First Nations Child & Family Caring Society of Canada

First Nations Child and Family Caring Society (Caring Society) Factum Summary

October 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 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 are now filing their final written submissions (factums) and closing oral arguments are set for 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 Caring Society Factum?

The Caring Society maintains that:

1) The Federal Government's documents confirm its provision of First Nations child and family services is "woefully inadequate" contributing to "situations [that] are dire" for First Nations children, placing them at higher risk for child welfare placement and risk of serious harm including death.

2) The Federal Government has failed to address the inequality despite knowing about the problem for over a decade and having solutions available. It has also largely ignored repeated calls for action by First Nations, provincial/territorial governments, and independent authorities such as the Auditor General of Canada, child advocates and the United Nations Committee on the Rights of the Child.

3) The Federal Government's provision of First Nations child and family services fails to account for the cultural needs and historical disadvantage of First Nations children and their families.

4) The Federal Government does not fund all provisions of provincial/territorial child welfare statutes meaning First Nations children and families receive lesser benefit under the law.

5) The Federal Government lacks transparency and accountability in its delivery of First Nations Child and Family Services. For example, government officials often do not document key policies /practices and fail to communicate known shortcomings in federal programs to service recipients and the public.

6) The Federal Government's definition of Jordan's Principle (jordansprinciple.ca) restricts cases to children with complex medical needs and multiple service providers. The definition also excludes disputes between Federal Government departments even though they occur most frequently. The Federal Government refuses to change its approach to

Jordan's Principle despite a Federal Court finding it unlawful and repeated calls from First Nations, prestigious professional groups, and provinces to broaden the definition to include all services for children and disputes sourced within the Federal Government.

7) The Federal Government's practice of funding non-Aboriginal child welfare service providers at a higher rate with fewer conditions than First Nations service providers is discriminatory and incentivizes non-culturally appropriate service delivery to children and families.

8) The Federal Government subsidizes shortfalls in its First Nations child and family services program by transferring funding from other under-funded programs necessary for First Nations children's safety and wellbeing such as housing, water, and sanitation.

9) The Caring Society proposes a comprehensive set of remedies to compensate children who were harmed by the discrimination, remedy the flaws in the Federal Government's provision of First Nations child and family services and Jordan's Principle and stop discrimination from occurring again.

Interesting paragraphs

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

- "As the Respondent's data demonstrate, there could not be a more important case to come before this Tribunal, as First Nations children on reserve and in the Yukon have cumulatively spent over 66 million days in out of home care between the adoption of Directive 20-1 in 1989 and 2012 representing over 187,000 years of childhood. Canada can and must do better." (p. 8, paragraph 21)

- "[...] The Respondent's flawed and inequitable provision of First Nations Child and Family Services is discriminatory within the meaning of Section 5 of the *Canadian Human Rights Act* ('CHRA', 'the Act') and results in the denial of or adverse differentiation in child and family services that are otherwise available to the public. The evidence demonstrates that the Respondent has known about this discriminatory situation for many years and has failed to remedy the harms despite acknowledging that its flawed and inequitable policies contribute to 'woefully inadequate' funding and causes 'circumstances [that] are dire,' meaning First Nations children are at a greater risk of being unnecessarily removed from their families and that the death of some children may even result from inadequate funding." (p. 4-5, paragraph 11)

- "The discrimination perpetuated by AANDC manifests itself [...] in providing services to First Nations children AANDC has failed to take into account the historic disadvantages suffered by First Nations peoples [and] AANDC has failed to provide culturally-appropriate services." (p. 6, paragraph 16)

- "This transformation, and its resulting placement of numerous Aboriginal children into care outside of their communities reproduced the challenges of residential schools within the various provincial child welfare systems. As Dr. Milloy noted, 'one morphs into the other in a sense, foster homes and boarding homes become, as I said, residential schools, writ small, that you just reduce the school down to further isolation of the child from his family by putting him in foster home somewhere.'" (p. 115, paragraph 313)

- "As Chief Joseph noted in his evidence, children are an essential part of First Nations communities and the bond between the community and the child must be maintained:

