Court File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA AND ASSEMBLY OF FIRST NATIONS

Complainants

and

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

STATEMENT OF PARTICULARS, DISCLOSURE, PRODUCTION OF THE COMPLAINANTS

[Rules 6(1)(a)(b) and (c) Canadian Human Rights Tribunal of Procedure]

WILSON CHRISTEN LLP
Barristers
137 Church Street
Toronto, Ontario
M5B 1Y5

Jeffery Wilson
LSUC #17649K
Tel: (416) 956-5622
Fax: (416) 360-1350
Email: jeffery@wilsonchristen.com

Counsel to First Nations Child and Family Caring Society of Canada and Assembly of First Nations.

Overview

1. There is insufficient funding for statutory[1] child welfare and protection programs for registered Indian[2] children and families normally resident on reserve.

2. The fact of insufficient funding can readily be measured by the significantly greater public funding available, and benefit received, for the statutory child welfare and protection programs that are, and have been provided to registered First Nations children and families living off reserve, and non-First Nation children living on and off reserve.

3. To date[3] the Respondent has not contested these assertions. Thus, a registered First Nation child and First Nation family entitled under statute to child welfare or child protection services and normally resident on reserve receives a lesser benefit compared to that received by all others.

4. The under-funding of statutory child welfare and protection programs targeted at registered First Nations normally resident on reserve engages sections 3 & 5 of the *Canadian Human Rights Act*.

5. In this inquiry[4], the Complainants are respectfully asking the tribunal to give effect to the principle of substantive equality[5]. The evidence the Complainants intend to present will enable the tribunal to compare the child welfare needs and statutory services available to the public generally against the child welfare needs and statutory services available to registered First Nation children and families normally resident on reserve and determine that there exists differential treatment and discriminatory practices in relation to the benefit provided.

Material Facts

6. First Nations Child and Family Caring Society of Canada ("FNCFCS") is an umbrella organization servicing First Nations Child and Family Services Agencies ("FNCFS Agencies") in Canada. Thus, it is an organization with particular expertise and experience in working with First Nations children and families on and off reserve in the context of their child welfare and child protection needs.

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[1] Each province and territory has legislation that provides for child welfare and child protections services and program to be implemented to ensure a minimum standard of care for all children.

[2] "Indian" is the term used in section 91(24) of the *Constitution Act,* granting the federal government jurisdiction over "Indians and Lands Reserved for Indians", and is used in other pieces of federal legislation enacted under this head of power. However, in this submission, the term 'First Nation(s)' will be used to describe people who are referred to in legislation as an 'Indian (s)'.

[3] The Complainants filed a joint complaint 2006/1060 with the Canadian Human Rights Commission ("CHRC") on February 23, 2007. The Respondent filed no response disputing the content of the Complaint. In fact, as the Complainants will demonstrate at the inquiry, the Respondent participated in the development of all reports substantiating the complaint.

[4] The Commission requested the institution of an inquiry in September of 2008.

[5] *Hodge v. Canada (Ministry of Human Resources Development)* [2004] S.C.J. No. 60.

7. Assembly of First Nations (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. FNCFCS and AFN are the joint complainants. They filed a complaint, 2006/1060 (the "Complaint") on February 23, 2007.

8. The Respondent is the Attorney General of Canada (representing the Minister of Indian and Northern Affairs) pursuant to the April 8, 2009 directions of the tribunal, and is referred to as "Canada".

9. The Complainants assert that Canada, through its First Nations Child and Family Services Program ("FNCFS Program"), does not provide sufficient funding to ensure culturally based statutory child welfare and protection programs for registered First Nation children and families normally resident on reserve that are comparable to those received by all other children and families.

10. Canada is responsible for the funding of such statutory and culturally based child welfare and protection services on reserve through authorized First Nation Child and Family Services Agencies Bands, Tribal Council or in the absence of available First Nation child welfare agencies through the Provinces or Territories. FNCFS Agencies carry out the identical mandate of agencies or government departments funded for the same statutory child welfare and protection programs off reserve by provincial and territorial governments.

11. The Complainants intend to demonstrate that Canada does not provide the funds to enable comparable benefits that are available, and received, by all others.

12. The Complainants intend to demonstrate that the effect of this discriminatory practice includes the denial, in contravention of statutory obligations, of essential child welfare and child protection programs to on reserve First Nation children and families to their severe detriment, and this impacts upon a constituency of children and families known to have greater child welfare and child protection needs.

