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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Walter Swetlishoff on behalf of the New Denver Survivors Collective

COMPLAINANT

A N D:

Her Majesty the Queen in Right of the Province of British Columbia as represented by Ministry of Attorney General and Ministry Responsible for Treaty Negotiations

RESPONDENT

REASONS FOR PRELIMINARY DECISION
ALLEGATION OF CONTINUING COMPLAINT
APPLICATION FOR ADVANCE RULINGS

Tribunal Member:	Diane H. MacLean
Counsel for the Complainant:	Judith Doulis
Counsel for the Respondent:	Robert Horricks

I INTRODUCTION

[1] In a complaint originally filed on September 28, 2004, Walter Swetlishoff, on behalf of the New Denver Survivors Collective (the "Survivors"), alleged that Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Attorney General and Ministry Responsible for Treaty Negotiations (the "Ministry") discriminated against the Survivors. The complaint alleges discrimination contrary to s. 7(1)(a) and (b) of the *Human Rights Code* and with respect to a service customarily available to the public, contrary to s. 8 of the *Code*. The grounds alleged are race, ancestry and religion.

[2] This decision deals with two issues. First, have the Survivors alleged a continuing complaint and, if so, is it timely? If not, should it nevertheless be accepted? Second, the Survivors seek advance rulings on a number of issues. In order to put this decision in context, I provide a considerable amount of background information. In doing so, I am not making any final decisions regarding issues raised in the complaint.

II THE COMPLAINT AND RESPONSE

[3] In their original complaint, the Survivors alleged that the Ministry contravened the *Code* by erecting a monument at the place of "human suffering" in New Denver B.C. They said that they urged the Ministry, for four years preceding the filing of the complaint, not to erect a monument because this would discriminate against their ancestry:

> Our forefathers resisted and fought against the Russian Orthodox church to proclaim Martin Luther's simple religious beliefs. They were given the name "Iconobortsi", which means "icon wrestlers" and this later became "Doukhobortsi" or "Spirit Wrestlers". For us New Denver Survivors to accept a memorializing symbol is to dishonour our forefathers who gave their lives for this principle and passed on to us this same principle of honouring only the Living Spirit within each individual. The Unity Committee of Canada and the United States will shun our small group as traitors to the basic principles of our culture.

[4] The Survivors say that the alleged discrimination occurred when they found out about the plans to build the monument (or place a memorial) from an article in the local newspaper which said that construction had already begun. They alleged that the Ministry's action regarding the monument is discrimination in publication. In their

original complaint, the Survivors said that they were not alleging a continuing contravention.

[5] The Ministry responded to the complaint by denying the allegations but did not provide any further information.

[6] The complaint was amended in February 2005 to include allegations of discrimination in regard to services and publication because of the Survivors' race, ancestry, and religion. The Survivors referred to a report of the Ombudsman released in April 1999 (the "Report"), and reported on a letter they had received from the then Attorney General on September 20, 2004 which stated:

> We will be proceeding with an apology in the Legislature as discussed, on October 4, 2004. I am advised that Ministry staff have attempted to contact everyone by telephone so that those who wish to be present in the Legislative Gallery may attend.

[7] The delegation of Survivors who attended the Legislature were shocked that the Attorney General did not apologize, but repeated an expression of regret that had already been issued to them in 2001. What the Survivors found most disturbing was a statement in Hansard which they interpreted as an accusation regarding their ancestor's religion, specifically in regard to religious protests against government authorities and laws. The Survivors also referred to an October 5, 2004 statement made by the then Attorney General on a radio broadcast – in particular, they were disturbed by the suggestion that things might be done differently today. The Survivors said:

> The Attorney General Geoff Plant is violating Code 7(a) (b) by publishing and issuing statements which are intended to discriminate against the New Denver Survivors to expose them to hatred and contempt by citing our ancestor's religion and race. Geoff Plant does not hide the fact that because of our ancestry we don't deserve the apology and thus refused to issue such (as stated in his letter dated September 30, 2004) on October 4, 2004.

[8] As background to this amendment to the complaint, the Survivors said that the Ombudsman investigated three children's institutions in British Columbia: Jericho Hill, Woodland's and New Denver. In each case the Ombudsman found "similar 'systemic abuses' of children." The Survivors say that the Ministry met with representatives of students in both other schools and agreed to accept the Ombudsman's recommendations in the respective reports and, specifically, to issue an apology in the Legislature. The

Survivors allege that the Government discriminated against them by serving the other abused children, as recommended by the Ombudsman, but refusing to serve the Survivors in the same way.

