File No. S230534
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

BETWEEN:

VANCOUVER ABORIGINAL CHILD AND FAMILY SERVICES SOCIETY

PETITIONER

AND:

R.R.

AND:

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

RESPONDENTS

AND:

WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION, THE UNION OF BC INDIAN CHIEFS, AND THE HUMAN RIGHTS COMMISSIONER FOR BRITISH COLUMBIA

INTERVENERS

WRITTEN SUBMISSIONS OF THE INTERVENER, HUMAN RIGHTS COMMISSIONER FOR BRITISH COLUMBIA

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INTRODUCTION

1. At the heart of this judicial review is the question of whether those engaged in the child welfare system should be entitled to the protections and remedies afforded by the *Human Rights Code*, R.S.B.C. 1996 c. 210 [*Code*]. The Petition seeks to set aside a decision of the British Columbia Human Rights Tribunal (the "Tribunal") finding that the Vancouver Child and Family Services Society ("VACFSS") discriminated against an Afro-Indigenous mother with disabilities contrary to s. 8 of the *Code* by allowing stereotypes to permeate its decisions to retain custody of her children and to strictly control her access to them (*R.R. v Vancouver Aboriginal Child and Family Services Society (No. 6)*, 2022 BCHRT 116 (the "Decision")).

2. The Petitioner seeks review of the Decision on several grounds, including that the Tribunal: exceeded its jurisdiction by making findings about custody and access which are within the exclusive jurisdiction of the Provincial Court; misapprehended the effect of a Provincial Court order thereby allowing an impermissible collateral attack on that order; and, impugned valid legislation (Written Argument of the Petitioner VACFSS ("Petitioner's Submissions") at para 105). The Petitioner's submissions invite this Court to carve out child welfare services from the protection from discrimination in the provision of services customarily available to the public afforded by s. 8 of the *Code*.

3. The Human Rights Commissioner for British Columbia (the "Commissioner") is an independent officer of the Legislature with a statutory mandate to protect and promote human rights in the province. She intervenes in this judicial review to make four submissions respecting the Tribunal's jurisdiction.

4. First, the Commissioner submits that s. 8 of the *Code* clearly provides the Tribunal with jurisdiction over complaints of discrimination regarding child welfare services. This jurisdiction includes the ability to make all factual and legal determinations necessary to adjudicate such complaints.

5. Second, the Commissioner submits that the jurisdiction of the Provincial Court with respect to child welfare issues does not oust the Tribunal's jurisdiction to consider and address discrimination respecting such services. Where the issue of interpreting and applying the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 [*CFCSA*] arises in the course of a complaint before the Tribunal, the Tribunal has jurisdiction to delineate the relevance of any statutory imperatives imposed by the *CFCSA* on its discrimination analysis. Moreover, the Tribunal can consider whether the *CFCSA* itself contributes to discrimination regarding child welfare services.

6. Third, the Commissioner submits that the Tribunal does not lose jurisdiction over a complaint of discrimination regarding child welfare services where Provincial Court child welfare proceedings have resulted in a consent order. In such circumstances, the Tribunal may apply the discretionary doctrines of *res judicata*, issue estoppel and collateral attack. However, the possibility that these doctrines will lead to a successful defense for a party in a Tribunal proceeding does not negate the Tribunal's jurisdiction.

7. Finally, the Commissioner submits that limiting the Tribunal's jurisdiction or ability to apply the *Code* where child welfare services are concerned undermines the Legislature's intention to provide remedies and accessible procedures for addressing discrimination against highly marginalized and vulnerable members of our society. There is no legal or policy basis to carve out child welfare services from the ambit of the *Code*'s protections and doing so would further marginalize such claimants and run counter to the *Code's* broad and remedial purposes.

8. The Commissioner takes no position on the merits of the Petition and relies on the facts as set out by the Tribunal in the Decision.

