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**Tribunal File No. 2010-04892-I;
2010-04889-I; 2010-04890-I**

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

R.N. (ON BEHALF OF C.N.), J.N. AND R.N.

Applicants

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, DAN MITCHELL, THUNDER BAY POLICE SERVICE, THUNDER BAY POLICE SERVICES BOARD, CHIEF ROBERT HERMAN, DETECTIVE CONSTABLE SHAWN HARRISON, INSPECTOR SYLVIE HAUTH, LAKEHEAD DISTRICT SCHOOL BOARD AND MS. NADEU

Respondents

REPLY TO A RESPONSE

1. This is the reply by the Applicants (C.N., R.N., and J.N. “N. Family”), to new matters raised in the Response’s from the Respondent parties. To the extent that the Response’s sets out different facts and legal positions than those set out in the applications, the Applicants plead and rely on the facts and law set out in their original application.

2. The Applicants withdraw the application against the Thunder Bay Police Service and as such will not respond to the grounds for dismissal raised by the Thunder Bay Police Service Respondents.

3. The new matters to be addressed are as follows:

- a. Whether the Tribunal lacks jurisdiction over the Respondent Her Majesty the Queen in Right of Ontario and Dan Mitchell (“Ontario”) on the basis that the exercise of prosecutorial discretion is immune from review by courts and tribunals, and that it is not a “service” within the meaning of the *Human Rights Code* (reply to paragraph 1 of Ontario’s Response), and whether privilege applies to the communications

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between the Crown Attorney's office and the Thunder Bay Police Service (reply to paragraph 13 of Ontario's Response);

- b. Further particulars with respect to Ms. Nadeau's behaviour as described in paragraph 41 of the complaint (reply to paragraph 23 of Response by the Police Respondents);
- c. Whether the Tribunal should consolidate the applications of R.N., on behalf of C.N., R.N. and J.N. (reply to paragraph 29 of the Police Respondents);
- d. Whether the application by J.N. and R.N. raises any allegations against the Respondent Lakehead District School Board ("School Board") (reply to paragraph 4 of School Board's response to parental applications), and whether or not the School Board is liable for the actions of Ms. Nadeau (reply to paragraph 21 of School Board's response); and
- e. Dismissal of the application against Ms. Nadeau as it has been dealt with in another proceeding (reply to paragraphs 29- 38 of Ms. Nadeau's response).

4. It is submitted that there is no merit to the above alleged grounds for dismissing this application.

A. The application does not make a complaint with respect to prosecutorial discretion (paragraph 1 of Ontario Response)

5. Ontario states that this application is not within the jurisdiction of the Tribunal because the exercise of prosecutorial discretion is not a "service" with the meaning of the *Human Rights Code*. However, the applications do not take issue with the prosecutor's exercise of their prosecutorial discretion; instead, the applications take issue with the manner in which the file was reviewed by the Crown Attorney.

6. The Supreme Court of Canada in *Krieger v. Law Society of Alberta*¹, indicated that "all conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process. The court found that the core elements of prosecutorial discretion encompass the following:

¹ [2002] 3 S.C.R. 372 at para 4

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- (a) The discretion whether to bring the prosecution of a charge laid by police;
- (b) The discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c.C-46, ss.579 and 579.1;
- (c) The discretion to accept a guilty plea to a lesser charge;
- (d) The discretion to withdraw from criminal proceedings all together...; and
- (e) The discretion to take control over a private prosecution².

7. The discriminatory behaviour of the Crown Attorney in their review of the investigation file does not fall within the core elements of prosecutorial discretion and is therefore subject to the conduct review process and is within the jurisdiction of this Tribunal.

8. The Applicants contend that the review of the investigation file by the Crown Attorney is a service and that the manner in which the review is conducted must comply with the principles enunciated in the *Victims' Bill of Rights*.