[9] The Ministry provided a response to the amended complaint, denying the allegations but again not providing any details.

[10] The Survivors provided a Statement of Remedy to the Ministry on the following terms:

> We want the Government to stop discriminating against the New Denver Survivors because It [sic] is revictimizing us again creating great suffering and health concerns. We implore the Government to immediately implement the Ombudsman's recommendations ("Righting the Wrong: The Confinement of the Son [sic] of Freedom Doukhobor Children, 1999.") in full."

[11] The Ministry responded to the Statement of Remedy, denying that the allegations in the complaint constituted a violation of the *Code* and therefore the remedies requested should not be awarded. The Ministry also said that s. 37 of the *Code*, the remedial section, does not permit the Tribunal to order the implementation of the Ombudsman's recommendations.

III FURTHER PARTICULARS AND AMENDMENTS

[12] The processing of this complaint has been delayed as a result of a number of changes in representation, as well as uncertainty as to the scope of the complaint. At a pre-hearing conference, it was agreed that it would be helpful to identify the scope of the complaint and the Survivors' counsel agreed that she would consult with her clients and file an amended complaint. At a further pre-hearing conference, the Survivors' counsel indicated that she intended to ask for a preliminary ruling on four jurisdictional issues. I pointed out that the scope of the complaint still appeared to be an issue between the parties and that there needed to be a clearer delineation between what merely formed background information to the complaint and what constituted the allegations of discrimination. It was agreed that the Survivors' counsel would succinctly summarize the allegations actually forming the complaint. In the pre-hearing conference memo, I also noted that, although the Survivors did not initially allege a continuing complaint, they now appeared to be doing so. Therefore, I also requested that the Survivors' counsel address that issue.

[13] In response to my direction, the Survivors filed a further amendment to the complaint. In addition to the particulars, the Survivors included a detailed and helpful historical background. The alleged discrimination is as a result of the Ministry's failure or refusal to implement the recommendations in the Report. The particulars of the allegations include:

- The Ministry failed or refused to acknowledge unequivocally that the confinement of the Survivors was wrong;
- The manner in which the Ministry acknowledged the confinement of the Survivors had the effect of minimizing or diminishing the wrongdoing;
- The manner in which the Ministry acknowledged the confinement of the Survivors suggested that their mistreatment was justified or excusable;
- The manner in which the Ministry chose to acknowledge or compensate the Survivors was hurtful, insulting and demeaning;
- The Ministry's decision to construct a park and erect a monument on the New Denver site was unacceptable and demeaning to the Survivors;
- The Ministry knew or ought to have known that the memorial was unacceptable and demeaning to the Survivors;
- Despite the Survivors' rejection of the memorial, the Ministry continued with its plans to construct the memorial;
- The Ministry failed or refused to fully disclose to the Survivors why they had been incarcerated in New Denver;
- The Ministry has access to historical records, documents and archives which would have provided an explanation as to why the Survivors had been incarcerated;
- The Ministry has refused to provide the Survivors with an unconditional, clear and public apology on behalf of the government, in the Legislative Assembly, for the means by which they were apprehended and for their confinement in New Denver;
- The Ministry has failed or refused to engage in meaningful consultations with the Survivors about the appropriate form of compensation for their apprehension and confinement in New Denver;

- The Ministry has failed or refused to provide the Survivors with an appropriate form of compensation for their apprehension and confinement in New Denver;

- The Ministry, through action and inaction, has treated the Survivors differently and adversely with respect to righting the historical wrong against them as compared to others who had been subjected to historical wrongs perpetrated by the government of the day;

- The Ministry, through action and inaction, has cultivated and/or perpetuated the view that the Survivors are unworthy or less worthy then others who have been subjected as children to maltreatment in public institutions;

- The fact that the Survivors are Doukhobors and children of Sons of Freedom Doukhobors is the reason, in whole or in part, for their adverse treatment;

- The Ministry's actions and inactions with respect to the implementation of the Ombudsman's recommendations have exacerbated the Survivors' hurt, humiliation and suffering; and

- The Ministry's actions and inactions with respect to the implementation of the Ombudsman's recommendations has and continues to perpetuate the historical injustice to the Survivors as a result of their wrongful incarceration in New Denver in the 1950s.