ARGUMENT

A. The Scope of the *Code*'s Protections

9. This Petition for judicial review alleges that the Tribunal was without jurisdiction or ability to adjudicate whether the child welfare services at issue were delivered in a discriminatory manner (Petitioner's Submissions at paras. 105, 108-109, 120-135). Put another way, the Petition invites this Court to consider whether child welfare falls beyond the scope of services to which s. 8 of the *Code* applies.

10. Consideration of this issue requires an appreciation of the interpretive principles specific to human rights legislation, the correct approach to statutory interpretation and the purposes of the *Code.*

Interpretive Principles

11. The *Code* is quasi-constitutional in nature and is often "the final refuge of the disadvantaged and disenfranchised". As a result, the protections of the *Code* should be interpreted broadly to give effect to its remedial purposes to provide relief to victims of discrimination (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 546-547; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para. 33; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed., (Toronto: LexisNexis, 2022) Ch 19, § 19.01 [2] [*Sullivan*]).

12. For the same reasons, exceptions to human rights legislation must be narrowly construed (*Zurich Insurance v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339) and clearly and expressly stated: *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81.

13. The *Code*'s protections extend to specific areas of life so intertwined with one's identity and dignity that protection from discrimination is necessary in order to further the purposes of the *Code.* These protected areas include employment (s. 13),

tenancy (s. 10), professional associations (s. 14) and – most salient for the purposes of this judicial review – services customarily available to the public (s. 8).

14. The question of whether or not child welfare services fall within the ambit of s. 8 of the *Code* is fundamentally a question of statutory interpretation, the starting point for which is the modern approach outlined by E.A Driedger and adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The language of s. 8

15. Section 8 of the *Code* provides:

> **Discrimination in accommodation, service and facility**
>
> **8** (1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.
>
> (2) A person does not contravene this section by discriminating
>
> (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or
>
> (b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

16. The *Code* does not expressly define the term "services." Instead, the plain language of s. 8 requires only that a service be "customarily available to the public" so as to bring it within the purview of the *Code*. In the absence of a definition, and in keeping with the broad and liberal approach appropriately taken to the interpretation of the *Code*, "services" has been broadly defined in the jurisprudence (*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 49).

17. Consistent with this approach, human rights tribunals across Canada have found that child welfare services are "services" within the meaning of human rights legislation (*Murphy v. British Columbia (Ministry for Children and Families) (No. 2)*, 1999 BCHRT 19; *Murphy v. British Columbia (Ministry for Children and Families)*, 1999 BCHRT 8; *Ashton v. IDM Youth Services and another (No. 2)*, 2018 BCHRT 110; *BB v. B.C. (Min. of Children and Family Development) and others*, 2015 BCHRT 188; *PL v. BC Ministry of Children and Family Development and others*, 2023 BCHRT 58*; N.B. v. York Region Children's Aid Society*, 2017 HRTO 639; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2 [*First Nations Child and Family*] aff'd 2021 FC 969).

18. The Legislature has clearly turned its mind to exceptions to s. 8. First, it has included an overarching exception to s. 8(1) for conduct that would otherwise offend that provision: the "*bona fide* reasonable justification" defense. The *bona fide* reasonable justification exception reflects the Legislature's intention to balance competing values and interests *(Dickason v. University of Alberta,* [1992] 2 S.C.R. 1103 at 1121). For the purposes of the *Code* to be realized, the Tribunal must sometimes consider a respondent's other legal responsibilities as part of the *bona fide* reasonable justification analysis, which is not uncommon (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 at paras. 20-21 [*Grismer*]).

19. Further, as the language of s. 8(2) makes clear, the Legislature has identified specific types of services and discrimination to be excluded – namely discrimination

on specific grounds in the provision of life or health insurance benefits and or the maintenance of public decency. Section 8 contains no exclusion for child welfare services. In the absence of language setting out a clear and express exemption for such services, in the Commissioner's respectful submission, there can be no question that s. 8 of the *Code* generally applies to the provision of child welfare services.