13. As the Complainants will also demonstrate, this discriminatory practice contravenes "Jordan's Principle[6]" passed unanimously by the House of Commons on December 12, 2007.

14. Furthermore, this Tribunal will have the opportunity of hearing from the Complainants' witnesses in support of each of the following facts:

(i) The Complainants, together with Canada, participated in a series of expert studies[7] designed to examine the nature of the differential treatment in the provision of

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[6] Jordan's Principle is a child first principle, the origins of which are that of a case of Canadian jurisdictional wrangling that left a small child, Jordan River Anderson, unnecessarily in a hospital where he passed away because the provincial and federal authorities could not sort out who was responsible for the funding for his home-care. According to Jordan's Principle, the government of first contact is to provide the services immediately required for an First Nation child in priority to a determination of which of the governmental jurisdictions within Canada are responsible.

statutory child welfare and child protection services on and off reserve and to provide recommendations on the improvement to Canada's current funding structures, policies and formulas;

(ii) The findings contained in the expert 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;

(iii) Canada's response, *without* supporting expert analysis and opinion, included strategies that did not redress the inequities.[8] Separate and independent reports from the Auditor Generals of Canada and British Columbia in May of 2008, and the recent March 2009 Report of the Standing Committee on Public Accounts[9] found that Canada's response did not redress the inequities;

(iv) Canada independently commissioned studies that came to the same conclusion[10] as that of the Complainants in respect of the inequities;

(v) Canada did not provide the Canada Human Rights Commission with any factual material to contradict the assertions of discriminatory practices in the Complaint; and

(vi) Canada 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 First Nations Child and Family Services Agencies being unable to meet their statutorily mandated responsibilities[11].

15. The Canadian Human Rights Commission requested an inquiry. An inquiry is necessary because findings of fact are required for a determination of the legal issues.

Position on the Legal Issues

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[7] The studies include the "Joint National Policy Review-Final Report" of June 2000 and a series of three reports: "Bridging Econometrics and First Nations Child and Family Service Agency Funding" (2004); "Wen: de We Are Coming to the Light of Day" (2005) and "Wen de The Journey Continues" (2005)

[8] This Tribunal will hear evidence about Canada's proposed "Alberta Response Model" and a national funding approach referred to as the "First Nations Child and Family Services Prevention Enhancement".

[9] March 2009, 40th Parliament, 2nd Session, Hon. Shawn Murphy, MP Chair : "Chapter 4, First Nations Child and Family Services Program-Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General".

[10] Amongst other documentation that is subject of disclosure at Tab 2 of the Particulars Brief, reference can be made to the 2007 INAC "Evaluation of the First Nations Child and Family Services Program"; the 2006 Deloitte Enterprise Risk Services Report – Risk Assessment Results "First Nations Child and Family Services Program"

[11] October 2006 Revised 2006-10-26 Fact Sheet "First Nations Child and Family Services" contains this excerpt:

> However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care and in order for the agencies to meet their mandated responsibilities.

Section 5 CHRA "Service"

16. If, as is argued, 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 statutory required and culturally based child welfare and protection programs for registered First Nation children and families normally resident on reserve,

(b) The purpose of First Nations Child and Family Services Program is that which Canada describes; namely:

> The main objective of the First Nations Child and Family Services (FNCFS) 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**[12] (Emphasis added)

(c) The funding provided under Canada's First Nations Child and Family Services Program is not simply an administrative or executive transfer of funds to the First Nations Child and Family Services Agencies, Bands and Tribal Councils that provide for provincial statutory required child welfare and child protection services on reserve. Canada 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 Canada 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,

the funding is a "service"[13] within the meaning of section 5 of the *Canadian Human Rights Act*. Certainly, and at the very least, the resolution of this issue requires factual findings and a determination after a full hearing. As noted in one reviewing judicial tribunal where in another

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[12] INAC Fact Sheet: "First Nations Child and Family Services" (Date Modified: 2008-11-03).