[14] The Survivors say that the discrimination is ongoing and constitutes a continuing contravention of the *Code*.

[15] The Survivors seek a range of remedies, including an order that the Ministry implement the recommendations in the Report.

IV HAVE THE SURVIVORS ALLEGED A CONTINUING CONTRAVENTION?

1. The Survivors' Explanation

[16] At a further pre-hearing conference, there was a wide-ranging discussion regarding whether the alleged behaviour in the amended complaint constituted a continuing contravention and the difficulties in this particular case of describing that behaviour. Therefore, the Survivors' counsel agreed that she would provide a more detailed description of the behaviour alleged to be a continuing contravention. The Ministry's

counsel then had the option of applying for further particulars or making submissions with respect to whether what had been alleged amounted to a continuing contravention.

[17] As a result, the Survivors filed yet a further amendment to the complaint to provide particulars regarding behaviour supporting their allegation of a continuing contravention. The Survivors say the discrimination started in 2000 with the Ministry's response to the Report, and continued until late 2004 or early 2005, when the Ministry determined that its actions with respect to the Report had concluded. The behaviour that supports the Survivors' allegation of a continuing contravention include:

- The Ministry's actual or implied public representations that the incarceration of the children of the Sons of Freedom Doukhobors' in New Denver was somehow justifiable in light of the conflict between their parents and the government of the day;

- The Ministry's failure or refusal to provide the Survivors with a full and complete explanation as to the reasons for their apprehension and confinement in New Denver;

- The Ministry's refusal to compensate the Survivors similarly to the others it recognized as having been subjected to historical wrongdoing by the government of the day, in particular compared to how they treated and compensated persons who had been maltreated in Jericho Hill School, Woodlands, Glendale, Tranquille and Endicotte Centres; and

- The Ministry's repeated efforts to compensate the Survivors with a historical monument rather than implementing the Ombudsman's recommendations, and the Government's refusal to provide the survivors with an apology.

[18] In support of their submissions that this amounts to a continuing contravention, the Survivors referred to particular paragraphs in their earlier amendment to the complaint.

2. Ministry's Submissions Regarding Whether the Complainants are Alleging a Continuing Contravention

[19] The Ministry submits that there are two considerations: first, whether there are incidents which could be a violation of the *Code* and, second, whether the date of the last incident occurred within six months of the date on which the complaint was filed.

[20] The Ministry's first argument is that there is no continuing contravention because there is no incident within the six months preceding filing the amended complaint. The

Ministry says that the Survivors' first assertion of a continuing contravention was in their May 31, 2006 amendment. These new allegations were made 20 months after the complaint was first filed. The Survivors' first indication of the temporal scope of the alleged continuing contravention was made on July 27, 2006, some 22 months after the complaint was filed. The Ministry says there are no incidents of alleged discrimination in the six months preceding May 31, 2006 which would "anchor" an allegation of a continuing contravention. The Ministry points out that the Survivors themselves admit that the alleged continuing contravention ended in late 2004 or early 2005.

[21] The Ministry's second argument is that the incidents that the Survivors say constitute a continuing contravention are either vague, in terms of when they occurred, or are not incidents that could amount to a violation of the *Code*. The Ministry referred to Rule 25(4) of the Tribunal's *Rules of Practice and Procedure* which provides, in part:

> … if the complainant's amendment to the complaint adds an allegation that occurred outside the time limit for filing the complaint, the complainant must apply under rule 24.

[22] The Ministry says that the Survivors have not applied under Rule 24 to have the new allegations considered and they have not explained how the alleged discrimination related to repeated incidents of the same kind. The onus is on a complainant to show whether there are incidents that could be a violation of the *Code*. This requires some consideration of the content of the allegation and a finding that there is at least a possibility that the incident is an act of discrimination. The content also has to be considered in order to determine whether the incidents are of a 'similar character'. As well, a complainant must assign a specific date to an incident to allow the Tribunal to consider the length of the delay between the alleged incidents.

