THE CARING SOCIETY PRESENTS

ASK AN EXPERT

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Stop the discrimination and prevent it from re-occurring: Updates on the Canadian Human Rights Tribunal case

INTRODUCTION:

In 2007, the First Nations Child & Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a complaint with the Canadian Human Rights Commission alleging that Canada was discriminating against First Nations children by improperly funding child welfare on reserve and in the Yukon and failing to implement the full scope of Jordan's Principle. After numerous attempts by Canada to get the case dismissed, hearings at the Canadian Human Rights Tribunal (Tribunal) began in February 2013 and concluded in October 2014.

On January 26, 2016, the Tribunal ruled that Canada is racially discriminating against 165,000 First Nations children in its provision of the First Nations Child and Family Services (FNCFS) program and flawed, narrow implementation of the scope of Jordan's Principle.

Since its landmark ruling in 2016, the Tribunal has issued more than 20 additional orders, many of which are non-compliance orders against Canada. This information sheet and podcast with Cindy Blackstock, Executive Director of the Caring Society, and guest Sarah Clarke of Clarke Child & Family Law[1] provides an overview of the case and what has or *has not* happened since.

The Big Three:

What are some of the most significant elements people need to know about the case?

- The Tribunal ordered Canada to 1) stop its discrimination against First Nations children and, 2) prevent its reoccurrence. Resolving the complaint requires that the Tribunal is satisfied *on an evidentiary basis* that:
    - the immediate discrimination has stopped;
    - the broader systemic and insidious discrimination ingrained throughout Canada's bureaucracy has stopped; and
    - there are adequate and evidence-informed safeguards in place to prevent discrimination from reoccurring.

[1] Clarke Child & Family Law: https://www.childandfamilylaw.ca/

- We need a forever solution, not a five-year solution. The Tribunal did not give the parties a five-year runway for the discrimination to end – it was very clear in its instructions that Canada was to stop its discrimination and prevent it from reoccurring. Blackstock dislikes the term "long-term reform" because it covers up what Canada has actually been ordered to do.
- Children and young people have been among some of the most engaged followers of the case. From witnessing the hearings at the Tribunal to hosting events and raising awareness amongst their peers or writing letters to elected officials urging them to stop the discrimination, the level of engagement by children in the case is special and sets it apart from other legal proceedings.

What's the evidence?

As Clarke describes in the episode, the most profound evidence of Canada's discrimination against First Nations children and families was within Canada's own records. In addition to its internal documents, Canada collaborated on and even funded research seeking to document and remedy funding inequities within the FNCFCS program[2][3][4]. In 2016 CHRT 2[5], the Tribunal noted that at the time of its ruling, Canada had known about its discriminatory child welfare funding for at least sixteen years, and despite the ample evidence-based solutions at its disposal, repeatedly failed to take action[6].

In addition to the evidence submitted during the 72-day Tribunal hearing as described above, the importance of changes to First Nations child welfare and full implementation of Jordan's Principle was affirmed by the Truth and Reconciliation Commission (TRC) as top Calls to Action to redress the legacy of residential schools and advance reconciliation in Canada. The federal government has adopted the Calls to Action.

The Tribunal did not prescribe a specific dollar amount to end the discrimination and prevent its reoccurrence. Rather, the Tribunal ordered Canada to restructure its services and programs for First Nations children in a manner that meets their needs. Ultimately, increased budgets will not matter unless the *structure* responds to the needs of children and their families in a way that is evidence-informed and in a manner that respects the diversities of First Nations across the country. It is important to move beyond preoccupation with a magic number that will resolve the case.

Myth-busting:

What are the common misperceptions, practices, or assumptions about the case and why should they be considered myths?

Assumption: *Canada did not fully understand how the costing and the structure of the funding were impacting children and families at the time the case was filed.*

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[2] Wen:De Report (2005): cwrp.ca/sites/default/files/publications/en/WendeReport.pdf

[3] First Nations Child and Family Services Joint National Policy Review (2000): fncaringsociety.com/sites/default/files/docs/FNCFCS_JointPolicyReview_Final_2000.pdf

[4] Auditor General Report to the House of Commons: Chapter 4: First Nations Child and Family Services Program (2008): publications.gc.ca/collections/collection_2008/oag-bvg/FA1-2008-1-4E.pdf

[5] 2016 CHRT 2: fncaringsociety.com/publications/2016-chrt-2-2016-tcdp-2

[6] Blackstock, C. (2016). The Complainant: The Canadian Human Rights Case on First Nations Child Welfare. McGill Law Journal (62)2. https://lawjournal.mcgill.ca/article/the-complainant-the-canadian-human-rights-case-on-first-nations-child-welfare/

Stop the discrimination and prevent its reoccurrence.

Reality: At the time the case was filed, the discriminatory nature of the FNCFCS program was well documented and well understood. As Clarke explains, the federal government was well aware that the structure of the FNCFS program was causing harm but chose to put money ahead of the rights of children and families. Coming to terms with the fact that Canada knew about the harms and chose not to act is a difficult truth for many people in Canada. The inequities were so dramatic, says Blackstock, that you had to believe that when faced with the evidence of how dramatically Canada was underfunding First Nations children, driving them into child welfare care at rates higher than residential schools and denying kids public services in ways that would create life-long deficits, any moral or reasonable person would do the right thing, let alone a government that considers itself a bastion of human rights. But Canada did not.