[13] See *Chambers v. Saskatchewan (Department of Social Services)*1988 CarswellSask 300 (Sask. C.A.), [1988] S.J. No. 464 (C.A.) at paragraph 38 where the Court observed: "Broadly speaking, services provided by the Crown are available to all members of the public. Most services the Crown provides can be described as publically available benefits. Provision of financial assistance to people in need is but one example."
See also *Chipperfield v. British Columbia (Ministry of Social Services)* [1997] B.C.H.R.T.D. No. 20: the Tribunal rejected the notion that the provision of funding cannot be a "service" for human rights purposes when the sole purpose of the funding is to permit access to targeted accommodation of a need. In *Courtois v Canada (Department of Indian Affairs and Northern Development)* [1990] C.H.R.D. No. 2, the Tribunal considered section 5 of the CHRA to find that the provision of funding for education on a reserve was a "service" available to the general public despite the constitutional jurisdictional divide regarding the provision of funding for education on and off reserve. In *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387, [1994] O.J. No. 1732 (C.A.), funding denied to an individual because of an age limitation was found to be discriminatory, and the funding in that case was to provide financial assistance to persons needing assistive devices.

human rights discrimination complaint case, a similar preliminary issue was raised about meeting the test of a service:

> **6.** In our view, there is a clear jurisdictional issue raised as to whether the relationship between the Diocese and its postulants can be characterized as a "service" within the meaning of s. 1 of the Code. That is not a pure question of law. A proper analysis of the issue can only be done on a factual record establishing, for example, the nature of the relationship between the Diocese and those it accepts as postulants, the mutual obligations and expectations between them, what is provided to the postulants by the Diocese, the basis upon which things are provided to postulants and the like. Those factual determinations are best made by the Tribunal, which would have the advantage of hearing live evidence on these issues if it thought it advisable. Also, the Tribunal has special expertise on issues of interpreting its home statute and the reviewing court would benefit from that opinion.[14]

Prohibited Ground of Discrimination

17. The Complainants submit that they have established a *prima facie* case of discrimination on the grounds of race or national or ethnic origin.[15] Only First Nation children and First Nation families on reserve suffer the effect of the discriminatory practices.

18. The Complainants submit that the issue of an appropriate comparator group will be properly assessed on the facts of the Complaint and following the tribunal's examination of the purpose of the service [16] and the differential child welfare and protection needs[17].

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

20. The evidence will demonstrate that the needs of First Nations Child and Family Services Agencies and the needs of the children and families that they serve are certainly not less[18] than those of children and families off reserve and the agencies that serve them, and thus the remedy sought.

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[14] *Incorporated Synod of the Diocese of Toronto v. Ontario (Human Rights Commission)* [2008] O.J. No. 1692 at paragraph 6

[15] *Marakkaparambil v.Ontario (MOHLTC)* [2007] O.H.R.T.D. No. 24 where the Tribunal applies the *Law* analysis to discrimination complaints about government services and benefits offering up the following test: is it plain and obvious that the complaint cannot succeed on the *Law* framework, in the human rights context, on the facts submitted? See, in particular, paragraph 39.

[16] *Battleford and District Co-operative Ltd. v. Gibbs* [1996] S.C.J. No. 55 at paragraph 33.

[17] *Lavoie v. Canada* [2002] 1 S.C.R. 769 at paragraph 40 may be instructive:

> ...the type of scrutiny proposed by the respondents- namely to choose comparator groups based on jurisdictional considerations- finds no support neither in *Law* nor in any other s.15(1) case. On the contrary, the very essence of an entrenched bill of rights such as the *Charter* is to analyze differential treatment as an issue of equality rights, not of federal versus provincial jurisdiction...

[18] The Complainants rely upon the Royal Commission on Aboriginal Peoples.

Relief Requested

21. The purpose of the tribunal hearing is to achieve a substantiation of the complaint to the Commission and for an order against the federal authorities:

(1) Pursuant to section 53 (2)(a) of the *CHRA* requiring the immediate cessation of disparate funding, as described above;

(2) Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:

(a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17;

(b) The adoption of all of the funding formula (updated to 2009 values) and policy recommendations contained in "Wen: de The Journey Continues [:] The National Policy Review on First Nations Child and Family Services Research Project Phase 3" and which implementation shall also be approved by the Canadian Human Rights Commission in accordance with section 17; and

(3) Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to:

(a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989[19] and thereby experienced pain and suffering;

(b) As compensation for the expenses required to enable those persons who experienced pain and suffering to receive therapeutic, repatriation, cultural and linguistic services and for the expenses to enable First Nations Child and Family Services Agencies to provide such services.

(4) Pursuant to section 53(2)(d) full compensation for the expense of legal services; and

(5) Pursuant to section 53(2)(a) requiring that payment of funds, as referred to above, be implemented without the reduction of funding for any First Nations programs, including Firth Nations Child and Family Services Agencies.

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[19] As the evidence at the hearing will reveal, in 1989, Canada introduced the funding formula known as "Directive 20-1, Chapter 5."