[23] The Ministry says that the Survivors assert that the continuing contravention started in 2000 without a specific reference to a date or a month in that year. The first reference to an event in 2000 is a meeting between the then Deputy Attorney General, various deputy ministers, and approximately 150 persons who had been incarcerated in New Denver during the 1950s. The Ministry says that this reference provides no information about how the respondent is alleged to have breached s. 7 or 8 of the *Code* on the grounds of religion, race, or ancestry. The Ministry notes that, in the amendment, the

Survivors report that two people who attended that meeting felt that it was not an appropriate response to the very serious issues it concerned. There are other references in the Survivors' submissions on the scope of the complaint which indicate that they took exception to statements made at the meeting but they do not say what was said that caused offence. Suggestions that the Ministry's actions were inappropriate are not, in themselves, a breach of the *Code*.

[24] The Survivors also refer to a survey to support their allegation of a continuing contravention, but the Ministry says there is nothing that suggests a specific breach of the *Code* by the Ministry.

[25] The Survivors also refer to a letter dated October 21, 2001 from the then Deputy Attorney General to the New Denver Survivors' Committee (the "Committee" (this group seems to have overlapping membership with the Survivors Collective)), which indicates a disagreement between the Deputy Attorney General and the Committee responsible for the survey about the Committee's mandate. This correspondence took place almost a year after the first alleged incident in November 2, 2000 and it is unclear what discrimination is being alleged.

[26] The Survivors then say that in 2003, as in 2002, the Government continued to press the Survivors to settle for a memorial as reparation for their incarceration. The Ministry says that the Survivors do not specify when in 2002 or 2003 these incidents occurred, so that it is impossible to determine the amount of time that lapsed from the previous alleged incident in October 2001.

[27] As well, the Survivors refer to pressure put on them to accept the memorial, but they do not refer to any particular incident. They refer to a meeting where an architect presented architectural drawings but they do not say what constituted a violation of the *Code*. As well, the Ministry points out that the Survivors did not represent all the people who attended the meeting or who took part in ongoing consultations, nor do they represent all the children placed in New Denver.

[28] The Ministry also notes that the Survivors made a statement that they wanted the Ministry to implement the recommendations in the Report and that they did not want a monument. The Ministry says that this statement does not constitute an "incident".

[29] There is reference to a letter written by the New Denver Survivors' Committee (not the Collective) advising that the statement of regret was meaningless and that 90% of the New Denver Survivors polled opposed the monument because they were not consulted. This statement was later amended to replace 90% with the majority (the Ministry notes that only 28% actually said a historic site was not needed.)

[30] The Ministry then referred to a May 2003 letter written by the then Attorney General, in which he referred to the intention regarding the development of an historic site. He acknowledged that the majority of the Survivors were not in favour of the historic site and agreed not to proceed with its development at that time. The Attorney General also said that the Government would take the matter of a formal apology under advisement. The Ministry submits that, although a specific date is provided, there is no indication of the behaviour that the Survivors say contravened the *Code*.

[31] As well, the Survivors stated that throughout 2004, the New Denver Survivors' Committee continued to fight for the implementation of the recommendations in the Report. The Ministry said that the most contentious of the recommendations, that is, compensation, could not be implemented without consultation with the Survivors as a collective, which is what the Ministry had been trying to do. There is no allegation in the statement that what the Ministry did could be a violation of the *Code*.

[32] The Survivors also referred to a letter dated April 2, 2004 from the Council of Doukhobors of Canada to the then Attorney General asking the Government to implement the Report and make an "unconditional clear public apology in the legislature". This statement of opinion about what the Government ought to do cannot be considered an "incident," and failing to apologize for an alleged wrongdoing is not a violation of the *Code*.

[33] The Survivors then referred to a letter written by the then Attorney General in response to a letter from the Canadian Friends Service Committee. In this letter, the Attorney General advised that the Ministry met with former residents of New Denver on several occasions to reach consensus on initiatives that would address the recommendations in the Report. He noted that the matter had been complicated by a legal action on the part of some of the former residents, noting that the B.C. Court of Appeal

upheld a B.C. Supreme Court ruling that the claim was statute-barred, but that the Ministry was continuing to work with the former residents. As well, the former Attorney General noted that, as to a public apology, the Government was considering issuing a statement to the former residents. The Survivors take issue with the Attorney General's use of language in referring to the children in New Denver as "residents" rather than "survivors". The Ministry points out that the Survivors do not argue how the letter could constitute a violation of the *Code*, but the Ministry does not see how the reference to "residents" rather than "survivors" could be a breach of the *Code*: *Khanna v. Common Ground Publishing*, 2005 BCHRT 398.