The Purposes of the Code

20. Reinforcing the intention reflected in the language of s. 8 that child welfare services not be carved out from the scope of s. 8 are the *Code*'s broad and remedial purposes, set out in s. 3 as follows:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

21. The fundamental importance of these aims is reflected in the *Code*'s recognition as quasi-constitutional legislation and in s. 4 which provides that, where there is conflict between the *Code* and another enactment, the *Code* prevails.

22. The modern approach to statutory interpretation, together with the interpretive principles specific to human rights legislation can lead to no conclusion other than that child welfare services fall within the ambit of s. 8 of the *Code*.

B. Effect of the *CFCSA*

23. Among other things, the Petitioner argues that the Tribunal does not have the jurisdiction to comment on whether or not there is discrimination in child welfare services contrary to the *Code* because the Provincial Court has exclusive jurisdiction over decisions and orders about custody and access under the *CFCSA* (Petitioner's Submissions at paras. 120-121). The Respondent AGBC argues that, while the Tribunal can consider whether services have been delivered in a discriminatory manner, it cannot determine the merits of a child welfare matter in doing so (Written Submission of the Respondent AGBC ("AGBC's Submissions") at para. 129).

24. These arguments imply that the *CFCSA*'s grant of jurisdiction to the Provincial Court somehow ousts the Tribunal's jurisdiction to consider discrimination in the provision of child welfare services. In the Commissioner's respectful submission, such an approach fails to take into account: (1) the language of the *CFCSA*; (2) the principles to be applied when considering overlap between two statutes enacted by the same legislature; and (3) the primacy of the *Code*.

25. Neither the *Code*, nor the *CFCSA*, contain language evidencing an intention to excise services provided pursuant to the *CFCSA* from the protections otherwise afforded by s. 8 of the *Code*. Nor does the *CFCSA* contain language affirming an intention to confer "exclusive" jurisdiction on the Provincial Court over all legal and factual issues related to child welfare proceedings. The Provincial Court is a court of competent jurisdiction to issue orders under the *CFCSA* (s. 1(1)). However, nothing in that statute purports to exclude other decision makers from interpreting or applying the *CFCSA* if necessary to fulfill their own mandates.

26. The *CFCSA* does, however, expressly limit who may or may not be held liable for its administration in civil proceedings. Section 101 exempts persons acting in the exercise of powers or duties under the *CFCSA* from liability for damages - though it maintains vicarious liability for a government or Indigenous body that would otherwise be accountable for the actions of such an individual. Had the Legislature

intended to further limit the liability of service providers acting pursuant to the *CFCSA* by immunizing them from liability under the *Code*, it could have done so, but did not.

27. Interpreting the *CFCSA* as ousting the Tribunal's jurisdiction over child welfare services under the *Code* would also be inconsistent with the presumption of coherence. It is presumed that statutes enacted by the same legislature can be applied coherently and given full effect, even if they overlap in the sense that both could apply to the same set of facts. Where overlap exists, conflict may occasionally arise. However, conflict between statutes enacted by the same legislature should be narrowly construed and avoided wherever possible (*Sullivan* at § 11.03 [4]). Where true conflict is unavoidable, it may be resolved through interpretation or through an explicit provision by the Legislature giving precedence to one statute over the other (*Sullivan* at § 11.03 [4]).

28. The Respondent AGBC argues that there is operational conflict between a decision of the Tribunal about discrimination in child welfare services and the actions of service providers who administer the *CFCSA*. However, operational conflict arises only "where it is impossible to comply with two administrative decisions in that they are in direct operational conflict" (*British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at para. 53; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 54).

