Tribunal to Hear First Nations Child Welfare Complaint Based on Merits

In 2007, the First Nations Child and Family Caring Society (Caring Society) and Assembly of First Nations (AFN) brought forth a complaint to the Canadian Human Rights Commission, asserting that First Nations children living on reserves receive lower quality of child welfare services due to underfunding by the Government of Canada.

The complaint was dismissed in 2011 on the basis that federal services provided on reserves could not be compared to provincial standards. A judicial review of this decision took place on February 13-15, 2012.

On April 18, 2012, Justice Anne Mctavish set aside this decision, granting the applications for appeal and returning the complaint to a differently constituted Tribunal. In her decision, she cites errors in the Tribunal's interpretation of section 5 of the Canadian Human Rights Act, which relates to discriminatory practices. Additionally, Justice Mctavish noted a breach of fairness in the Tribunal dismissing the complaint. She raised concerns that the thousands of pages of material submitted to the Tribunal were not appropriately considered.

Justice Mctavish identified three errors made by the Tribunal that led to overturning the previous decision:

1. The Tribunal did not provide a reason as to why the Caring Society and AFN could not proceed with the complaint under subsection 5(a) (which refers to the denial of access to services based on discrimination) of the Canadian Human Rights Act.
2. The Tribunal's interpretation of subsection 5(b) (which refers to service provision that differentiates adversely based on discrimination) of the Canadian Human Rights Act required a comparator group that received the same services from the same provider. Since the Government of Canada only provides child welfare services to First Nations on reserve, no such comparator group could exist. This would exclude First Nations from the protection of the Act. Justice Mctavish found this interpretation to be rigid and unreasonable.
3. The Tribunal concluded that no appropriate group was available to compare under subsection 5(b) of the Act. Justice Mctavish found this conclusion to be inappropriate when considering the Government of Canada's choice to use provincial child welfare standards as the appropriate comparator in its programming manual and funding policies.

The First Nations Child & Family Caring Society is grateful for the ongoing support and counsel provided by Stikeman Elliott LLP.

For more information on the complaint filed under the Canadian Human Rights Act, visit fnwitness.ca.