WHAT ARE THE COMPLAINANTS' MAIN ARGUMENTS BEFORE THE TRIBUNAL?

Canadian Human Rights Tribunal on First Nations Child Welfare

What is Section 5 of the Act?

The Canadian Human Rights Act is a federal statute intended to help ensure equal opportunity to all people and to prohibit discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Section 5 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… (is one that can) 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.

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 Complainants' main arguments?

The Complainants, the First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN), 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 a service under the Canadian Human Rights Act (the Act).

2.Adverse treatment of First Nations children is based on the prohibited ground of discrimination.

3.The Complainants have established *prima facie* discrimination.

4.Fiduciary duty is owed to First Nations.

1. AANDC provides a service under the Act

The Caring Society argues that the government discriminates against First Nations children in the provision of child welfare services and in its failure to fully implement Jordan's Principle. Under the Act, denial of a service, that is available to the general public, to members of a

specific racial group is discriminatory. The government argues that they are not providing a service under the Act, rather just the funding, and therefore, that the Tribunal does not have the jurisdiction to consider the complaint. To counter this, the Caring Society argues that the concept of a service under the Act includes funding. Additionally, they argue that AANDC is more than a funder because it "*exerts control over the provision of child welfare services*" and is therefore involved in their delivery.[1] The Caring Society expands, stating that the government "*dictates, controls and participates in how, when and where First Nation Child and Family Service Agencies provide child welfare services.*"[2] For example, they cite the terms of funding policies in which AANDC sets the conditions for funding new First Nations Child and Family Service (FNCFS) agencies and commits to periodic reviews of the child welfare programs. The Caring Society argues that such activities are clearly beyond the scope of a mere funder.

2. Adverse treatment is based on the prohibited ground of discrimination

The Caring Society argues that the government's adverse treatment of First Nations children is based on the prohibited grounds of discrimination based on "*race and national or ethnic origin*".[3] They suggest that the FNCFS program determines eligibility based on race, determined through blood quantum, which is used to determine status Indian registry.

3. *Prima facie* discrimination has been established

The Caring Society and the AFN attest that they have established *prima facie* discrimination, arguing that First Nations children who access the FNCFS program are discriminated against because of their First Nations status. Four main factors are highlighted as evidence of discrimination:

A. **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.** The Caring Society put forward research and evaluations from AANDC, AFN, the Auditor General, the United Nations Committee on the Rights of the Child, and the Caring Society, arguing that these documents demonstrate inequitable treatment of First Nations children on-reserve. According to the Caring Society, internal government documents and the testimonials of child protection workers from various regions further demonstrate inequitable treatment. They argue that the government's internal documents demonstrate a practice of reallocating funding from essential AANDC programs, such as infrastructure and housing, to subsidize shortfalls in child welfare funding. They assert that this is evidence of *prima facie* discrimination and serves to increase risks for children. The Caring Society argues that AANDC has failed to justify this discrimination.[4]

B. **First Nations children's *"unique and greater"* needs have not been accounted for in child welfare services provided through the FNCFS program.** The Caring Society argues that this is a contributing factor to the overrepresentation of First Nations children in care. The legacy of the residential school system and the sixties scoop have created a situation in which First Nations children and families have greater needs due to historical trauma. The Caring Society argues that, based on existing case law, "*treatment that perpetuates a historical disadvantage to a group is discriminatory.*"[5] They contend that the failure to take steps to resolve this historic disadvantage establishes a case of *prima facie* discrimination. The AFN also argues that current child welfare services perpetuate the historical disadvantage, by failing to address the historic trauma suffered at residential schools and its intergenerational impacts. The AFN cites evidence that points to a *"statistical link between being inter-generationally affected by residential schools and the likelihood of spending time in foster care."*[6] They discuss this in the context of the significant overrepresentation of First Nations children in the foster care system.

C. Culturally appropriate services are not provided under the FNCFS program. According to the Caring Society, AANDC has failed to ensure that FNCFS agencies can provide First Nations children with culturally appropriate child and family services, which are equal to those provided to non-Aboriginal children. In arguing for the responsibility to provide culturally appropriate services, they cite sections of the United Nations Convention on the Rights of the Child and the Declaration on the Rights of Indigenous Peoples, which protect children's rights to identity and Indigenous families/communities' rights to raise their children. They further suggest that the failure to provide culturally appropriate services is discriminatory because the absence of such services perpetuates the historic disadvantage imposed by residential schools and other colonial policies. Moreover, it is based on the misguided assumption that First Nations children can be assisted by the same types of services that meet the needs of non-Aboriginal children. The Caring Society argues that, in its own evaluations, AANDC has described the need for culturally appropriate services, but fails to provide and support them. This leads to negative consequences for First Nations children, such as removal from their homes, and loss of connection to culture, identity and language. Finally, AANDC has been unable to justify their failure to provide culturally appropriate services, citing only the inherent difficulty of defining such services.[7]

D. Essential social services are denied to First Nations children due to jurisdictional disputes. First Nations children are particularly vulnerable to disagreements between governments and departments over payment for services. Services may be denied, delayed or disrupted as a consequence. Jordan's Principle states that when a jurisdictional dispute arises between federal and provincial/territorial governments, or between government departments, over services available to children in the general public, the department of first contact should pay for the service and seek reimbursement later. This would prevent situations in which First Nations children are denied or experience delays in essential public services due to living on-reserve. Although Jordan's Principle was unanimously endorsed by the House of Commons, the government currently restricts its implementation, applying it only to disputes between governments, rather than between departments, and only for First Nations children with complex medical needs and/or multiple disabilities. Reflective of the narrow definition, the federal government maintains that not a single Jordan's Principle case has ever been reported. The Caring Society requests that the Tribunal remedy the situation giving "*full effect to Jordan's principle for First Nation child and family services.*"[8] The Caring Society argues that failure to fully implement Jordan's Principle constitutes *prima facie* discrimination under section 5 of the Act.

4. Fiduciary duty is owed to First Nations

The AFN argues that the 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. The AFN suggests that AANDC can exercise its unilateral power to affect First Nations legal and practical interests, such as the right to culture and language, through changes to the FNCFS funding and services. According to the AFN, services for First Nations children and families are shaped by the federal government's discretionary power. The AFN submits that a fiduciary relationship is present and the onus rests on the government to disprove the existence of this relationship.[9]

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, including quote from #91 page 33.

[2] Summarized from the First Nations Child and Family Caring Society Factum, including quote from #126 page 46.

[3] Summarized from the First Nations Child and Family Caring Society Factum, including quote from #167 page 63.

[4] Summarized from the First Nations Child and Family Caring Society Factum.

[5] Summarized from the First Nations Child and Family Caring Society Factum, including quote from #262 page 97.

[6] Summarized from the Assembly of First Nations Factum, including quote from #434 page 157, citing Dr. Amy Bombay Transcript Page 16, Vol. 41.

[7] Summarized from the First Nations Child and Family Caring Society Factum.

[8] Summarized from the First Nations Child and Family Caring Society Factum, including quote from #396 page 146.

[9] Summarized from the Assembly of First Nations Factum.

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