First Nations Child & Family Caring Society of Canada

Canadian Human Rights Commission (CHRC) Factum Summary

October 2014

What is this case about?

The First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations filed a complaint in 2007 alleging that the Federal Government's flawed and inequitable provision of First Nations child and family services and failure to implement Jordan's Principle is discriminatory pursuant to the Canadian Human Rights Act. The case was referred to the Canadian Human Rights Tribunal (the Tribunal) in September of 2008 at which time the Canadian Human Rights Commission (CHRC) joined the proceedings acting in the public interest. The Tribunal granted Amnesty International Canada and the Chiefs of Ontario interested party status a year later. The Tribunal has the authority to make a legally binding finding of discrimination and order a remedy.

What stage is the case at now?

Hearings at the Canadian Human Rights Tribunal began in February 2013 and concluded in May 2014. The Tribunal heard from 25 witnesses and over 500 documents were filed as evidence. The parties are now filing their final written submissions (factums) and closing oral arguments are set for October 20-24, 2014. The decision is expected in 2015. You can read the factums authored by all the parties on fnwitness.ca and look for the link to the APTN video archive of the witness testimony.

What is a factum?

A factum is a legal party's recital of the relevant facts, law and authorities (citations) to support the order they are seeking from a judicial body.

What are some of the highlights of the CHRC Factum?

The CHRC maintains that:

1) Aboriginal Affairs and Northern Development Canada (AANDC) provides inequitable child welfare services to First Nations children residing on reserve. This inequitable funding is perpetuated through AANDC's First Nations Child and Family Services Program (FNCFS) and its corresponding, on reserve funding formulas.

2) AANDC has discriminated against First Nations children living on reserve by failing to provide them with equitable services. This discrimination takes place on the grounds of race and national or ethnic origin, as per section 5 of the *Canadian Human Rights Act*.

3) AANDC controls the funding available to agencies and therefore determines the "extent and manner in which child welfare services are provided to First Nations children and families".

4) AANDC has funded, contracted, approved, and acknowledged that their funding formulas are flawed and inequitable through multiple reports. However, despite this knowledge, AANDC has not created any "meaningful or lasting change in the quality or quantity of funding services for First nations on reserve."

5) AANDC's funding formula structures create more incentives to take children out of their homes and into care than to provide preventative and/or family services. These perverse incentives are consequences of funding regulations established by AANDC.

6) AANDC's funding formula, Directive 20-1, is not based on population levels but on assumed percentages of First Nations children on reserve and in care. These percentages are applied to each reserve across Canada, without regard for actual numbers of children in care. Furthermore, the assumed percentage was created in

1988 and has not been updated since (with the exception of Manitoba being increased by 1% in 2010).

7) AANDC has acknowledged that Directive 20-1 does not allow for the delivery of "culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve."

8) AANDC's FNCFS Program and funding formulas are not sufficient to meet, or flexible enough to adjust for, the greater needs of First Nations people on reserve.

Interesting paragraphs

While we strongly encourage people to read the full version of the CHRC's factum as well as the factums filed by other parties including the Attorney General, here are some paragraphs from the CHRC factum that others have highlighted as particularly interesting to them (please refer to original text for footnote citations):

- "While the allegations in the complaint deal with present day funding and programs involving First Nations child welfare service on reserve, it is necessary to consider the issue in the full historical context, in particular the legacy of Indian Residential Schools ("IRS")." (p. 4, paragraph 9)

- "[…] there were approximately 135 IRS in total. While it is impossible to determine exactly how many children attended theses schools based on the limited information available, Dr. Milloy estimates that at any given time approximately 15% of all Indian children were attending IRS." (p. 5, paragraph 13)

- "[…] As some residential schools closed down, many of the children, having nowhere else to go, were taken into child welfare care. AANDC also began to hire social workers in order to deal with the increasing number of Indian children in care." (p. 8, paragraph 25)

- "[…] the number of "neglected" children who were placed in residential schools post-1960 was quite high, representing approximately 75% by 1966. A 1967 research study of nine residential schools in Saskatchewan found that approximately 80% of the children in those schools had been placed there for child welfare reasons, and called for more in-home supports for families in order to avoid having to remove so many children from their homes." (p. 22, paragraph 59)