29. The Commissioner submits that there is no operational conflict between the *CFCSA* and the *Code*. The *Code*'s internal limits are sufficient to resolve any prospect of operational conflict, which does not arise merely because the Tribunal finds discrimination regarding child welfare services. For example, the Tribunal's power to defer or dismiss complaints (ss. 25 and 27(1)(f) of the *Code*) and the two-step discrimination analysis employed by the Tribunal to all claims of discrimination permit consideration of other legal proceedings and or a respondent's other legal obligations. Moreover, if the requirements of the Tribunal's justification analysis require that, to avoid discrimination, any assessment be based on evidence rather

than stereotype, this does not create any operational conflict for service providers administering the *CFCSA* who are subject to a duty under the *CFCSA* to prevent discrimination under the *Code* (*CFCSA*, s. 3(b.1)).

30. Even if there were some form of conflict between these two statutes, the Legislature has expressly provided that the *Code* prevails: *Code*, s. 4. However important the mandate of the *CFCSA* may be, the Legislature clearly intended that it be subordinate to the *Code.*

31. Because there is no conflict between the mandates of the Tribunal and Provincial Court under the *Code* and the *CFCSA*, there is no need to draw any jurisdictional boundaries between them or search for "true" matters of jurisdiction (*Vavilov* at paras. 65-68). Rather, the questions arising in this judicial review concern the Tribunal's powers when determining complaints under the *Code*. These questions have various characterizations for the purposes of determining the standard of review under s. 59 the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

The Tribunal' s ability to consider the CFCSA

32. The arguments advanced by the Petitioner and Respondent AGBC seek to curtail the Tribunal's jurisdiction by imposing rigid limits on the issues the Tribunal may consider in deciding a complaint of discrimination (Petitioner's Submissions at para. 120, AGBC's Submissions at paras. 129-142). In the Commissioner's respectful submission, the imposition of such rigid limits is contrary to established principles of deference to specialized administrative decision-makers set out by the Supreme Court of Canada. It is also at odds with the express language of the *Code*, its broad and remedial purposes and its quasi-constitutional status.

33. In the exercise of its functions under the *Code*, the Tribunal will at times be required to comment or make findings about the operation of complex statutory schemes, like the *CFCSA*, in order to determine whether their application to the complainant in a particular case was discriminatory (see for example *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, at paras. 5-7, 37; *First Nations Child and*

Family at paras. 3-11). This analysis is not only common, it is an entirely proper exercise of jurisdiction necessary for the Tribunal to fulfil its function.

34. The Supreme Court of Canada has repeatedly affirmed that "administrative bodies empowered to decide questions of law 'may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard'". The presumption that a tribunal may look beyond its enabling statute is engaged whenever a tribunal with the authority to decide questions of law is confronted with "issues . . . that arise in the course of a case properly before it." (*Tranchemontagne* at para. 24; see also *McLeod v. Egan*, [1975] 1 S.C.R. 517 at 519 (per Laskin CJ); *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 [*Canadian Broadcasting*]; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at para. 45; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 27; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56 at paras. 12, 16).

35. Indeed, the Supreme Court of Canada has commented that "[w]here a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it." (*Vavilov* at para. 24).

36. Nothing in either the *Code* or the *CFCSA* rebuts the presumption of the Tribunal's jurisdiction to consider the *CFCSA* in the present case. The Tribunal is empowered to decide all questions of law necessary to reach a determination in a discrimination complaint, apart from *Charter* questions (s. 45 *ATA; Collins v. Abrams*, 2001 BCCA 22 at para. 12). The Tribunal can also make all findings of fact and mixed fact and law required to make a determination about prohibited discrimination under the *Code.*

37. Moreover, the Tribunal is a specialized administrative body, empowered to develop and apply a test for when discrimination regarding child welfare services is established. It is for the Tribunal to determine which issues arise in the course of deciding an individual discrimination complaint, including the delineation of the relevance of external statutory imperatives (see *Canadian Broadcasting Corp.* at 190-192, commenting on similar powers of the Canada Labour Relations Board).

