbers and reference to the specific details in the AGC's materials diminish the likelihood of an informed reader identifying the individuals involved and consequent undue hardship. If this is not done, the materials filed at the Tribunal also posted online read together will make the identification of the persons possible.

[31] Further, the Tribunal's comments on Jordan's Principle in request number 2 of 2024 CHRT 92, at paragraph 58 also apply to these particular cases in request number 1.

A request for Jordan's Principle services does not negate a third-party requestor's privacy or their right to control their child(ren)'s core identity in the public sphere to the extent necessary to preserve their dignity. Moreover, it does not mean that their child(ren)'s sensitive personal and medical information can be made public in these proceedings absent their consent or with some case-by-case exceptions.

iii. As a matter of proportionality, do the benefits of the order outweigh its negative effects?

[32] Yes. The need to protect the third-party children's privacy, dignity, integrity and personal and medical information who are not part of these proceedings outweighs the negative effects of the minimal limits to openness in this case. Moreover, the order will not prevent members of the public and the media from understanding the matter or accessing the evidence and other information in the Tribunal record.

V. Order

[33] Pursuant to section 52 (1) (c) and 52 (2) of the *CHRA*, the confidentiality order is granted for paragraphs 24-29 contained in Ms. St-Aubin's revised affidavit dated March 28, 2024. Given that the information was already filed in a redacted format in compliance with the Tribunal's previous orders the AGC does not have to file another corrected version of Ms. St-Aubin's affidavit.

[34] Ms. St-Aubin's unredacted affidavit dated March 15, 2024 and the unredacted exhibit A attached to Ms. St-Aubin's affidavit filed with the Tribunal and shared with the parties shall be sealed from the public record.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 9, 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 9, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

David P. Taylor, Sarah Clarke and Kevin Droz, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Lacey Kassis, and Adam Williamson, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Christopher Rupar, Senior General Counsel, Paul Vickery, Sarah-Dawn Norris, and Meg Jones, Counsel. Dayna Anderson, General Counsel, Kevin Staska, Samantha Gergely, Counsel, Justice Canada, the Respondent

Maggie Wente and Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party.

Julian Falconer, Christopher Rapson, Shelby Percival, counsel for the Nishnawbe Aski Nation, Interested Party