- "[…] the funding available under the FNCFS Program is limited because of the maximum annual budgetary increase of 2%, which falls far short of the annual increases in First Nations child and family service expenditures. In fact, the research conducted by AANDC and the AFN concluded that as of March 3, 1999, the "average per capita per child in care expenditure of the [AANDC] funded system is 22% lower than the average of the selected provinces." This is alarming given that "studies suggest that the need for child welfare services on reserve is 8 to 10 times [greater] than off reserve"." (p. 41, paragraph 138)

- "[…] As of 2005, there were "approximately three times the number of First Nations children in state care than there were at the height of residential schools in the 1940s." (p. 45, paragraph 152)

- "However, the report found that AANDC's Directive 20-1 "inadequately invests in prevention and least disruptive measures." In fact, the report concluded that the structure and design of the funding formula creates a perverse incentive for First Nations child and family service agencies to remove First Nations children from their homes because it provides dollar-for-dollar reimbursement of "maintenance" expenditures (or the costs for service required after a child is taken into care). As a result, there "are more resources available to children who are removed from their home than for children to stay safely in their homes." (p. 47, paragraph 159)

- "The Auditor General concluded that AANDC's current "funding practices do not lead to equitable funding among Aboriginal and First Nations communities", the effect of which is that First Nations children on reserve are taken into child welfare care at a disproportionate rate (almost eight times that of children in care residing off reserve)." (p. 77, paragraph 266)

- "AANDC has acknowledged that "Directive 20-1 does not provide sufficient funding for [First Nations child

and family service agencies] to deliver culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve." (p. 93, paragraph 320)

- "[…] the Commission submits that the Tribunal ought to consider the discrimination alleged in the present complaint in the context of: (i) the legacy of IRS and historical prejudice as previously described in these submissions; and (ii) the fundamental importance of the interest affected which is, ultimately, the safety and wellbeing of First Nations children, who are one of the most vulnerable and disadvantaged groups in Canada." (p. 107, paragraph 365)

- "[…] For communities with less than 250 children on reserve, they receive $0 operations funding from AANDC; therefore, the children and families in those communities are denied culturally based services as a direct result of AANDC's prescriptive funding formula." (p. 115, paragraph 395)

- "Inherent in both Directive 20-1 and EPFA are two assumptions. First, that each First Nations child and family services agency has an average of 6% of the on reserve total child population in care. The only exception to this assumption is the province of Manitoba, where it was modified in 2010 to an assumption that 7% of on reserve First Nations children are in care. Second, that each agency has an average of 3 children per household, and 20% of on reserve families requiring services (or "classified as multi-problem families")." (p. 123, paragraph 423)

- "Provincial funding for child welfare off reserve is based on the actual number of children in care, and not on assumptions, like AANDC's funding formulas for First Nations child welfare on reserve. This is true even where the province provides services on AANDC's behalf to First Nations children and families on reserves where there are no First Nations agencies." (p. 128, paragraph 435)

- "It is disappointing to note that these reports and recommendations, most of which AANDC has funded, contracted, participated in, accepted, approved and/or acknowledged, have not resulted in any meaningful or lasting change in the quality or quantity of funding and services for First Nations on reserve. AANDC is aware of the flaws and inadequacies of its own policies and funding formulas, but has failed to correct them." (p. 172, paragraph 584)

- "Between 1981 and 2012, First Nations children spent cumulatively 66 million nights in care, away from their homes and away from their families." (p. 184, paragraph 627)

What remedy is the CHRC seeking?

The CHRC is seeking measures to:

1) Cease applications of the discriminatory aspects of AANDC's FNCFS Program and its funding formulas within 12 months of the Tribunal's decision;

2) Supervise AANDC for the implementation of this remedy, for a period of 18 months or longer, under the discretion of the Tribunal;

3) Prevent the discrimination from happening again.

A section of the factum is dedicated to describing the remedies and identifying how these measures are supported in the *Canadian Human Rights Act*. You can read the specifics on pages 185-186.

Can the other parties ask for different remedies?

Each party in the proceeding is free to identify what remedy (if any) they believe the Tribunal should consider. The Tribunal has the ultimate authority to determine what remedy (if any) is awarded.

Where can I find more information about the case?

Go to fnwitness.ca or email us at info@fncaringsociety.com.

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