38. In the present case, the Tribunal approached its analysis under s. 8 by examining whether R.R. could show a connection between her protected characteristics and adverse impact she suffered and whether the Petitioner could justify *prima facie* discrimination on the basis that the children needed protection. The Respondent AGBC argues that the Tribunal created an alternative standard for continuing custody (AGBC's Submissions at paras. 111-120). However, the Tribunal was not directly applying the *CFCSA* or engaged in analysis of whether it could make an order pursuant to the same. Instead, it was considering the *CFCSA* for the purposes of making a decision about the existence of discrimination in the provision of services delivered pursuant to the *CFCSA*. The AGBC proposes novel limits, not supported by Tribunal jurisprudence, on how the Tribunal should consider whether children "need protection" in the course of its application of all the prongs of the s. 8 test (AGBC's Submissions at paras. 131-142). However, as the above-referenced jurisprudence makes clear, it is squarely within the Tribunal's specialized expertise to develop and apply that test.

The CFCSA as a contributing factor in discrimination

39. The Petitioner and Respondent AGBC submit that, in rendering its Decision, the Tribunal impugned otherwise valid legislation (Petitioner's Submissions at paras. 185-86; AGBC's Submissions at paras. 143-165). The Respondent AGBC further submits that legislation is not a "service" and therefore the Tribunal does not have jurisdiction to find that legislation is discriminatory, or to consider it as a compounding factor in determining discrimination (AGBC's Submissions at paras. 144-146).

40. In the Commissioner's respectful submission, the submissions of the Petitioner and the Respondent AGBC overstate the Supreme Court of Canada's conclusions in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [*Andrews/Matson*], which they say precludes a review of legislation (AGBC's Submissions at para. 152; Petitioner's Submissions at para. 187). In *Andrews/Matson*, the Supreme Court upheld two decisions of the Canadian Human Rights Tribunal dismissing complaints that the decision-makers had found were attacks on legislation rather than discrimination in services.

41. Importantly, the Supreme Court of Canada affirmed that the question of whether or not a complaint relates to "services" within the meaning of human rights legislation falls within the expertise of a human rights tribunal (*Andrews/Matson* at para. 56). The Supreme Court of Canada did not find that the Canadian Human Rights Tribunal was without jurisdiction to make findings that legislation created services that contravened the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*]. Rather, the Court expressly stated that "the Tribunal provided careful and well-considered reasons explaining ... that, while the *CHRA* conferred remedial authority to render conflicting legislation inoperable, the Tribunal could not grant a remedy unless a discriminatory practice had first been established" (Andrews/Matson at para. 56). The Court found that this conclusion was reasonable.

42. Put simply, a complainant cannot challenge legislation alone. However, provided that a complaint alleges discrimination in the provision of services, the Tribunal has jurisdiction to consider the extent to which the relevant legislation creates or contributes to discrimination in those services and, if appropriate, render it inoperable. Such an approach is consistent with the Supreme Court of Canada's decision in *Tranchemontagne,* which confirmed that tribunals can declare legislative provisions inapplicable because of the paramountcy of the *Code* over other legislation (at para. 7).

43. The Commissioner further respectfully submits that there no basis for the position advanced at paras. 162-164 of the Respondent AGBC's Submissions to the effect that the Tribunal cannot consider legislation as a compounding factor in its discrimination analysis. In particular, the Respondent AGBC argues the Tribunal cannot go beyond determining whether or not a parent has been reasonably accommodated within the *CFCSA* system and comment on services the *CFCSA* does not provide which would alleviate discrimination. This argument is incompatible with the jurisprudential approach to the justification defense which may require different types of accommodations, including change to existing standards (*Grismer* at para. 22). Further, the Commissioner submits that it is not trite law that there is no obligation to provide services that do not otherwise exist. *Moore* in fact overtook older authority and determined that discrimination can be found where the *means* of equal access to a service are not provided for by legislation (*Moore* at para. 28).

