Attorney General of Canada (representing Aboriginal Affairs and Northern Development Canada) - Factum Summary

First Nations Child & Family Caring Society of Canada

November 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 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 Attorney General Factum?

The Respondent maintains that:

1) The evidence provided by The Caring Society and the AFN (the Complainants) "does not establish that First Nation children on reserve are receiving child welfare services at a discriminatory level as compared to children in the rest of the country." (p. 1, paragraph 4)

2) Based on the evidence presented to the Tribunal, the level of federal funding provided to child and family service providers on reserve "does not demonstrate adverse differential treatment or denial of a service under section 5 of the *Canadian Human Rights Act* (the Act)." (p. 1, paragraph 1)

3) "The question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the Act." (p. 2, paragraph 5)

4) "The Respondent does not provide a 'service' within the meaning of section 5 of the Act." (p. 33, paragraph 129)

5) "The role of the federal government, through the Respondent, is to fund the First Nations Child and Family Service Program (FNCFS)." (p. 6, paragraph 21)

6) "The Respondent is not involved with and does not control decisions on what programs or services are offered by the FNCFS Agencies for child welfare on reserve." (p. 6, paragraph 22)

7) "Comparison between federal and provincial/territorial funding systems is not a valid comparison under the Act." (p. 27, paragraph 106)

8) The complaint is fundamentally flawed as it "seeks to compare two different service providers […] serving two different publics." (p. 29, paragraph 113)

9) "The claim of discrimination is unfounded and should be dismissed." (p. 2, paragraph 5)

Interesting paragraphs

- "[…] the Complainants' evidence focussed on establishing that an increase in federal funding and a change to existing funding models would facilitate the development of more

First Nation Child and Family Agencies ("FNCFS Agencies") on reserve, more autonomy for those Agencies and the availability of a broader range of services. However, the evidence does not establish that First Nation children on reserve are receiving child welfare services at a discriminatory level." (p. 1, paragraph 4)

- "The Respondent is not involved with and does not control decisions on what programs or services are offered by the FNCFS Agencies […] The Respondent's role is to ensure that public funds are used for child welfare expenditures in accordance with the applicable funding authorities." (p. 6, paragraph 22)
- "[…] anti-discrimination law in Canada is not intended to address differences arising from the legitimate exercise of authority between two different jurisdictions … as between a province and the federal government." (p. 28, paragraph 110)
- "The claim cannot succeed as the Act cannot be used as a vehicle to equalize differences in treatment as between different entities servicing different publics." (p. 29, paragraph 115)
- "In this case, the evidence demonstrates that the federal government is funding child welfare services that are regulated and administered by provinces and Yukon because those same provinces and territory choose not to fund such services. Even if an adverse impact resulting from the apparent failure of those provinces and the Yukon to fund child welfare for First Nation children living on reserve could be linked to a protected characteristic, the same cannot be attributed to the federal government's decision to address that failure by stepping in to fill the perceived funding gap created by others." (p. 32, paragraph 127)
- "The Complainants have not met the threshold onus of establishing the existence of a *prima facie* case of discrimination, namely, that they have been disadvantaged by the Respondent's conduct based on stereotypical or arbitrary assumptions about aboriginal persons." (p. 32, paragraph 128)
- "[…] the funding itself is not being held out as a service to the public. Rather, the benefit that is being held out as a service and offered to the public are the provincially mandated child prevention and protection services that the agencies (and not the Respondent) directly provide to individual First Nation children and their families." (p. 34, paragraph 135)
- "The role of the Respondent is limited to providing funding for child welfare on reserve and being accountable for the spending of those funds." (p. 35, paragraph 137)
- "Even if the Tribunal was to find that the provision of federal funding constitutes a service under section 5 of the Act, then the recipients of that service, and the victims of the practice, are the agencies that receive funding. These funding recipients are not individuals but artificial entities incapable of having their human dignity infringed and it is questionable whether they can suffer, let alone bring a claim of discrimination." (p. 35, paragraph 138)
- "[…] the difference between the level of services and programs offered might have little to do with funding and more to do with choices made by the FNCFS Agency about the type of services and programs they want to provide and other administrative issues affecting the overall budget." (p. 38, paragraph 153)
- "Any suggested differences in how the Respondent funds FNCFS Agencies as compared to the provincial agencies are a reflection of this difference and do not demonstrate that less funding is provided to the FNCFS Agencies." (p. 39, paragraph 159)
- "An additional roadblock in measuring the comparability of federal funding to provincial funding is the role of First Nation communities, who receive the funding and make choices based on their priorities for how that money should be spent." (p. 40, paragraph 162)
- "The information in [the internal government documents filed for evidence] are not admissions. At best, they reflect personal views of employees of the department at particular points in time." (p. 41, paragraph 164)
- "The Complainants are essentially claiming that child welfare on reserve could be more effective if it was designed and/or funded differently or more substantially. However, the task of this Tribunal is to determine whether there is adverse differential treatment […] not whether a service or program for example, could be "better."" (p. 43, paragraph 176)
- "The fact the Complainants now allege a range of generalized complaints demonstrates that their concerns are not really about alleged discrimination but with the general policy approach taken by the government – they have effectively launched the Tribunal on an inquiry of governmental policy,

rather than an investigation into alleged discriminatory practices." (p.44, paragraph 178)

- "If the Respondent's funding was in fact the cause of the numbers of children in care, it would be reasonable to assume that they would be the same throughout. However, there is a fluctuation on the numbers, with large jurisdictions such as BC and Saskatchewan having the lowest child in care counts of 3.6% and 3.7% respectively." (p. 44-45, paragraph 181)

What order is the Attorney General seeking?

"The Respondent respectfully requests this complaint be dismissed as unfounded." (p.61, paragraph 252)

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.

Produced by:

Victoria Anderson