[34] The Survivors also refer to correspondence from the New Denver Survivors' Committee dated August 23, September 4, and September 21, 2004. Although it submits that correspondence written by this committee could not be considered a contravention of the *Code*, it was written within the time limits so it is not a necessary component of a continuing contravention argument. The same can be said for the transcript of the former Attorney General's statement of regret in the legislature and letters sent to him critical of that statement.

[35] The Ministry takes issue with the Survivors' statement that they rely on but are not limited to the paragraphs referred to in the schedules attached to the amendment to establish a continuing contravention. The Ministry says:

> … the obligation is on the Complainant to refer clearly to the incidents which the Complainant purports establish a continuing contravention – what has been described in *Dove* (*supra*) as "concrete information about who did what to whom where and when, thereby enabling the Tribunal to understand and assess the allegations, and giving the Respondents a meaningful opportunity to investigate and respond to them" (at paragraph 24)

[36] The Ministry submits that, referring to the July 27, 2006 amendment, the first "incident" relied on in support of a continuing contravention is November 2, 2000, followed by dates in October 2001, "2003 as in 2002", March 2003, May 2003, "throughout 2004", as well as more recent dates that would be within the six-month time limit. The Ministry says:

> Determining the gaps between the incidents is complicated by the inclusion of general time frames rather than specific dates, and allegations of fact

which are not "incidents" in the sense of "who did what to whom" or otherwise are not incidents that *could* be a violation of the *Code*.

[37] As to s. 22(3) of the *Code*, the Ministry says:

> The Complainant does not argue that the new allegations contained in the May 31, 2006 and July 27, 2006 should be accepted under Section 22(3) of the *Code* on the public interest or substantial prejudice tests. However, had this argument been made, the Respondent's would have asserted, among other things, that it is not in the public interest and would result in substantial prejudice to allow a complainant to broaden the scope of a complaint with vague and ill-defined allegations.

[38] Finally, the Ministry concludes:

> As can be seen from the procedural history outlined above, the Tribunal and the Respondent have repeatedly attempted to clarify the issues in the Complaint. The Complainant has responded with an expanded, but nonetheless confusing, set of allegations.
>
> The Respondent says there is no continuing contravention because there is no incident with the 6 month period prior to filing the new allegations on May 31, 2006; and, in the alternative, that the incidents that the Complainant says constitute a continuing contravention are either vague in terms of when they occurred or, otherwise, are not incidents that could be a violation of the *Code*.

3. Analysis and Decision Regarding a Continuing Contravention

[39] The reference to a continuing contravention is found within s. 22 of the *Code*:

> (1) A complaint must be filed within 6 months of the alleged contravention.
>
> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
>
> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

[40] When the Complaint was first filed in September 2004, the Survivors alleged that the Ministry discriminated against them in respect of a publication on the basis of ancestry

and religion, contrary to s. 7 of the *Code*. The Survivors did say that they had urged the Ministry for four years not to erect a monument at the New Denver site, but did not, at that time, claim that any other actions of the Ministry were discriminatory. The Complaint Form asks complainants if they are alleging a continuing contravention and the Survivors answered "No" to this question. In response to the question: "Were all incidents within the last six months?", the Survivors answered "Yes". So, at this point, the Survivors were clearly not alleging a continuing contravention.

[41] The Survivors then filed an amendment on February 11, 2005 (the "February 2005 amendment"). An amendment is provided for in Rule 25 of the Tribunal's *Rules of Practice and Procedure*, as it read at the relevant time:

> (1) A complainant may amend the complaint and a respondent may amend the response to the complaint at any time up until two months before the date scheduled for the hearing of the complaint, without an application.
>
> (2) A complainant who amends the complaint must:
>
> (a) complete a Complaint Amendment Form (Forms 1B – 1E);
>
> (b) deliver a copy of the completed Complaint Amendment Form to the other participants [see rule 9 for how to deliver]; and
>
> (c) file the completed Complaint Amendment Form [see rule 8 for how to file].
>
> (3) A respondent who amends the response to the complaint must:
>
> (a) complete a Response to Complaint Amendment Form (Form 3D);
>
> (b) deliver a copy of the completed Response to Complaint Amendment Form to the other participants [see rule 9 for how to deliver]; and
>
> (c) file the completed Response to Complaint Amendment Form [see rule 8 for how to file].
>
> (4) Despite rule 25(1), if the complainant's amendment to the complaint adds an allegation that occurred outside of the time limit for filing the complaint [see rule 10(2)], the complainant must apply under rule 24.