44. Furthermore, considering systemic discrimination and how it is perpetuated by the regime created by the *CFCSA* did not transform the Tribunal into a commission of inquiry contrary to *Moore* (AGBC's Submissions at paras. 41, 151-153). *Moore* focused primarily on the Tribunal's remedial authority and found that the remedies the Tribunal grants must be related to the individual complaint. *Moore* does not prohibit the Tribunal from considering the existence of systemic discrimination or discrimination created by legislation. The Tribunal can do so as long as it relates to the particular circumstances of the complainant (*Moore* at paras. 59-60).

C. The Effect of the Consent Order

45. The Petitioner and Respondent AGBC take the position that the Tribunal has no jurisdiction over discrimination regarding child welfare services where the Provincial Court has made an order about custody and access (Petitioner's Submissions at para. 160; AGBC's Submissions at para. 70). The Respondent AGBC adds that court orders are not "services" within the meaning of the *Code* (AGBC's Submissions at para. 76).

46. The Petitioner further argues that the Tribunal lost jurisdiction because it permitted re-litigation of issues already decided by the Provincial Court and amounted to a collateral attack on a court order placing the children in the interim custody of the Director by consent (Petitioner's Submissions at paras. 136, 148).

47. The Tribunal has jurisdiction to make determinations of discrimination in the delivery of child welfare services. Doing so does not necessarily entail review of any court order. Where court orders have determined issues that are also relevant to the issues that arise for the Tribunal in the course of determining a discrimination complaint under the *Code*, the Tribunal has jurisdiction to, and often does, apply common law finality doctrines such as the rules against collateral attack, cause of action and issue estoppel and abuse of process (see for example *Barter v. I.C.B.C. et al.*, 2003 BCHRT 9; *Pomfrey v. Kocheff and Maple Ridge Veterinary Hospital (1972) Ltd.*, 2004 BCHRT 40; *Krsmanovic v. Snowflake Trading*, 2012 BCHRT 113).

48. However, a Tribunal decision does not violate any finality doctrine merely because it finds there was discrimination in child welfare services in a matter where there was also a court order pertaining to custody and access. The Tribunal may examine the record and make findings about whether the relevant issues have been determined by a court order. Additionally, while the respondent to a complaint under the *Code* may raise the finality doctrines in defence, the possibility of doing so does not create jurisdictional issues (*Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 at para. 63). The application of these doctrines is discretionary and depends on the facts and context of each particular case.

D. The importance of human rights protection in child welfare services

49. The critical importance of the Tribunal's jurisdiction and ability to consider complaints of discrimination in the provision of child welfare services cannot be understated. This is all the more so where the rights of Indigenous people are at stake:

> For generations, Canadian governments have interfered with the relationship between Indigenous caregivers and their children. Beginning in the 19th century, Indigenous children were forcibly removed from their communities and forced to attend residential "schools". As residential schools closed, child welfare authorities took over, removing Indigenous children at disproportionate rights in the Sixties and Millenium Scoops. Today, Indigenous children remain overrepresented and underserved in government care.
>
> Decision at para. 1

50. Any interpretation of the Tribunal's jurisdiction that limits its ability to address discrimination arising in the context of child welfare services stands to effectively immunize some or all child welfare service providers from the *Code*'s obligations. The corollary of such a finding is that the human rights protections available to some of British Columbia's most marginalized residents will be restricted or non-existent in one of the areas of life where they may need those protections most acutely. Such an interpretation undermines the universality of human rights, the Legislature's commitment to reconciliation and the remedial purposes of the *Code*.

The universality of human rights

51. Human rights are universal and inalienable. They belong to everyone equally, without discrimination (*Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, Preamble). To limit the Tribunal's ability to review and find discrimination regarding child welfare services undermines all of these aims in a manner that reinforces historic patterns of systemic discrimination. As the Tribunal found, current discriminatory practices in child welfare services often result from long-standing patterns of current and former discrimination against marginalized populations (Decision at paras. 1, 34-39). The *Code* exists specifically to redress such wrongs and further substantive equality.

