WHAT ARE THE CANADIAN HUMAN RIGHTS COMMISSION'S MAIN ARGUMENTS BEFORE THE TRIBUNAL?

Canadian Human Rights Tribunal on First Nations Child Welfare

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 Canadian Human Rights Commission's main arguments?

The Canadian Human Rights Commission (Commission), participates in hearings before the Tribunal, representing the public interest. The Commission puts forward the argument that a *prima facie* case of discrimination has been established and asks that the Tribunal find that First Nations children are being discriminated against and order appropriate remedies. They expand with 3 main arguments for the Tribunal to consider:

1. The federal government's department of Aboriginal Affairs and Northern Development Canada (AANDC) provides a service under section 5 of the Canadian Human Rights Act (the Act).
2. AANDC denies and/or differentiates adversely on the grounds of race, or national/ethnic origin in the provision of services.
3. AANDC failed to provide justification for its discriminatory practice.

1. AANDC provides a service under the Act

The Commission argues that AANDC's "*control, administration and execution of the FNCFS* [First Nations Child and Family Service] *Program and corresponding funding formulas, is providing a service pursuant to section 5 of the CHRA* [the Act]."[1] They cite a federal court decision that a service is something of a benefit offered to the public and is a process that takes place within the

What is Section 5 of the Canadian Human Rights Act?

Section 5 of the Canadian Human Rights Act states that it is discriminatory to deny, or differentiate adversely in relation to an individual, in the provision of goods, services, facilities or accommodations customarily available to the general public.

What is a *prima facie* case of discrimination ?

The Supreme Court of Canada describes it as follows:

*"The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent."**

In this sense, *prima facie* refers to evidence that, unless refuted, can clearly prove the Complainants' case.

context of a public relationship.[2] They describe the wide variance in what the courts have designated a service under the Act, including the encouragement to increase physical activity by Health Canada and courses offered to the military.

The Commission states that, through the funding and management of the FNCFS program, AANDC provides a benefit to First Nations children living on-reserve. The purpose of the program, as stated by AANDC, is to "*provide funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services*."[3] This benefit, according to the Commission, is provided within the context of a public relationship. The Commission further argues that AANDC controls the existence of the services, the extent and manner in which the services are provided, and the ongoing nature of the services through its role as manager of the program.

2. AANDC denies/differentiates adversely against First Nations in the provision of services

First Nations children on-reserve are denied and/or differentiated against in the provision of child welfare services, according to the Commission. This adverse treatment is based on prohibited grounds of discrimination, namely race or national/ethnic origin. To elucidate this argument, the Commission presents 4 points concerning AANDC's FNCFS program and on-reserve funding formulas:

A. **The federal government's funding formulas are based on flawed assumptions and not the actual needs of First Nations communities.** Assumptions include that each FNCFS agency has 6% of on-reserve children in care (Manitoba is 7%), that there are an average of 3 children per household, and that 20% of families require services. These assumptions do not reflect the real needs of First Nations children in many communities and they lead to funding inequities. Provincial funding, for example, is based on the actual numbers of children in care, or in need of services, rather than assumptions.

B. **The funding formula applied in British Columbia, New Brunswick, Yukon and Newfoundland and Labrador creates perverse incentives to remove children from their homes, contributing to the overrepresentation of First Nations children in care.** The actual costs of maintaining a child in care, referred to as maintenance costs, are reimbursed dollar-for-dollar while those same services would not be covered as prevention or early intervention measures to keep a child in his/her home.

C. **There is a lack of funding for prevention services and least disruptive measures, despite these services being critical to address the greater needs of First Nations children.** First Nations children are overrepresented in each stage of the child welfare system across Canada, resulting in three times as many children in care today than were in residential schools at their height. The most common reason for child removal is neglect; with the most common form of neglect being physical neglect, which often stems from the lack of available resources to provide for a child. Thus, preventative funding could have a very successful impact on keeping First Nations children out of care.

D. **Funding for key elements of child welfare services on-reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation, and the cost of living, are insufficient.** This results in severe difficulties for FNCFS agencies, impacting the quality and quantity of services available to First Nations children on-reserve. AANDC has long known about and failed to correct these flaws and inequities.

3. AANDC failed to provide justification for the discrimination

The Commission argues that a *prima facie* case of discrimination has been established and, therefore, that the onus is on AANDC to justify their discriminatory practice. A bona fide justification would include proof that accommodating the needs of First Nations would impose undue hardship on the provider, considering health, safety and cost. As the health and safety of AANDC are irrelevant in this case, they would need to prove that undue financial hardship would be caused by implementing First Nations child welfare services in a non-discriminatory manner. The Commission notes that the federal government did not provide evidence of financial hardship, and thus argues the federal claims of undue financial hardship must be dismissed. The government is unable to explain the reason funding is unavailable, the steps taken to secure funding, or the impact that funding provision would have on government operations.

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 Canadian Human Rights Commission Factum, including quote from #367 page 108.

[2] Canada v. Davis, 2013.

[3] Summarized from the Canadian Human Rights Commission Factum, including quote from #377 page 110 citing the Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1; see also e-mail from Barbara D'Amico to Beverly Lavoie dated June 11, 2010, CHRC BOD, Ex. HR-14, Tab 386.

*O.H.R.C. and O'Malley v. Simpsons-Sears. Ltd. [1985] 2 S.C.R. 526 at 558.