



CANADIAN
HUMAN RIGHTS
COMMISSION

COMMISSION
CANADIENNE DES
DROITS DE LA PERSONNE

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Via Email

January 29, 2013

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Dear Mr. Adzic and Parties:

**Re: FNCFCSC and AFN v. Attorney General of Canada
Tribunal file no.: T1340/7008**

Please find enclosed the Commission's Amended Statement of Particulars in the above-noted matter.

Yours truly,

Daniel Poulin
A/Director and Senior Counsel
Encl.

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

First Nations Child and Family Caring Society of Canada et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

**AMENDED STATEMENT OF PARTICULARS OF
THE CANADIAN HUMAN RIGHTS COMMISSION**

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OVERVIEW

1. This complaint involves an allegation of discrimination in the provision of a service on the grounds of race and national or ethnic origin. The Complainants, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (the Caring Society), allege that the Respondent, Indian and Northern Affairs Canada (represented herein by the A.G. of Canada), discriminates against Aboriginal children in the provision of a service, by inadequately funding child welfare services on reserve contrary to section 5 of the *Canadian Human Rights Act* (the Act).

2. It is alleged generally that the funding formulas used by the Respondent, a part of the First Nations Child and Family Services National Program Manual, result in the inequitable and under-funding of services pursuant to provincial/territorial child welfare laws. Specific concerns centre on the under-funding of agency infrastructure and services designed to keep families together, which contributes to a growing number of Aboriginal children in state care. Through this funding formula and the related arrangements with direct service providers, the Respondent is responsible for the provision of child welfare services on reserves.

A. MATERIAL FACTS

Complainants

3. The first Complainant, the Caring Society, is a national non-profit organization that provides research, policy and professional development, and supports to First Nations child welfare agencies. Its aim is to promote the well-being of First Nations children, youth, families and communities with a particular focus on the prevention of, and response to, child mistreatment or neglect.

4. The second Complainant is the AFN. The AFN is the national political representative body of First Nation governments and their citizens in Canada, including those living on reserve and in urban, rural areas. The AFN represents over 600 First Nations.

5. The Caring Society and the AFN are joint complainants and filed the complaint at issue on February 23, 2007.

Respondent

6. The Respondent, formerly Indian and Northern Affairs Canada (INAC), now known as Aboriginal Affairs and Northern Development Canada (AANDC), represented by the Attorney General of Canada, is one of the federal government departments responsible for meeting the Government of Canada's obligations (including fiduciary obligations) and commitments to First Nations, Inuit and Métis, and for fulfilling the federal government's constitutional responsibilities in the North. INAC's responsibilities are largely determined by numerous statutes, negotiated agreements, treaties, and relevant legal decisions.

Discriminatory Practice

7. At issue in this complaint is the under-funding of child welfare services to First Nations children on reserve.

8. FNCFS agencies operate on reserve pursuant to provincial/territorial legislation [*It must be noted that this is stated to be without prejudice to asserted First Nations jurisdiction over child welfare*]. At the time the complaint was filed with the Commission, these agencies were funded by AANDC according to a national

funding formula known as Directive 20-1 (in British Columbia, Manitoba and New Brunswick), and as the Enhanced Prevention Focused Approach (Enhanced Approach) (in Alberta, Saskatchewan, Nova Scotia, P.E.I. and Quebec). In Ontario, funding is done under a separate agreement known as the 1965 Indian Welfare Agreement. Currently, the Enhanced Approach has been expanded to include New Brunswick and Manitoba. Where there are no agencies, the provinces provide the service and may be reimbursed by AANDC.

9. The Respondent is responsible for the funding of such statutory and culturally based child welfare and protection services on reserve through provincially authorized First Nation Child and Family Services (FNCFS) Agencies, Bands and Tribal Councils, in the absence of available First Nation child welfare agencies throughout the Provinces or Territories. FNCFS Agencies are required to carry out the same statutory services as agencies or government departments funded for child welfare and protection programs off reserve by provincial and territorial governments.

10. It is alleged that Directive 20-1 provides unlimited funds to place First Nations children in foster care but almost no resources to keep children at home. This chronic and discriminatory under-funding of preventive child welfare services results in higher numbers of children being seized from the home than would otherwise be the case. Preventive child welfare services - often referred to as "least disruptive measures" - are almost completely absent on reserve, and First Nations are therefore deprived of their benefit. These services, regarded as standard for children off reserve, include family counselling and guidance, in-home supports and parent aides, child and respite care, parenting programs, and services to assist families dealing with the serious illness of the child or a family member.

11. It is further alleged that although the Enhanced Approach was meant to rectify the shortcomings identified in Directive 20-1, it has failed to do so, as evidenced by studies commissioned by the Respondent.

