First Nations Child & Family Caring Society of Canada

Assembly of First Nations (AFN) Factum Summary

November 2014

What is this case about?

The First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations filed a complaint in 2007 alleging that the Federal Government's flawed and inequitable provision of First Nations child and family services and failure to implement Jordan's Principle is discriminatory pursuant to the Canadian Human Rights Act. The case was referred to the Canadian Human Rights Tribunal (the Tribunal) in September of 2008 at which time the Canadian Human Rights Commission (CHRC) joined the proceedings acting in the public interest. The Tribunal granted Amnesty International Canada and the Chiefs of Ontario interested party status a year later. The Tribunal has the authority to make a legally binding finding of discrimination and order a remedy.

What stage is the case at now?

Hearings at the Canadian Human Rights Tribunal began in February 2013 and concluded in May 2014. The Tribunal heard from 25 witnesses and over 500 documents were filed as evidence. The parties filed their final written submissions (factums) and presented their closing oral arguments from October 20-24, 2014. The decision is expected in 2015. You can read the factums authored by all the parties on fnwitness.ca and look for the link to the APTN video archive of the witness testimony.

What is a factum?

A factum is a legal party's recital of the relevant facts, law and authorities (citations) to support the order they are seeking from a judicial body.

What are some of the highlights of the AFN Factum?

The AFN maintains that:

1) The Federal Government discriminates against First Nations children on reserve through the systematic underfunding of child welfare services which denies substantive equality to First Nations children on reserve.

2) The Federal Government maintains assimilation policies which historically seek to "kill the Indian in the child". These policies perpetuate the fundamental inequity of child welfare service provision to First Nations children on reserve.

3) The Federal Government has discriminated against First Nations children living on reserve by failing to provide them with equitable funding for services and programs. This discrimination takes place on the grounds of race and national or ethnic origin, as per section 5 of the *Canadian Human Rights Act*.

4) The Federal Government perpetuates the historical disadvantage and racial discrimination of First Nations children living on reserve through chronic underfunding of child welfare services and through a continued removal of children.

5) The Federal Government is perpetuating negative, intergenerational impacts for First Nation children on reserve through discriminatory practice similar to the legacy of Indian Residential Schools (IRS).

6) The Federal Government fails to provide funding policies through Aboriginal Affairs and Northern Development Canada (AANDC) that meet "the vision and the substantive provisions" of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

7) The Federal Government exercises jurisdiction and authority over First Nations child welfare on reserve, thereby establishing the Crown's fiduciary duty. As a fiduciary, the Crown is required by law to act for the benefit of First Nations children and families.

Interesting paragraphs

While we strongly encourage people to read the full version of the AFN's factum as well as the factums filed by other parties including the Attorney General, here are some paragraphs from the AFN factum that others have highlighted as particularly interesting to them (please refer to original text for footnote citations):

