

WHAT REMEDIES HAVE BEEN SUGGESTED TO THE TRIBUNAL AND WHAT ARE THE ARGUMENTS AGAINST THEM?

Canadian Human Rights Tribunal on First Nations Child Welfare

Suggested remedies and the arguments against them

Each Complainant and interested party submitted a list of remedies to be considered should the Tribunal find that the complaint is substantiated. The remedies suggested are summarized below, as are the federal government's arguments against the proposed remedies.

The First Nations Child and Family Caring Society's requested remedies

The First Nations Child and Family Caring Society (Caring Society) requests that the Tribunal clarify which aspects of the First Nations Child and Family Service (FNCFS) program are discriminatory and provides a general list of suggested remedies. These remedies are summarized below; a more detailed and specific list can be found in the Caring Society's closing submission to the Tribunal. The Caring Society asks that the Tribunal order the federal government to:

- Provide immediate relief to First Nations agencies.
- Establish a process to ensure First Nations children receive culturally appropriate child welfare services, which are comparable to those for children living off-reserve, and take into account the unique needs of First Nations children.
- Immediately increase the annual funds provided to FNCFS agencies by 108.13 million plus a 3% annual escalator.
- Fully implement Jordan's Principle, applying it to: First Nations children; all educational, health and social services that are normally available to off-reserve children; and disputes between federal departments as

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 is the Tribunal's remedial authority?

Section 53 of the Canadian Human Rights Act states that if, at the conclusion of the inquiry, the panel finds the complaint is substantiated, an order can be made against the person engaged in the discriminatory practice stating that:

- The person cease the discriminatory practice and take measures to redress it or prevent it from taking place in the future.
- The person must make the rights, opportunities or privileges that were denied available to the victim.

well as those between federal and provincial departments.

- Cease discriminatory practices and prevent similar practices from occurring in the future. Systemic remedies could include: designing a non-discriminatory FNCFS program; providing training on First Nations culture and history, human rights and social work, and the FNCFS program to the federal government's Aboriginal Affairs and Northern Development Canada (AANDC) staff; and publicly posting AANDC policy and practices.
- Place a monetary award for each First Nations child taken into out of home care since 2006, at a maximum of \$20,000 per person, in a trust to fund healing activities for First Nations children who have suffered discrimination in the provision of child and family services.

In addition, the Caring Society asks that the Tribunal retains jurisdiction over the matter until all parties agree the FNCFS program provides comparable and culturally appropriate services that account for the unique needs of First Nations children.¹

The Assembly of First Nations' requested remedies

The Assembly of First Nations (AFN) states that the government needs to address systemic discrimination in the FNCFS program and funding with systemic remedies. They ask the Tribunal order the federal government to:

- Cease and desist discriminatory funding practices and services, providing funding and services that are equitable in comparison to those offered by the provinces, until a long term-plan for providing care for First Nations children and families is developed.
- Fund a study to determine the most effective means of providing care for First Nations children and families.
- Close the gap in child welfare services for First Nations children and families, through measures which include implementing individual annual performance measurements and evaluations of AANDC staff.
- Fund and participate in a joint policy development initiative with the AFN, Caring Society, Commission and other experts. The group will report back to the Tribunal on establishing long-term child welfare services that:
 - Support First Nations rights to self-governance and enable First Nations solutions.
 - Support the rights of Indigenous peoples to raise and protect their children.
 - Ensure consistency with the fiduciary relationship between Crown and First Nations as well as with the goal of reconciliation.
 - Eliminate federal child welfare policies that perpetuate the historical disadvantages of First Nations children and families.
- Form an expert panel to establish appropriate compensation for children and families impacted by discriminatory child welfare practices from 2006 on.
- Ensure that any increase in funding for FNCFS not result in any inequity or cause further harm in relation to other AANDC programs in capital, housing, education, etc.
- Fund an annual gathering for First Nations child welfare experts.
- Establish written policies to ensure First Nations children and families have benefits and services equal to all other Canadians.²

The Canadian Human Rights Commission's requested remedies

The Canadian Human Rights Commission (Commission) requests that the Tribunal find that AANDC's FNCFS program and its funding formulas are discriminatory and inconsistent with section 5 of the Canadian Human Rights Act. The Commission requests the following remedies:

- Order AANDC to cease and desist from applying the discriminatory aspects of the FNCFS program and funding formulas.
- Order AANDC to redress and remedy the discriminatory aspects of the FNCFS program and funding formulas within 12 months.
- Request the Tribunal to supervise the implementation of the remedies for 18 months or more.³

The Interested Parties' requested remedies

The Chiefs of Ontario support the remedies requested by the Commission. They also request that the steps to remedy discrimination should include an independent study of funding and service levels of First Nations child welfare in Ontario, based on the 1965 Welfare Agreement.⁴

Amnesty International suggests that it is important to consider Canada's international human rights obligations and develop effective remedies to breaches in these obligations, including:

- Take quick and effective measures to achieve substantive equality in the provision of child welfare services, including allocating resources to remedy existing discrimination and ensure all children experience the same enjoyment of their rights. This includes providing culturally appropriate services for Indigenous children.
- Identify systemic gaps and barriers to Indigenous children's rights in order to implement positive measures through legislation, resource allocation, policies and programs. This may require a restructuring of resources and services. It should include an application of Jordan's Principle that accords with Canada's international obligations and is not narrow and restrictive.
- Provide compensation to victims who suffered physical or psychological damages as a result of the breaches in Canada's international obligations.
- Provide assurance that these breaches will not continue; through both words and actions.
- Take concrete, positive steps to ensure Canada's international obligations are met. This may include establishing independent institutions to monitor and ensure that breaches to the rights of First Nations children do not take place, as well as ensuring the meaningful participation of beneficiaries.

Amnesty International suggests that the Tribunal provide ongoing supervision and independent safeguards to ensure the effective enforcement of the orders.⁵

What are the federal government's arguments against these proposed remedies?

The government asserts that, even if a claim of discrimination is established, the remedies sought are inappropriate. The government argues that:

- Policy amendments may be suggested by the Tribunal, but not prescribed with specifics.
- Decisions made on what is considered to be culturally appropriate should be made by the FNCFS agencies themselves, rather than the Caring Society.

- The request for monetary compensation for each child removed from his/her home since 2006 is fundamentally flawed. It cannot be proven that children were removed from their homes because of the government's funding practices.
- The Tribunal does not have authority to award legal costs.
- The remedies requested are extensive, sometimes irrelevant and beyond the scope of the complaint.⁶

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.

² Summarized from the Assembly of First Nations 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.

⁶ Summarized from the Aboriginal Affairs and Northern Development Canada Factum.