12. Both funding regimes, whether Directive 20-1 or the Enhanced Approach, result in substantive inequality for aboriginal children and families on reserve. The effect of the current funding regime and the resulting inequality constitutes adverse differentiation in the provision of a service, as it results in the denial of essential child welfare and child protection services to on reserve First Nations children and families and impacts upon a constituency of children and families known to have greater child welfare and child protection needs.

13. As for the 1965 Indian Welfare Agreement applicable to Ontario, it will be demonstrated that while it is possible that Ontario agencies receive more funding than the agencies funded under the two other arrangements, facts suggest that the funding arrangement does not adequately account for the unique, and higher child welfare needs of First Nations children nor does it adequately account for the unique practice context of FNCFS agencies similar to the rest of the country. In addition, AANDC documents suggest that a cap has been placed on the amount of funding for child welfare services in Ontario.

14. As the Complainants will also demonstrate, this discriminatory practice contravenes "Jordan's Principle", passed unanimously by the House of Commons on December 12, 2007.

15. Furthermore, witnesses will testify to the following facts:

(i) The Complainants, together with the Respondent, participated in a series of studies designed to examine the nature of the differential treatment in the provision of statutory child welfare and child protection services on and off reserve and to provide recommendations to improve the Respondent's current funding structures, policies and formulas;

(ii) The findings contained in the studies substantiate the differential treatment arising from the current funding structures, policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve, who receive unequal child welfare services as a result;

(iii) The Respondent's response, *without* supporting expert analysis and opinion, included strategies that did not redress the inequities. Separate and independent reports from the Auditor General Reports of Canada and British Columbia in May of 2008, the June 2011 Status Report of the Auditor General of Canada, the March 2009 and February 2012 Reports of the Standing Committee on Public Accounts and the Federal Government's response found that the Respondent had not redressed the inequities;

(iv) The Respondent independently commissioned studies that came to the same conclusion as that of the Complainants' in respect of the inequities;

(v) The Respondent has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in FNCFS Agencies being unable to meet their statutorily mandated responsibilities to provide a standard of child welfare and protection services.

16. The evidence will demonstrate that:

(a) The Government of Canada's First Nations Child and Family Services Program is the primary, if not exclusive source of public funding for statutorily required and culturally based child welfare and protection programs for registered First Nation children and families normally resident on reserve;

(b) The purpose of the First Nations Child and Family Services Program is that which the Respondent describes, namely: The main objective of the First Nations Child and Family Services Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to First Nations children and families on reserve are comparable to those available to other provincial residents in similar circumstances;

(c) The funding provided under the Respondent's First Nations Child and Family Services Program is not simply an administrative or executive transfer of funds to the FNCFS Agencies, Bands and Tribal Councils that provide for provincial statutory required child welfare and child protection services on reserve. The Respondent exercises independent control and imposes terms and conditions for the distribution and use of funds that may be different and supplementary to those terms and conditions for the distribution and use of funds in the case of all other children; and

(d) Without the provision of substantively equitable funding by the Respondent to that provided for by the Province and Territories, registered First Nation children and families on reserve are denied a comparable standard of help, assistance and benefit. This funding is a "service", within the meaning of section 5 of the *Act*.

B. ISSUES

17. The issue which is raised in this case and which the Tribunal must address is as follows:

Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children and families, or adversely affected them, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin?

C. THE LAW AND THEORY OF THE CASE

Prima facie case

18. The initial onus is upon the Complainant to establish a *prima facie* case of discrimination on at least one of the grounds alleged. The threshold for proving such a case is low. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent."¹ That answer or explanation must be believed and not shown to be a pretext.² Once a complainant establishes a *prima facie* case of discrimination, she is entitled to relief in the absence of justification by the respondent.³ Once a *prima facie* case of discrimination is established, the burden of proof shifts to the respondent to demonstrate that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified.

¹ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536 at page 558

³ *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202 at page 208

19. It is submitted that the evidence so far clearly demonstrates the existence of a *prima facie* case of discrimination. Only First Nations children and families on reserve suffer the effect of the discriminatory practices.

20. While a Comparator group may exist in the present case, one is not required. As the Federal Court found, a comparator group is not part of the *definition* of discrimination, but rather, is an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases.⁴ In effect, if a comparison were to be made, it will be argued and evidenced that it consists of Aboriginal children and families living off reserve and non-Aboriginal families and children living off-reserve.

21. Provincial and Territorial child welfare and child protection statutes do not provide for a lesser standard in the application of child welfare and child protection laws and services for registered First Nations children and families normally resident on reserve. All children with similar needs are to receive the same benefit under the law. Funding structures, policies and formulas which result in a lesser benefit for under-registered First Nations children and families under the law, are discriminatory on the prohibited grounds of race, national or ethnic origin.