- "[…] Many children underwent the unimaginable transition from being the center of life itself to a non-entity with no value whatsoever in a residential school, an unacceptable discriminatory practice intended to break First Nation families – a practice that continues today." (p. 3, paragraph 11)
- "The historical contextual evidence shows us patterns of conduct on the part of the Department, which continue to the present time and is evidence of perpetuation of historical disadvantage or racial discrimination. The most significant of these is the removal of children and chronic underfunding. There are also patterns of overbearing Departmental control over the lives of First Nations; as well as knowledge of problems, and neglect, which in the case of IRS, was verging on manslaughter. Finally, the historical context provides clear evidence of a transition from IRS to child welfare, and the Department's undeniable role in First Nation child welfare." (p. 5, paragraph 17)
- "After the adoption of the *Davin Report* in 1883, the numbers mushroomed and by 1923 the Department had maintained responsibility over seventy-one (71) schools – sixteen (16) industrial schools and fifty-five (55) boarding schools – with 5,347 children in their care and in residence. Dr. Milloy explained that "boarding schools" were small schools usually associated with a community, whereas "industrial schools" were big flagship schools located away from communities. *Davin's Report* had recommended the industrial school model. By 1923, the distinction was eliminated and all were known as residential schools. By 1931, that number grew to a high of eighty (80)." (p. 35, paragraph 91)
- "Later, in 1919, the unresolved issues relating to recruitment were addressed when Duncan Campbell Scott, who had earlier opposed compulsion, decided in favour of it. He decided it was impossible to effectively "recruit for the schools under the present voluntary system." An amendment to the *Indian Act*, 1920 made it mandatory for every child between the ages of seven and fifteen to attend school. Section 10 set out the mechanics of enforcement: truant officers, and, "on summary conviction," penalties of fines or imprisonment for non-compliance." (p. 39, paragraph 104)
- "The cause of the tragic "trail of disease and death" lay in the construction, administration and funding of the residential school system. In this way, chronic underfunding was connected to child deaths in the schools. Bryce estimated that 24% of children in IRS died of TB [tuberculosis]. Dr. Milloy in his testimony said the rate was probably as high as 42%. According to Duncan Campbell Scott, Deputy Superintendent of the Department of Indian Affairs, "fifty per cent (50%) of the children who passed through these schools did not live to benefit from the education which they had received therein." (p. 43, paragraph 114)
- "The "parenting presumption" was at the heart of the school system and it was the presumption drawn from the non-Aboriginal community, that the teachers, administrators, and principals in the schools were more appropriate parents for young Aboriginal children than their own biological parents. Dr. Milloy wrote that could not have been true as he cites numerous examples of incidents, problems and issues with respect to the care of the children. These incidents and problems arose for the greater part because operating a residential school was a complex and stressful task. Dr. Milloy explained that the schools were "sites of the struggle against poverty", and in them was an atmosphere of considerable stress that dulled the staff's sensitivity toward the children. This negative situation created a brooding culture of violence which was further exacerbated because of staff inadequacies as caregivers." (p. 51, paragraph 136)
- "Initially, graduates were to be absorbed by the non-Aboriginal communities but this initiative came to be recognized as a gross miscalculation on the part of the Department. Employment in these non-Aboriginal communities was not readily available, but the graduates also faced a great deal of racial prejudice which happened to undermine the entire effort. This lead the Department to conclude as early as 1889 that "there appears to be no alternative but to return the [children] to the reserves."" (p. 54, paragraph 144)

- "As previously noted, even though the schools were declining in number the enrollment in them was increasing, until it reached the height of its enrollment in 1953 at 11,000. According to Dr. Milloy, the increase can be explained by the new life and rationale the schools developed into where children were being directed into the schools as part of the wider approach to the child welfare system. Children from the far north were put into southern residential schools as part of the effort to *integrate* but also because the Department did not want to build new residential schools in the north." (p. 67, paragraph 181)

- "The function and purpose of the schools changed from a purely educational institution to one that was dealing with the influx of children from an existing child welfare movement. However, the old problems of the system continued in the system in every sector, child care and education, with many of them being identified by people working within the system, such as Department officials, principals, church officials, etc. They attributed it to the same old persistent flaw of the system: underfunding." (p. 68, paragraph 184)

- "According to Dr. Milloy's expert opinion, it is probably more accurate to state that residential schools have negatively affected every First Nations person. The fact is that First Nation children who did not attend IRS still lived in the same communities as those who did and in this way they were affected by the spill-over and flow-back of the residential school experience. Aboriginal communities are the poorest communities across the country and their children are apprehended at much greater numbers than children from other groups. Aboriginal people also fill up Canadian jails in greater proportions than other groups. The intergenerational impacts have disrupted the children whose parents, siblings and grandparents attended IRS, and in this way, residential schools continue to affect the First Nations population." (p. 78, paragraph 209)