9. "Service" is not defined under the *Code*. Rather, the *Code* provides an exhaustive list of what does not constitute services: "a levy, fee, tax or periodic payment imposed by law" (section 1). This Honourable Tribunal has stated that "if it is not listed, it is deemed services for the purpose of the *Code*."³

10. Ontario asserts that the exercise of its prosecutorial powers is a quasi-judicial function and as such is not a service under the *Code*; however Ontario has provided no basis upon which it could be said that the performance of a "quasi-judicial" role does not constitute a "service" under the *Code*.

11. In *Ontario (Attorney General) v. Ontario (Human Rights Commission)*, the Divisional Court considered whether a coroner's decision about whether to call an inquest into a death constitutes a "service" to which the *Code* applies. In concluding that it was indeed a service, the Court read the legislation in a "broad, liberal and purposive manner" and provided judicial guidance on the definition of "services":

² *Krieger* at para 46

³ *Hogan v. Ontario (Ministry of Health & Long-Term Care)* 2005 HRTO 49 at para. 12.

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38 Moreover, the submission by the appellants that the *Code's* focus is on discrimination by one person against another person is incorrect. **Clearly, the *Code* also applies to discrimination by groups or government in the provision of services.**⁴

12. Based on the above, it is submitted that the review of the investigation file is a service under the *Code*, and is within the jurisdiction of the Tribunal. The treatment of the Applicants by the Crown Attorney in reviewing the investigation file was discriminatory and failed to take into account the historical and contemporary experiences of discrimination faced by Aboriginal people in Canada's educational system.

13. At paragraph 13 of their Response, Ontario asserts that the advice/information they provided to the Thunder Bay Police Service is protected by privilege. The Applicants submit that to the extent that Ontario and or the Thunder Bay Police Respondents (Thunder Bay Police Services Board, Chief Robert Herman, Detective Constable Shawn Harrison, and Inspector Sylvie Hauth) rely upon legal opinions in their responses to the applications privilege is waived. Privilege is also waived by virtue of the public statements made by the Crown Attorney's office that no charges would be laid against Ms. Nadeau because "there was little chance of successful prosecution, and putting the boy on the stand by filing criminal charges was not in the public interest"⁵

14. Waiver of privilege can be voluntary or deemed to have taken place by implication. Voluntary waiver occurs where the holder of the confidential communication voluntarily discloses or consents to disclosure of any material part of a communication, for example the above public statements. Waiver by implication, on the other hand, occurs where communications are "put in issue" by the holder of the privilege and fairness dictates that the full context of those communications should not be kept from the opposing party. In *R. v. Campbell*, the R.C.M.P. put in issue its good faith belief in the legality of a reverse sting operation, and asserted its reliance upon consultations with Department of Justice lawyers to buttress that

⁴ *Ontario (Attorney General) v. Ontario (Human Rights Commission)*, [2007] O.J. No. 4978 at para. 38.

⁵ May 30, 2009, edition of the Globe and Mail.

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position. The Supreme Court of Canada held that the R.C.M.P. waived the right to shelter, behind privilege, the contents of the advice relied upon. Binnie J. stated as follows:

As *Rogers, supra*, shows, it is not always necessary for the client actually to disclose part of the contents of advice in order to waive privilege to the relevant communication of which it forms part. It was sufficient in this case for the RCMP to support its good faith argument by undisclosed advice from legal counsel in circumstances where, as here, the existence or non-existence of the asserted good faith depended on the content of that legal advice.⁶

15. The Applicants submit that in making public statements regarding the decision not to lay charges the Crown Attorney's office waived any claims to privilege. In addition, the Applicants submit that the Crown Attorney's office and the Thunder Bay Police Service implicitly waived privilege by relying upon legal opinions given or received in their responses to the applications.

B. Particulars regarding the allegations against Ms. Nadeau at paragraph 41 of the Application.

16. At paragraph 41 of the application the Applicants allege that the Thunder Bay Police Service was aware of Ms. Nadeau's past discrimination towards the N. children. The Thunder Bay Police Service was put on notice of this information during their initial interview with R.N. on April 17, 2009. During the interview R.N. informed Detective Constable Harrison that there had been prior incidents involving Ms. Nadeau and the N. boys.