22. The evidence will demonstrate that the needs of FNCFS Agencies and the needs of the children and families that they serve are certainly not less and are probably more than those of children and families off reserve and the agencies that serve them, and thus justify the remedy sought.

⁴ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 446 at para. 290.

Bona fide justification

23. When the evidence establishes a *prima facie* case of discrimination, the burden shifts to the Respondent to demonstrate that its decision is a *bona fide* justification under the *Act*. To do so, the respondent must, in light of the decisions of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU ("Meiorin")* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer")*, demonstrate on the balance of probabilities that:

- a) The respondent adopted the standard for a purpose or goal rationally connected to the function being performed;
- b) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and
- c) The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the complainant without incurring undue hardship.

Provision of a service

24. The Commission will submit that the facts at issue do constitute a "provision of a service" under the *Act* and reiterates the pleadings found at paragraph 16 of the Complainants' original Statement of Particulars.

Gould v. Yukon Order of Pioneers [1996] 1 S.C.R. 571

Watkin v. Attorney General of Canada, 2008 FCA 170

Canada (Attorney General) v. Davis, 2013 FC 40

25. In addition, the Commission will argue, in the alternative, that the Respondent is the effective provider of child welfare and protection services performed by the Agencies and Provinces in that the Respondent exercises effective and complete control over the funding, budget, administration, management and mandate of the Agencies and is involved in the development of policies that directly affect child welfare practices. Thus the acts of the Respondent impacts on the provision of the service by the Agencies and therefore constitutes a discriminatory practice in the provision of a service.

See by analogy *Canadian Pacific Limited v Canada (Human Rights Commission)*, [1990] F.C.J. no. 1028

D. REMEDIES

26. The Commission seeks the following remedies:

- a) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent immediately cease the discriminatory practice and more particularly an Order requiring the immediate cessation of disparate funding;
- b) The full and proper adoption and implementation of the funding formula (updated to 2013 values) and policy recommendations contained in *Wen:de The Journey Continues* and in *The National Policy Review on First Nations Child and Family Services Research Project Phase 3* within a period of six months; and
- c) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent, along with the complainants, the Commission and the intervener Chiefs of Ontario conduct a study on the 1965 Ontario Agreement in order to ensure that the services provided in Ontario are equivalent to those provided across the country. Full and proper adoption

and implementation of any needed improvements to the formulas to be completed under the supervision of the Commission.

27. The Complainants have advised the Commission that they wish to seek the following remedies:

a) Pursuant to paragraph 53(2)(d) of the *Act* the payment of a sum of \$112,000,000 (one hundred and twelve million dollars) into a trust fund to be administered in a way to be agreed upon by the parties or, failing, as ordered by the Tribunal, as compensation for the expenses required to enable those persons who were removed from their communities to receive therapeutic, repatriation, cultural and linguistic services and for the expenses related to providing those services;

b) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent undertakes to give full and proper implementation of Jordan's Principle across its services pursuant to Private Members Motion 296; and

c) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent undertakes, in the event that First Nations child and family service agencies may be developed in the future in any province or territory, provide a level of child welfare funding that ensures First Nations children and families on reserves receive equitable benefit pursuant to Provincial/Territorial child welfare laws and standards.

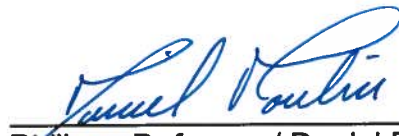
E. WITNESSES

28. The Commission will call the witnesses named and described in Annex A.

DISCLOSURE MATERIALS PROVIDED

29. The Commission's most recent disclosure will be provided to the parties on February 1, 2013.

All of which is respectfully submitted this 29th day of January 2013.



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Counsel for the Commission

Annex A

Commission Witnesses

NON-EXPERTS	
NAME AND TITLE	SUBJECT OF TESTIMONY
<p>Cindy Blackstock Executive Director, First Nations Child and Family Caring Society of Canada</p>	<p>Dr. Blackstock has been in her current position since 2002. Her experience in social work and specifically with First Nations organizations such as the Anderson Family, Norway House Cree Nation, the Assembly of Manitoba Chiefs and the Assembly of First Nations has provided her with a range of experiences and knowledge of a range of social issues affecting First Nations people across the country.</p> <p>She was the co-principle investigator of the Wen:de series of reports, and she will discuss the policy review conducted by INAC/AANDC and the AFN. Dr. Blackstock was directly involved in the creation of Jordan's Principle, passed unanimously by the House of Commons on Dec. 12, 2007. Dr. Blackstock will discuss the over-representation of First Nation's children in child welfare and the factors driving this over-representation, including the negative outcomes arising from the unnecessary placement of children in child welfare care.</p> <p>She will testify generally to the facts giving rise to the complaint and the remedies being sought.</p>

