

WHAT ARE THE MAIN ARGUMENTS BEFORE THE TRIBUNAL?

SUMMARY SHEET

Canadian Human Rights Tribunal on First Nations Child Welfare

What are the First Nations Child and Family Caring Society and the Assembly of First Nations' main arguments?

The First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) or Complainants, ask that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies. They put forward 4 main arguments for the Tribunal to consider:

1. The federal government's department of Aboriginal Affairs and Northern Development Canada (AANDC) provides more than just the funding for child welfare services. It dictates and controls the terms under which First Nations Child and Family Services (FNCFS) agencies provide child welfare services. AANDC therefore provides a service under the Act.
2. First Nations children are being discriminated against by the federal government; adverse treatment of First Nations children by the federal government is based on the prohibited grounds of race and national/ethnic origin. The FNCFS program determines eligibility based on race, determined through blood quantum, which is used to determine status Indian registry.
3. First Nations children who access the FNCFS program are discriminated against because of their First Nations status. The Complainants make the following arguments to demonstrate discrimination:
 - The federal government provides higher levels of funding, with fewer restrictions, to non-Aboriginal service providers delivering services to First Nations children on-reserve than they provide to FNCFS.
 - First Nations children's "*unique and greater*" needs have not been accounted for in child welfare services within the FNCFS program.
 - Culturally appropriate services are not provided under the FNCFS program.
 - Essential social services are denied to First Nations children due to jurisdictional disputes.
4. The federal government has inserted itself as the authority in providing First Nations with child welfare services and, therefore, must act in the best interests of First Nations children and families.¹

Child Welfare Tribunal

In 2007, the First Nations Child and Family Caring Society and the Assembly of First Nations filed a complaint against the federal government of Canada, alleging that child welfare services provided to First Nations children and families on-reserve were flawed, inequitable and discriminatory. They ask that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies. The government countered this, stating that its services cannot be compared to those provided by the provinces/territories and that they do not offer a service in accordance with the Canadian Human Rights Act. Accordingly, the government asks that the case be dismissed. The Tribunal began hearing evidence in 2013 and a ruling is expected in mid-2015.

What are the federal government's main arguments?

The federal government's department of Aboriginal Affairs and Northern Development Canada (AANDC), represented by the Attorney General of Canada, asks that the case be dismissed. They present 3 main arguments for the Tribunal to consider:

1. The complaint put forward by the Caring Society and the AFN is beyond the scope of section 5 of the Canadian Human Rights Act (the Act), which prohibits denial or adverse differentiation of services based on race. The government argues that section 5 does not apply to cross-jurisdictional differences in services or to comparisons between different service providers.
2. The comparison between federal and provincial funding does not prove discrimination under section 5 of the Act. The government argues that it funds, but does not provide, services and that the Complainants have failed to demonstrate that the federal government is responsible for denial/adverse differentiation of services based on race.
3. The Complainants' argument, that even without comparison to provincial funding, federal provision of child welfare services is discriminatory because it does not meet the higher needs of First Nations children, is not substantiated with evidence. It is not enough for the Complainants to assert that child welfare could be more effective if it was funded and/or designed differently. Thus, this policy level concern is irrelevant for a discrimination case.²

What are the Canadian Human Rights Commission's main arguments?

The Canadian Human Rights Commission (Commission), participates in hearing complaints before the Tribunal, representing the public interest. The Commission asks that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies. They suggest that discrimination has been established and present 3 main arguments for the Tribunal to consider:

1. The control, administration and execution of the FNCFS program and its funding formulas, is considered to be the provision of a service under section 5 of the Act.
2. AANDC denies and/or differentiates adversely against First Nations on the grounds of race, or national/ethnic origin, in the provision of child welfare services. In support of this argument, the Commission makes the following points:
 - The government's funding formulas are based on flawed assumptions, rather than the actual needs of First Nations communities.
 - There is a lack of funding for prevention services and least disruptive measures, despite the critical need for such services.
 - The complete failure to fund prevention services and support services in some jurisdictions creates incentives to remove children from their homes.
 - Funding for certain elements of on-reserve child welfare services, such as salaries and legal costs, are insufficient.
3. AANDC failed to provide justification for its discriminatory practice, which would include proof that accommodating the needs of First Nations would impose undue hardship on the government.³

What are the Interested Parties' main arguments?

The Chiefs of Ontario and Amnesty International were both granted Interested Party status and independently submitted their arguments. They ask that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies.

The Chiefs of Ontario put forward their support for the main arguments presented by the Commission, presenting arguments related to issues in Ontario. In addition they attest that:

1. AANDC's FNCFS program is discriminatory under section 5 of the Act because it has not taken the necessary steps to provide services that meet the needs of First Nations children.
2. Jordan's Principle, a principle that calls on the government in first contact with the child to cover the cost of necessary health and social services and negotiate for reimbursements later, should be implemented. They argue that implementation requires, at a minimum, provision of child welfare services in keeping with provincial standards.
3. Because the government has control over the FNCFS program, it has a responsibility to fund the program in the manner in which it was promised and intended. It must, at a minimum, provide services in keeping with provincial standards and should also provide for the special needs, including cultural needs, of First Nations.
4. Eliminating discriminatory practices would have a significant positive impact for First Nations children and families, while the financial impact on the government would be negligible. Addressing discriminatory practices in child welfare lays a good foundation for addressing discriminatory practices in federally funded programs, such as health, education and policing.⁴

Amnesty International suggests that:

1. Canada's interpretation and application of the Act must respect Canada's binding legal obligations to First Nations children and families under international human rights law such as the United Nations Convention on the Rights of the Child and the Universal Declaration of Human Rights.
2. Canada's interpretation and application of the Act must respect the prohibition against formal and substantive discrimination. Discrimination against a group or individual because they are Indigenous and live on-reserve is strictly prohibited under international law, particularly against vulnerable groups, such as children. Therefore providing unequal and inadequate funding for child welfare services to First Nations children on-reserve, as compared to other children in Canada, is considered discrimination.
3. Canada's interpretation and application of the Act must respect Canada's obligations to protect children. The government must consider the best interests of First Nations children, without discrimination, as stipulated by the legally binding United Nations Convention on the Rights of the Child. The removal of First Nations children from their families in disproportionate numbers, because of unequal and inadequate funding when other less disruptive measures are available, is inconsistent with these international obligations and is discriminatory.
4. The fact that child welfare services in Canada are delivered by various levels of government, in coordination with non-government entities, does not detract from the government's requirement to meet its international obligations.
5. The government is required to take special and positive measures to remedy any formal discrimination and achieve substantive equality. These include allocation of sufficient funding and resources to ensure equitable and

effective culturally competent services. Compensation should be provided for those who have suffered as a result of any breaches, and mechanisms should be put in place to safe guard against future breaches.⁵

To view the final submissions to the Canadian Human Rights Tribunal on First Nations Child Welfare in full, please visit: <http://www.fncaringsociety.com/final-arguments>.

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¹ Summarized from the First Nations Child and Family Caring Society Factum and the Assembly of First Nations Factum.

² Summarized from the Aboriginal Affairs and Northern Development Canada Factum.

³ Summarized from the Canadian Human Rights Commission Factum.

⁴ Summarized from the Chiefs of Ontario Factum.

⁵ Summarized from the Amnesty International Factum.