- "Dr. Bombay performed research with colleagues by looking at the relationship between being affected by IRS and the likelihood of a child spending time in foster care. The opinion of Dr. Bombay was as follows: the data and statistical analyses suggest that those families who were more affected by IRS, for example, by having more generations of their family being a student in IRS, created consequences like having the lesser ability to provide adequate and stable care for their children, which in turn was associated with an increased likelihood of their children spending time in foster care." (p. 83, paragraph 225)

- "Elder Joseph testified that these schools and the things that happened in them, which was in his estimation a period of 130 years, set the stage for the most massive attempt at social engineering Canada had ever undertaken. He said there is a cycle of brokenness, despair, violence and abuse prevalent as a result, and that if Canada and Aboriginal families and communities do not get involved in breaking this cycle, that there will be a "huge mess down the road" and that another 150,000 lives will be lost. Elder Joseph testified that there is not much time available, and that the problems associated with residential schools must be resolved "as soon as we can"." (p. 115, paragraph 312)

- "The federal government exercises discretionary control over a First Nations beneficiary's interests. The specific Aboriginal interests at stake include: parents' right to care for their children; children's right to family and community; one's right to their culture and language; the transmission of culture, language, cultural expression and traditional knowledge from one generation to the next; and a First Nations right to self-determination and self-government. Due to the federal government's unilateral assertion of jurisdiction it has assumed discretionary control over programs and services that have direct impact on those Aboriginal interests, which are constitutionally protected under the section 35 of the *Constitution Act, 1982*." (p. 177, paragraph 490)

- "The vulnerability of the First Nation communities, families and children arises from a number of sources. First Nations are statutorily subject to both the Indian Act and provincial child protection legislation. First Nations can neither choose which legislation better serves their needs nor opt out of either. First Nations also rely on the federal government for funding of other services such as education, housing, band administration, etc." (p. 179, paragraph 497)

- "Moreover, the foundational terms of First Nation CFS [child and family service] programs and funding are subject to change at any time by Parliament. This provides the federal government with an opportunity to alter the terms of funding agreements and/or the mandates of the

First Nation CFS program in its entirety. To this end, First Nation governments, agencies and families face significant political risks that the government may reduce future benefits. This vulnerability is not hypothetical." (p. 179, paragraph 498)

What remedy is the AFN seeking?

The AFN is seeking measures to:

1) Cease and desist the discriminatory funding formulas of Directive 20-1, EPFA and the 1965 Welfare Agreement as well as discriminatory aspects of the FNCFS Program.

2) Attain funding for a study relating to child welfare in Fist Nation communities provided by AANDC.

3) Cease and desist the system of organizational operations and complacency that support systemic discrimination in child welfare services.

4) Create a joint policy development initiative with AANDC, AFN, FNCFCS, and other First Nation child and family welfare experts to establish effective, long-term child welfare services and funding.

5) Establish appropriate individual compensation for "children, parents and siblings impacted by the discriminatory First Nation child welfare practices between 2006 and the date of the Tribunal's Order in this matter".

6) Ensure an increase of funding for FNCFS will not result in the reduction of other AANDC programs and services such as housing and education.

7) Fund annual gatherings of the Crown and First Nation child welfare experts for the purpose of Crown education (for five years).

8) Enforce the submission of new, written policies by the AANDC within twelve months of the ruling.

The AFN submits that "it is appropriate that the Tribunal's Orders reflect and support the overall arching goal of *reconciliation* between First Nations peoples and the Crown" (p. 186, paragraph 517).

An entire section of the factum is dedicated to describing the remedies and identifying how these measures are supported in law and by the evidence. You can read these specifics on pages 182-192.

Can the other parties ask for different remedies?

Each party in the proceeding is free to identify what remedy (if any) they believe the Tribunal should consider. The Tribunal has the ultimate authority to determine what remedy (if any) is awarded.

Where can I find more information about the case?

Go to fnwitness.ca or email us at info@fncaringsociety.com.

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