WHAT ARE THE FEDERAL GOVERNMENT'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 federal government's main arguments?

The federal government's department of Aboriginal Affairs and Northern Development Canada (AANDC) asks that the case be dismissed. They expand with the following 3 arguments:

1. The complaint put forward is beyond the scope of section 5 of the Canadian Human Rights Act (the Act).
2. The comparison between federal and provincial funding does not prove a *prima facie* case of discrimination under section 5 of the Act.
3. Even without this comparison with the provinces, there is no proof of *prima facie* discrimination.

1. The complaint is beyond the scope of the Act

The government attests that the comparison between federal and provincial/ territorial funding systems in not valid under the Act. They argue that the case is fundamentally flawed because it compares two different service providers serving two different publics. The government suggests that comparisons across jurisdictions and

What is section 5 of the Canadian Human Rights 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.

comparisons between different service providers serving different groups of the public have rarely been made in court. The government argues that case law supports the view that anti-discrimination law in Canada is not intended to address differences between two different jurisdictions. Accordingly, the Act cannot be used to equalize differences in treatment between different groups serving different publics.

2. The comparison between federal and provincial funding does not prove *prima facie* discrimination

The government argues that the First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN), together referred to as Complainants, have not proven *prima facie* discrimination. The government attests that a fiduciary duty does not exist between the federal government and First Nations children on-reserve when it comes to child welfare. The government submits that the land issues required to determine fiduciary duty, are not implicated in the domain of child welfare. Further, the government argues that even if a fiduciary duty did exist, this would not inform a case on discrimination. Indeed, the government maintains that child welfare services fall within the jurisdiction of the provinces. Accordingly, they argue that responsibility for any negative consequences that result from the failure of the provinces/territories to fund child welfare on-reserve cannot be attributed to the federal government. Further, the government argues that agencies cannot, like individuals, claim discrimination.

The government argues that AANDC is not providing a service under section 5 of the Act, rather just the funding, and the case should therefore be dismissed. The government attests that they provide the funding to First Nations Child and Family Service agencies, but do not control the decisions made or services delivered by these agencies. They further argue that, even if the Tribunal finds that AANDC is providing a service, there is no evidence that child and family services are denied to First Nations living on-reserve, and that limitations in the sufficiency or quality of services are different than a denial of services. Further, the government argues that there is no evidence to support the claim that the government's funding results in the high number of on-reserve First Nations children in care. They argue that both on and off-reserve First Nations children are overrepresented in the system, and this is a result of factors such as poverty and health that are beyond the scope of child welfare.

The federal government argues that comparisons between federal funding of on-reserve child welfare services and provincial/territorial funding of off-reserve child welfare services is not fair. They argue that they are not required to mirror provincial/territorial services. But, should such a comparison be allowed, the government argues that the Complainants would need to prove how much funding is provided by both parties, which they have not done. The government further contends that the comparison between provincial and federal funding is impossible to make because funding is not offered in the same manner. Federal funding is provided by several departments and through a different organizational structure that enables agencies flexibility in how they spend these funds. The government argues that any suggested differences between federal and provincial funding are a reflection of this structural difference and cannot demonstrate that funding for on-reserve services is less than funding of off-reserve services.

3. Even without comparison to the provinces/territories, there is no proof of *prima facie* discrimination

The government argues that establishing a *prima facie* case of discrimination requires the use of a comparison group, to demonstrate significant differences in services provided to people living on and off-reserve. Accordingly, the government submits that the Complainants' argument, that the federal approach to funding on-reserve child welfare is discriminatory because it does not support culturally appropriate services which cater to the unique needs of First Nations children and does not address the historic disadvantage imposed by residential schools, cannot succeed. The

government states that discrimination cannot be proven simply based on the Complainants assertion that child welfare could be more effective if it was funded and/or designed differently; accordingly, this policy level concern is irrelevant for a discrimination case.[1]

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] Information Sheet summarized from Aboriginal Affairs and Northern Development Canada Factum.

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