[42] In the February 2005 amendment, the Survivors added discrimination in the provision of services and added the ground of race to the grounds of ancestry and religion. They also added details of the alleged discrimination. The Survivors say that, after meeting with the Ministry in regard to implementing the Report, they received a formal letter from the then Attorney General stating that the Government would be proceeding with an apology in the Legislature on October 4, 2004. A delegation of Survivors attended the legislature and was shocked to learn that the statement was not to be an apology but rather a repeat of a statement of regret which had been issued to the Survivors in 2001. The Survivors were very disturbed because of some of the statements made about their ancestor's religion. The Survivors say that, regardless of the tensions between the Government and the Sons of Freedom Doukhobor religious group, the Survivors, as children, were innocent of any wrongdoing and did not deserve to be punished and have their childhood taken away from them. The Survivors also referred to a radio interview where the then Attorney General made statements that suggested that perhaps the Government's policy in the 1950s was somehow acceptable. The Survivors allege that the then Attorney General violated s. 7 of the *Code* by publishing and issuing statements intended to discriminate against the Survivors and which expose them to hatred and contempt by citing their ancestor's religion and race, stating: "Geoff Plant does not hide the fact that because of our ancestry we don't deserve an apology and thus refused to issue such.."

[43] In regard to the Survivors' amendment under s. 7, I find that they are not alleging a continuing contravention. The s. 7 complaint focuses on the building of the monument as described in their original complaint and the then Attorney General's statement in the legislature and on the radio.

[44] However, in the February 2005 Amendment, the Survivors also extended their complaint to a violation of s. 8(a) and (b) of the Code which provides:

> (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 race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

[45] The Survivors said:

> The B.C. Ombudsman, Dulcie McCallum, researched all three children's institutions in British Columbia; Jericho Hill, Woodland's, and New Denver. In each case, she found similar "systemic abuses" of children. The only difference is, the Government met with each of the representing groups of those other two institutions and came to an agreement to accept McCallum's recommendations, specifically; an apology in the Legislature. The Government co-operated fully in accepting professional guidance from the Ombudsman so as not to re-victimize the survivors of those institutions, who are now adults. It is painful for us, the New Denver Survivors, to see an outright discrimination where the Government served other abused children according to the Ombudsman's recommendations but refused to serve the New Denver Survivors the recommendations provided for them by the same Ombudsman. The Attorney General Geoff Plant is also violating Code 8 (a) (b) because of our ancestry religion and race.

[46] The Survivors clearly alleged a continuing contravention in this part of the February 2006 amendment. They refer to the Government meeting with other groups and coming to an agreement to accept the Ombudsman's recommendations (serving the other abused children but not the Survivors), but then refer specifically to the apology issue. They did not make it clear that it is the difference in how the three groups were treated in the process of trying to arrive at an agreement regarding the Ombudsman's recommendations that is allegedly discriminatory. However, I note that the Survivors were unrepresented at the time, and that the amendment forms do not ask the complainants specifically if they are now alleging a continuing contravention. I also note that the part of the Complaint Form that deals with continuing complaints is Part F and that the Tribunal does not provide an amendment form for this part of the Complaint Form.

[47] Therefore, I am satisfied that the Survivors were alleging a continuing contravention in the February 2006 amendment, in regard to being treated differently, and on an ongoing basis, when compared other groups of children who were the subject of Ombudsman's reports. This alleged different treatment appears to encompass the whole process of meeting with the groups and coming to an agreement about how to implement the Ombudsman's recommendations. As well, I am satisfied that the last incident of the

alleged discrimination, the comments made by the then Attorney General on the radio, occurred on October 5, 2004, well within the six-month time limit. The reasons for this finding are outlined below.