17. R.N. informed investigators that Ms. Nadeau had on previous occasions singled out and ridiculed C.N. and that she displayed personal animus towards C.N.

C. The consolidation of the applications of R.N., J.N. and R.N. on behalf of C.N.

18. The Applicants submit that it would be fair, just and expeditious for the Tribunal to consolidate the applications as all the applications involve the same parties and deals with the same subject matter.

⁶ *R. v. Campbell* (1999), 171 D.L.R. (4th) 193 (S.C.C.) at pp. 234-235.

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19. Pursuant to Rule 1.7(d) of the Rules of Procedure, the Tribunal can order that applications be consolidated. The Applicants submit that consolidation of the applications would be proper in these circumstances.

D. Duty of the Lakehead District School Board owed to J.N. and R.N.

20. The Lakehead District School Board has an obligation to provide its students with an environment that is tolerant, respectful and does not discriminate on the basis of racial, ethnic, and cultural differences.

21. R.N. had informed the school of previous incidents where Ms. Nadeau had singled out the N. children and ridiculed them for their manner of dress. The Lakehead District School Board had been put on notice that Ms. Nadeau has displayed personal animus and discriminatory behaviour towards the N. children, specifically C.N. and took no actions to put any preventative measures in place.

22. The Lakehead District School Board has a guide for staff entitled “Aboriginal Presence in Our Schools”. The school board recognizes in this guide that parents play a key role in the educational practices of their children and that schools are to create welcoming environments which foster a sense of mutual respect. The guide recognizes that there is a deep mistrust of government and education in Aboriginal cultures. In essence, in providing an education for Aboriginal students, the school is also providing a service for the parents of those students. The guide further recognizes that the school board needs to establish learning climates that are culturally friendly to Aboriginal students by encouraging all staff to learn about local culture and traditions.

23. By failing to provide an environment that was culturally tolerant for Aboriginal students and their parents, the Lakehead District School Board not only discriminated against C.N., but also discriminated against R.N. and J.N. with respect to the service of providing a safe and tolerant learning environment for their children.

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24. At paragraph 21 of their Response, the School Board states that Ms. Nadeau was acting outside of school policies, expectations and training in cutting C.N.s hair. Section 46.3 of the *Code* states:

46.3 (1) For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. 2006, c. 30, s. 8.

Ms. Nadeau cut C.N.'s hair during the course of her employment and as such, the Lakehead District School Board is vicariously liable for the actions of Ms. Nadeau.

E. The application against Ms. Nadeau has not been properly dealt with by another proceeding

25. Section 45.1 establishes that the Tribunal may dismiss an application, in whole or in part, if the Tribunal is of the opinion that another proceeding has appropriately dealt with substance of the application. The application alleges that Ms. Nadeau's actions in cutting C.N.'s hair were a violation of C.N., R.N. and J.N.'s human rights.

26. Ms. Nadeau takes the position that the grievance procedure initiated by her appropriately dealt with the substance of the application. The grievance was in relation to Ms. Nadeau's rights and not in relation to whether Ms. Nadeau's actions violated the human rights of the N. family.

27. The applications filed by the N. family will not be a re-litigation of the issues dealt with during Ms. Nadeau's grievance against her employer. The N. family was not a party to that proceeding, there was no determination of the issue of human rights violations, and the grievance did not deal with any form of compensation to the Applicants for violations of their human rights.

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28. As such, the Applicants submit that Ms. Nadeau's grievance of her suspension by the Lakehead District School Board cannot be considered a proceeding that has appropriately dealt with the substance of an application pursuant to section 45.1.

Conclusion

29. It is therefore submitted that the herein applications falls within the jurisdiction of this Honourable Tribunal and should be permitted to proceed.