52. Permitting the Tribunal to adjudicate claims of discrimination regarding child welfare services does not undermine the aims of the *CFCSA*. As the Petitioner points out, s. 3(b.1) of the *CFCSA* sets out the Legislature's intention that child welfare agencies comply with the *Code*. This amendment to the *CFCSA* was the result of

recognition of the way that systemic discrimination and oppression has manifested itself through the child welfare system (see British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* 42nd Parl., 3rd Session, Issue No. 253 (23 November 2022) at 8529-8531(Hon. M. Dean); British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* 42nd Parl., 3rd Session, Issue No. 247 (3 November 2022) at 8107-8108 (Hon. M. Dean)).

53. As the Tribunal affirmed, those involved in the child welfare system have often experienced inter-generational trauma and harm from the child welfare system themselves. They are more likely to live in poverty (Decision at paras. 36-37). Despite the Petitioner's submissions that monetary compensation is not required to vindicate human rights in the child protection context (Petitioner's Submissions at paras. 207-208), these are the claimants who will benefit the most from compensation - though it may represent only a small fraction of the costs of systemic discrimination that they have borne.

54. The Petitioner and Respondent AGBC argue that the finding of discrimination against parents in the delivery of child welfare services interferes with the Provincial Court's ability to act in the best interests of children (Petitioner's Submissions at paras. 122-127; AGBC's Submissions at para. 96). This amounts to a suggestion that vindicating the best interests of the children may require discrimination against their parents. The Commissioner respectfully submits that this false juxtaposition undermines the purposes of the *Code* and the *CFCSA*. Discrimination against parents is not in the best interests of their children.

The Legislature's commitment to reconciliation

55. As is made evident in the Tribunal's Decision, jurisdictional or other limits on the Tribunal's ability to apply the *Code* to child welfare services stand to reinforce historical and colonial patterns of oppression effected through the removal of Indigenous children from their families and communities (Decision at paras. 1, 34, 36).

56. The Tribunal carefully reviewed the history of the child welfare system in British Columbia, particularly its impact on Indigenous families. The Tribunal found it uncontroversial, and explicitly recognized that the impacts on Indigenous people of the child welfare system are unique and cannot be separated from the Canadian colonial project founded on the denial of Indigenous title and laws, and deliberate efforts to assimilate and eradicate Indigenous culture, tradition, language, and people (Decision at para. 34).

57. Adopting the findings of the Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), the Tribunal noted that the residential school experience and the Sixties Scoop have adversely affected parenting skills and the success of many Indigenous families. These factors, combined with prejudicial attitudes towards Indigenous parenting skills and a tendency to see Indigenous poverty as a symptom of neglect, rather than as a consequence of failed government policies, have resulted in grossly disproportionate rates of child apprehension among Indigenous people (Decision at paras. 34-39).

58. To begin to remedy such injustices and advance reconciliation, the Province has passed the *Declaration on The Rights Of Indigenous Peoples Act*, S.B.C. 2019, c. 44, aimed at ensuring that all provincial laws are consistent with the *UN Declaration on the Rights of Indigenous Peoples* [*UNDRIP*].

59. *UNDRIP* is an international human rights instrument affirming the rights of Indigenous people to equality, self-determination and self-government. *UNDRIP* places particular emphasis on "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child" (*UNDRIP*, Preamble). *UNDRIP* also affirms that "Indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind" (*UNDRIP*, Preamble).

60. In 2022 the *CFCSA* was amended with the stated goal of bringing it in line with *UNDRIP* and in an effort to eliminate colonial practices that have resulted in disproportionate numbers of Indigenous children in care (see for example, British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* 42nd Parl., 3rd Session, Issue No. 247 (3 November 2022) at 8107-8108 (Hon. M. Dean)). Given the disproportionate impact of the child welfare system on Indigenous families, limiting Indigenous parents' right to protection from discrimination within the system created by the *CFCSA* undermines these commitments and any progress that has been made in implementing them (see Decision at paras. 34-39).