<p>Elsie Flette CEO South First Nation Authority Manitoba</p>	<p>Ms. Flette has been the Executive Director of West Region Child and Family Services for just under 20 years. Her agency is mandated by the provincial government to oversee, support, fund agencies who provide direct service on and off reserve delivery.</p> <p>She will speak to the inequities of services on reserve, discussing the National Program Manual on First Nations Child and Family Services and the Internal Audit Manual from INAC.</p>
<p>Judy Levi Coordinator, North Shore Mic Mac District Council (New Brunswick)</p>	<p>Ms. Levi has been working in her position for the past 19 years. She will speak about the organization of child welfare/protection agencies in New Brunswick, how funding is received and by whom. She is involved in advice, guidance and negotiations with the government and can discuss the differences between the funding received by the provinces and the federal government.</p> <p>Ms. Levi will also speak about Directive 20-1 and how this formula has been implemented in the areas she works and the inadequate child welfare resources it has resulted in. She will also discuss the impacts of the inequities on small agencies.</p>
<p>Brenda Ann Cope Comptroller, Mi'kmaw Family and Children's Services of Nova Scotia</p>	<p>Brenda Anne Cope is responsible for finances and administration services at the Mi'kmaw Family and Children's Services of N.S., where she has worked since the year 2000. She will discuss how the agency secures its funding, in particular the two funding services; provincial and federal.</p> <p>Ms. Cope will explain the authority under which money can be provided to children in their parents' homes. She will also speak to the changes made in 2008 with the Enhanced Approach and discuss the caps on federal funding, which were not implemented in provincial funding.</p>

<p>Richard Gray Director, First Nations of Quebec and Labrador Health and Social Services Commission</p>	<p>Mr. Gray works for the umbrella organization for First Nations in Quebec and Labrador concerned with health and social issues. He has been involved in national tables on CFS for the past 3-4 years. He will testify on the changes that have arisen from the "enhanced funding arrangement."</p>
<p>Derald Dubois Executive Director, Touchwood Child and Family Services (Saskatchewan)</p>	<p>Mr. Dubois was on the "project management team" which consisted of one AFN representative, one INAC representative and one Directors' representative (Mr. Dubois) who were charged with the implementation of the NPR recommendations. He will speak to what the recommendations were. He will also testify on the difficulties faced by agencies.</p>
<p>Steve Knudsen Former Executive Director of Secwepemc Child and Family Services Agency (British Columbia)</p>	<p>Mr. Knudsen has more than 35 years of experience in the area of social services, primarily in the area of child welfare and family support. He spent 7 years as the Executive Director of the Secwepemc Child and Family Services Agency. He will testify to the provincial and federal legislative requirements for child welfare and funding services, the inequalities arising out of these structures and policies and the level of control exercised by the Respondent in the provision of these services.</p>
<p>Darin Keewatin Executive Director of Kasohkowew Child Wellness Society (Alberta)</p>	<p>Mr. Keewatin has more than 20 years of experience in the area of child welfare and family services. He will speak to the provincial and federal legislative requirements for child welfare and funding services in Alberta, both on and off reserve. He will also testify to the inequalities created, the lack of culturally appropriate services and the Enhanced Approach as well as the impact it has had on the child and family services.</p>

<p>Carolyn Bodahnovich Financial Officer, West Region Child and Family Services (Manitoba)</p>	<p>Ms. Bodahnovich has more than 20 years of experience in the area of child welfare and family services. She will testify to the legislative and standard requirements for child and family services, the impacts of the Respondent's funding levels, as well as the level and impact of the control exercised by the Respondent and her experiences working with both the Federal and Provincial governments to ensure compliance.</p>
<p>Jonathan Thompson Director, Health and Social Development, Assembly of First Nations</p>	<p>Mr. Thompson was the AFN representative and co-chair of the Joint National Advisory Committee. He worked to create the framework, costing and purpose of the <i>Wen:de</i> studies and oversaw the work done. He will speak to his involvement in both.</p>

Commission Expert Witnesses

Dr. Nicolas (Nico) Trocme

Director of the Centre for Research on Children and Families, McGill University School of Social Work

Dr. John Loxley

Professor of Economics, University of Manitoba

Dr. Frederic Wien

Professor, Maritime School of Social Work, Dalhousie University)

Dr. John Milloy

Professor and Historian at Trent University