[48] In *Dove v. GVRD and others (No. 2)*, 2006 BCHRT 197, the Tribunal reviewed the basic analysis involved in regard to allegations of a continuing contravention:

> The principles to be applied in determining if a continuing contravention is alleged are clear. As stated in *Webber v. Alcan Incorporated*, 2004 BCHRT 52:
>
> > In *Lynch v. B.C. Human Rights Commission*, 2000 BCSC 1419, the Court adopted the following statement from the Manitoba Court of Appeal in *Re the Queen in Right of Manitoba and Manitoba Human Rights Commission et al* (1983), 2 D.L.R. (4th) 759:
> >
> > To be a "continuing contravention", there must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences. (at p. 764)
> >
> > The Manitoba decision was referred to in the recent decision of the Newfoundland and Labrador Court of Appeal in *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland Liquor Corp*., [2004] N.J. No. 22, in which the Court said:
> >
> > In applying this reasoning, consideration must be given to the development of human rights law during the past 20 years, and in particular, the emphasis on a liberal and purposive interpretation of the legislation. (at para. 59)
> >
> > The concept of a "continuing contravention" must therefore be interpreted in a manner consistent with the liberal and purposive interpretation which must be applied to human rights legislation in order to ensure that "the rights enunciated are given their full recognition and effect": *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at para. 24. (at paras. 36–38)
>
> At the same time, the concept of a continuing contravention must be applied in a manner which is fair to respondents. In giving the concept the liberal and purposive interpretation it requires, it must not be used to improperly sweep in allegations which would otherwise be far outside the *Code*'s time limits. It is largely for this reason that in considering whether a continuing contravention has been alleged the Tribunal will also consider how large any gaps in time between the alleged contraventions may be:

see, for example, *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209, at paras. 16 – 17. (para. 41, 42)

[49] As well, in *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374, the Tribunal expanded on this analysis:

> I find this latter passage of particular assistance in thinking about the kinds of fact patterns which might constitute a continuing contravention in a human rights context. On the one hand, there is the kind of case in which there are allegations of repeated harassment or discrimination. Provided that the allegations are sufficiently similar in character and occur with sufficient frequency, a continuing contravention may be established. One thinks of an allegation of a poisoned work environment as a result of recurring sexual harassment: see, for example, *Webber*, *supra*, at para. 39. On the other, there is the kind of case in which there is an ongoing state of affairs, for example, a public building which is inaccessible to wheelchair users or a policy withholding certain employment benefits for married persons from those in same sex relationships. An example of the former may be found in *Miele v. Famous Players Inc.*, 2000 BCHRT 5. Another example of this kind of continuing state of affairs was discussed in *Vorley v. B.C. (Min. of Solicitor General) (No. 2)*, 2005 BCHRT 511, at para. 18. So long as the building remains inaccessible, the policy remains in place, or the discriminatory conditions otherwise continue to exist, the discrimination is ongoing and a continuing contravention may be alleged.
>
> Of course, many cases may have aspects of both sorts of continuing contravention. Many allegations of an ongoing failure to accommodate a disabled employee have features of both. The Tribunal has recognized an ongoing failure to accommodate as a continuing contravention: see, for example, *Penner v. B.C. (Ministry of Public Safety and Solicitor General)*, 2005 BCHRT 465, at paras. 9 – 11. In relation to the first category, cases in which a succession of discriminatory acts are alleged, many difficult questions may arise as to whether the conduct alleged is sufficiently similar in character, sufficiently frequent, or sufficiently close in time, to qualify. For example, issues may arise where more than one person is alleged to have discriminated, or where the discrimination takes different forms or is in relation to different prohibited grounds, or where there are large gaps of time between the allegations.
>
> It is sometimes easier to identify what is not a continuing contravention, than what is. Drawing on *Lynch* and the *Manitoba* case, the Tribunal has on a number of occasions refused to recognize a continuing contravention where the facts alleged are the continuing effects of a prior act of discrimination, rather than a continuation of the discrimination itself: see, for example, *Callaghan v. University of Victoria*, 2005 BCHRT 589, at paras. 8 – 9, and *Lewis v. School District No. 67 and others*, 2006 BCHRT 349, at paras. 14 – 15. In both of those cases the Tribunal discusses how

> the continuing effects of an earlier alleged contravention, whether those take the form of health consequences or poor grades remaining on one's transcript or student loan debts, do not constitute a continuing contravention. The Tribunal has also held that a reiteration of a previous allegation of discrimination does not constitute a continuing contravention, as in *Rai v. Annacis Auto*, 2003 BCHRT 31, where the complainant was laid off in February 2001, was not rehired when others were in May 2001, and sought to establish a continuing contravention with those events by calling the employer to ask to be rehired in February 2003. The Tribunal has also relied on large gaps of time between discrete allegations as a basis for not finding a continuing contravention: see, for example, *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209, at paras. 16 – 17.
>
> In determining whether a continuing contravention is alleged, the Tribunal must consider these and any other relevant issues. It must due so in light of the purposes of the *Code*, including ensuring that individuals who claim to have suffered discrimination are given a means of redress while at the same time ensuring that respondents are treated fairly. This brief review of the kinds of factors which may be relevant suggests that the determination of whether a continuing contravention is alleged, and the length of that contravention is, as stated by our Court of Appeal in *O'Hara v. British Columbia (Human Rights Commission)*, 2003 B.C.J. No. 709, 2003 BCCA 139, a discretionary one. In the end, all one can hope to do is to draw the line in a fair, principled and reasoned way. (paras. 17 – 20)