Assumption: *Procedural wrangling and technical arguments are benign legal tactics with no direct impact on children and families.*

Reality: The federal government spent five years trying to prevent the case from being heard by the Tribunal. While Canada argued legal technicalities, children were growing up in real time. Children only get one childhood, says Blackstock. A child born the year the complaint was filed was nine years old by the time the Tribunal issued its decision in 2016 and would be 17 years old today. Procedural wrangling has real consequences, as does Canada's non-compliance with the Tribunal's orders. In 2017, the Tribunal linked Canada's non-compliance to the tragic deaths of three young girls[7].

Assumption: *The issues that First Nations children and families face, and the solutions required to address them are complex.*

Reality: There are solutions. Blackstock finds it incredulous that Canada consistently refers to anything to do with First Nations children's equity complex – while at the same time delivering equality to all other kids in the country without question. Getting clean drinking water to First Nations communities is considered "complex," yet society has found a way to get clean drinking water to the space station. "We are trying our best" can no longer be accepted as an adequate response by Canada to address discrimination. Canada was not able to convince the Tribunal, the Federal Court, or the Federal Court of Appeal that "trying their best" was enough for kids. "Good enough" is not justice. The adults in the room need to stop accepting "best efforts" as sufficient and look at the impacts of their decisions, including their decisions to do nothing.

Assumption: *The Tribunal no longer needs to retain its jurisdiction; it has been long enough.*

Reality: The Tribunal has found it necessary to issue more than 20 additional[8] orders since its landmark decision in 2016, many of them non-compliance orders against Canada. Clarke discusses how her optimism following the 2016 decision turned quickly to disappointment. Canada said that it welcomed the decision; unfortunately, it was soon apparent that Canada was not going to take action on its own, despite clear orders from Tribunal to take immediate measures to remediate the discrimination. Most of the orders issued by the Tribunal since 2016 are in direct response to Canada's inaction. Resolving the complaint requires Canada to supply the Tribunal with evidence that it has stopped its discrimination and implemented safeguards to prevent discrimination in the future. Assurances by Canada that work is underway are not evidence, particularly given past statements by Canada that it welcomed the Tribunal orders while taking no action to implement them.

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[7] 2017 CHRT 7: fncaringsociety.com/publications/2017-chrt-7-2017-tcdp-7

[8] Timeline of Tribunal orders: fncaringsociety.com/i-am-witness/chrt-orders

What works and what's next?

When asked about a moment or moments in the history of the case that stands out most profoundly, Clarke recalls the "magic" of having the young people in hearing rooms listening, watching, and making decisions for themselves about whether Canada was treating First Nations children fairly, saying, "It made us all sit up a little taller and be very careful about how we were explaining our various parties' positions." Clarke notes that it is rare for children to be in the courtroom, despite the enshrinement of their right to participate in the matters that affect them in the United Nations Convention on the Rights of the Child. The presence of children and youth had a positive effect in terms of how the parties conducted themselves in the courtroom, but more importantly, affirms the power of children and youth to make a difference and the importance of social justice-based reconciliation education campaigns[9].

The ruling on the merits (2016 CHRT 2) has profoundly shaped the human rights lens in Canada through the Tribunal's analysis of substantive equality. The Tribunal describes substantive equality both as a remedy and a shield: First Nations children are entitled to substantive equality *and* substantive equality can be used to structure the delivery of services to children and families. This "transformative equality" represents a standard of equity that children can describe but adults have a hard time articulating. While this case is generally focused on child and family services and Jordan's Principle, Clarke believes the Tribunal rulings will have a profound impact on all the cases coming behind it in relation to substantive equality in Canada.

At present, the parties[10] are in talks about how to meet the Tribunal orders, which includes looking at a broad spectrum of services and government delivery systems that impact First Nations children across the country and the need for regional variations. Ending the discrimination and preventing its reoccurrence means looking at everything from how child and family services are funded, how First Nations are receiving support to deliver programs to protect their children, how families are accessing Jordan's Principle, how the government is responding to those requests, how concerns about Canada's approach to both Jordan's Principle and First Nations child welfare are being resolved and reforming the federal department of Indigenous Services Canada. Clarke reiterates the importance of a forever solution that gets to every corner, nook, and cranny of government to end the discrimination "so the Tribunal can be satisfied that it can, in fact, close the complaint and be confident that kids will be protected in the years to come."

Additional resources:

First Nations Child & Family Caring Society. I Am a Witness Timeline. https://fncaringsociety.com/i-am-witness/tribunal-timeline.

King, J., Wattam, J., & Blackstock, C. (2016). Reconciliation: The kids are here! Child participation and the Canadian Human Rights Tribunal on First Nations child welfare. Canadian Journal of Children's Rights, 3(1), 32-45. https://ojs.library.carleton.ca/index.php/cjcr/article/view/75

Obomsawin, A. (Director). (2016). *We can't make the same mistake twice* [Film]. https://www.nfb.ca/film/we_can_t_make_the_same_mistake_twice/.

[9] For more on this topic, see fncaringsociety.com/knowledge-portal/fncares/fncares-research

[10] Parties include the Caring Society, the AFN, and Canada, Chiefs of Ontario, Amnesty International and Nishnawbe Aski Nation.