Access to human rights remedies

61. When the Tribunal makes a finding of discrimination, s. 37 of the *Code* provides that it may order a number of remedies, including an order requiring the adoption or implementation of an equity program (s. 37(2)(c)(ii)) and or compensation for injury to dignity, feelings and self-respect (s. 37(2)(c)(iii)).

62. These remedies are essential to providing full redress for discrimination under the *Code* and reflect Canada's commitment, embodied in article 8 of the *Universal Declaration of Human Rights*, to providing everyone that has experienced discrimination with an effective remedy. Through the *Code*, the Legislature has provided these remedies to victims of discrimination and has entrusted the Tribunal, as a specialized decision-maker, with the authority and discretion to craft them to ensure responsiveness and effectiveness. Through the *ATA*, the Legislature has afforded the Tribunal the highest level of curial deference when exercising such discretion.

63. The Provincial Court, in contrast, does not have the jurisdiction or authority to order a remedy for discrimination. The Provincial Court is a statutory court, without original jurisdiction (*Provincial Court Act*, R.S.B.C. 1996, c. 379, s. 2(3); *R. v. Raponi*, 2004 SCC 50 at para. 34). Neither the *Provincial Court Act* nor the *CFCSA* empower it to apply the *Code* or grant remedies under s. 37 (*Bi et al. v. City of Surrey*, 2017 BCPC

386 at para. 24; *Ntibarimungu v. Vancouver Career College*, 2009 BCPC 254 at para. 29; *Cohen v. Wilder*, [1996] B.C.J. No. 856 at para. 25 (QL); *Geisser v. City of Prince George*, 2016 BCPC 151 at paras. 9-13).

64. Contrary to the submission of the Petitioner (Petitioner's Submissions at paras. 201-206), *Tranchemontagne* does not stand for the proposition that the Provincial Court can apply the *Code*. Rather, *Tranchemontagne* reflects the state of the law as it applies to administrative tribunals. Although also a creature of statute, the same does not apply to the Provincial Court. No civil cause of action for discrimination can be brought before the courts and any remedy for discrimination must be sought before the Tribunal (*Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 63; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 at 195).

65. A small number of decisions have permitted plaintiffs in civil proceedings, including before the Provincial Court, to raise allegations of discrimination in actions for breach of contract where *Code* obligations have been incorporated by that contract, or when considering whether to award punitive damages. However, BC courts do not otherwise have jurisdiction to address claims for breaches of the *Code* (*Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63 at para. 47; *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 at paras. 63-64, 80-81, 168; *May v. Advanced Coast First Aid*, 2015 BCPC 113 at para. 23).

66. Although under the *CFCSA*, the Provincial Court has some supervisory powers over the Director, these do not or will not extend to all child welfare services, decisions, or conduct arising pursuant to the *CFCSA* (*Quinn v. British Columbia*, 2018 BCCA 320 at para. 80; *B (E) v British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 66 at paras. 70-71; *T.L. v. British Columbia (Attorney General)*, 2023 BCCA 167 at paras. 29, 124, 177). This is equally true of other services that fall within the broad categories of custody and access – for example voluntary care agreements and special needs agreements (*CFCSA*, ss. 6-7).

67. Further, the Provincial Court is without inherent, equitable or *parens patriae* jurisdiction to remedy *Code* violations. For example, while it can issue a restraining order against a parent (*CFCSA*, s. 98), it cannot issue an injunction to cause the Director to cease discriminating.

CONCLUSION

68. In the Commissioner's respectful submission, jurisdiction over discrimination in the provision of child welfare services must reside with the Tribunal. Neither the *Code* nor the *CFCSA* can be read in any other way. Moreover, to restrict the Tribunal's ability to address discrimination in the provision of child welfare services would be to leave those most vulnerable among us – many of whom themselves are intergenerational survivors of Canada's legacy of colonization through the removal of Indigenous children from their families and communities – without protection from discrimination when subject to the very same services. Such an approach undermines the purposes of the *Code*, the Legislature's commitment to reconciliation and Canada's commitment to the universality of human rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: October 20, 2023

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