[50] After reviewing the Survivors' original complaint and amendments to the complaint, I conclude that they are alleging a continuing complaint as follows. As a result of the Ombudsman's reports regarding groups of children alleged to have been mistreated at various Government institutions, the Government consulted with each of the affected groups in order to implement the Ombudsman's recommendations. The Survivors allege that, due to their race, ancestry and religion, they were treated differently than other groups; in particular, they focus on the lack of a clear apology and the lack of consultation regarding compensation. The Survivors say that, as innocent children, they were mistreated, and the Government attempted to justify its actions by referring to the actions of the Survivors' parents or other adults in the Sons of Freedom Doukhobor community. These references are alleged to have been made in the legislature and a subsequent radio broadcast (see para. 7 of this decision).

[51] In making their allegation of a continuing contravention, the Survivors refer to a course of conduct from June 2000 to October 2004, and perhaps beyond. I note that, in its

submissions regarding the Survivor's request for an advanced ruling, the Ministry said its discussions regarding the Report continued for some four years. In this period, the Government was consulting with the Committee, the Survivors and other former residents of the New Denver facility. During this time period, various employees of the Ministry were responsible for these consultations and presumably, between such consultations, would be working on these issues and consulting with other Government officials. The Ministry has said that some of the particulars identified as part of the allegations of a continuing contravention cannot be seen as an instance of discrimination because it involves an attempt by the Committee, the Survivors, or a person or group supporting them to express their disappointment in the process or to persuade the Government to implement the Ombudsman's recommendations. While I agree that these descriptions do not constitute specific allegations of discrimination, they cannot be looked at in isolation. Rather they are part of ongoing attempts by the Committee, the Survivors, and their supporters to engage in meaningful consultation with the Government. The Survivors are, in essence, claiming that their dealings with the Ministry, in regard to implementation of the Ombudsman's recommendations, were tainted by the Ministry's discriminatory perception of them as children of persons who were also culpable for what happened to their children. The Survivors believe that this somehow implies that they are also culpable, or at least less deserving than other children who were the subject of the Ombudsman's reports.

[52] Therefore, I am satisfied that the Survivors have properly alleged a timely continuing contravention of the *Code*.

V THE SURVIVORS' APPLICATION FOR AN ADVANCE RULING

[53] In the second part of this application, the Survivors seek advance rulings from the Tribunal in regard to whether it has jurisdiction over four particular aspects of the complaint. The questions asked by the Survivors are:

a) Can erecting a monument and/or constructing a memorial site constitute activity proscribed under s. 7 of the Code?

b) Is erecting a monument and/or constructing a memorial site a service which the Government customarily makes available to the public pursuant to s. 8 of the Code?

c) Does addressing the historical wrongdoings by the Government against an ethnic minority constitute a service customarily available to the public pursuant to s. 8 of the Code?

d) Does the Tribunal have jurisdiction to order the Government to implement all or any of the recommendation of the Ombudsman, Dulcie McCallum set out in her Public Report No. 38 "Righting the Wrong – The Confinement of Sons of Freedom Doukhobor Children", dated April 1999?

[54] The parties filed a substantial amount of material giving a detailed historical background, a chronology of current events, and legal submissions. Given the volume of materials, all of which have been reviewed, it took a substantial time to seriously consider all of the issues and, unfortunately, this request for an advanced ruling has delayed the progress of this complaint to a hearing.

[55] After considering all of the materials filed, I have decided that it would not be appropriate for me to answer the questions posed by the Survivors in a preliminary way, without the benefit of full evidence produced at a hearing.

[56] A pre-hearing conference will be scheduled to discuss disclosure, witness lists and hearing dates.

VI CONCLUSION

[57] The Survivors have alleged a timely continuing complaint. I decline to provide an advance ruling on the questions posed by the Survivors.

Diane H. MacLean, Tribunal Member