  'All of these Elders that I spoke to, and there were about 50, 55 of them across these three language groups, each talking about how special children are and talking about how sacred an obligation and responsibility we have to try to raise those kids. But once they're apprehended they're lost to the authorities or lost to a different set of considerations, a different set of frameworks on how to raise kids and just often removed physically

from those homes into faraway places.'" (p. 96, paragraph 260)

- "The October 31, 2012 AANDC power point presentation prepared by Sheilagh Murphy [Director General, AANDC Headquarters], acknowledges that the EPFA [Enhanced Prevention Focused Approach] funding must increase in order to allow FNCFSA [First Nations child and family service agencies] to provide reasonably comparable services: '[i]n addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve.' Similar statements appear in the November 2, 2012 draft of the power point presentation, including the need to align program funding and create flexibility to match provincial/territorial child welfare regimes." (p. 85, paragraph 230)

- "Canada is fully aware of the types of jurisdictional disputes that are excluded by its narrow definition of Jordan's Principle. In the Preliminary Report of the Terms of Reference Officials Working Group of the Canada/Manitoba Joint Committee on Jordan's Principle, senior officials from Health Canada and AANDC listed a number of 'service disparities' that 'are not the result of a dispute between Federal and Provincial jurisdictions' over responsibility for funding, and therefore 'do not relate to Jordan's Principle' as defined by the Respondent. One example of such a disparity in service involves mobility equipment:

  'Service Example: A child with multiple disabilities and/or complex medical needs requires a wheelchair and stroller and requires that a lift and tracking device be installed in his/her family home. The Non-Insured Health Benefits Program (NIHB) will provide children with only one item, once every five years. If the item is a wheelchair, NIHB supports the provision of manual wheelchairs only which must be fitted with seating inserts in order to accommodate small children. If the item is a ceiling mounted lift and tracking device, funding is not provided by NIHB to install the device in the family home. If these same children were to reside off reserve, they would be eligible to receive more than one mobility device (if needed) and any installation costs would be borne by the provincial program providing the mobility device.'" (p. 162-163, paragraph 434)

- "Orthodontic benefits provide another illustrative example of the service gap between AANDC and Health Canada. Of 532 appeals for orthodontic benefits under NIHB documented in the 2012/2013 fiscal year, 83% were first appeals, of which only 20% were approved. Of the only 80 second appeals during this period, a mere 1% were approved. None of the 12 third level appeals were approved. Not only was the appeals process unlikely to result in Health Canada reimbursing the expense, but the ever smaller number of claimants at each level of appeal demonstrate the discouraging effect of having to jump through so many hoops simply in order to receive reimbursement. One of Canada's documents, highlighting gaps between the services provided by AANDC and Health Canada to First Nations children and families in British Columbia, notes how this very issue impacts children in care:

  'Orthodontia: there is some limited accessibility for CIC [children in care] but the process is cumbersome and often requires the agency to appeal 2 times, and full coverage is rarely provided over the full plan of care.'" (p. 164, paragraph 437)

- "Finally, the Caring Society believes the evidence demonstrates that the Respondent's failure to ensure culturally appropriate services as per the program objectives is discriminatory. Of particular concern is the failure of the Respondent to enable the provision of culturally appropriate services by exclusively compelling First Nations to use provincial/territorial legislation with no consideration given to supporting First Nations laws and failing to provide adequate and flexible funding under the delegated model to develop culturally based standards and design, operate and evaluate culturally based programs. Additionally, the Caring Society is very concerned that the Respondent's practices of fettering the further development of First Nations child and family service agencies and

providing non-Aboriginal recipients with higher levels of funding, greater flexibility and fewer reporting requirements incentivizes non-culturally appropriate services." (p. 7-8, paragraph 19)

What remedy is the Caring Society seeking?

The Caring Society is seeking a comprehensive suite of measures to:

1) Compensate children who were wrongfully removed due to AANDC's discriminatory service provision by establishing a trust fund that can be accessed for cultural and wellness services and education;

2) Address the discrimination in AANDC's current provision of First Nations child and family services and Jordan's Principle; and

3) Prevent future discrimination.

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 the specifics on pages 173-216.

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.