



Canadian Human Rights Complaint: Equity for First Nations Children Briefing Note II: History and Status of the Complaint

Background: In 2007, the First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a human rights complaint against the Government of Canada. The complaint alleges that the Federal Government's failure to provide equitable and culturally based services to First Nations children on-reserve amounts to discrimination on the basis of race and ethnic origin.

Why a Human Rights Complaint?

- **Repeated studies have found that First Nations children living on-reserve receive inequitable child welfare funding and benefit compared to other children in Canada.** See for example reports by the Auditor General of Canada in 2008 and 2011, and the Standing Committee on Public Accounts in 2009.
- **Canada has failed to implement known solutions and has repeatedly ignored the recommendations of its own departments, committees and auditors.** There is no reason to believe that further research or reports will prompt government action.
- **Enforceable measures are needed.** The Canadian Human Rights Tribunal has the authority to determine whether discrimination has occurred and can order a remedy that is enforceable in Federal Court.

How has Canada responded to the Human Rights Complaint?

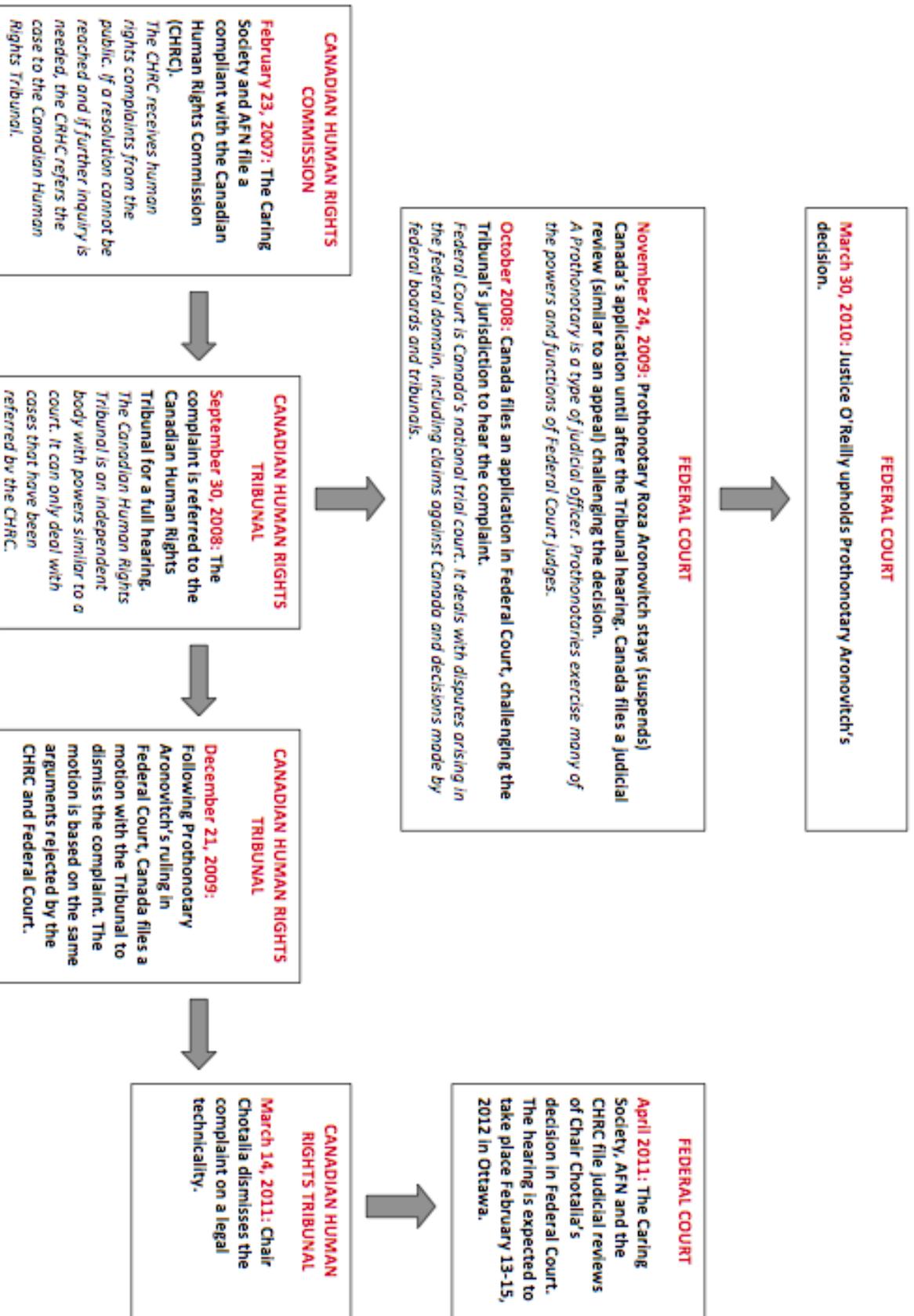
- **Canada is not fighting the case on the merits. The Federal Government is trying to escape a full hearing by arguing legal technicalities and challenging the jurisdiction of the Tribunal to hear the complaint.** Canada claims that:
 1. That funding is not a service and thus not subject to the Canadian Human Rights Act;
 2. That discrimination can only be determined by comparing the experience of different groups receiving services from the same provider. Because the Federal Government does not provide child welfare funding to any other group, Canada argues that there is no "comparator" to First Nations children on-reserve.
- The Caring Society disputes Canada's position. We argue that:
 1. The interests of children compel this case to be decided on the facts not on legal loopholes and technicalities;
 2. Child welfare services cannot be delivered without Federal funding and the government imposes significant child welfare practice and policy requirements to receive this funding;
 3. The Canadian Human Rights Act does not require a comparator group but even if one was required it is clear that child welfare is a statutory and public service available to all children; therefore children receiving child welfare services off-reserve are a legitimate comparator group.

What Has Happened So Far?

- In September 2008, the Canadian Human Rights Commission (CHRC) referred the complaint to the Canadian Human Rights Tribunal (a separate body) for a full hearing. The CHRC considers the complaint to be so important that it became an active party to the case, participating in the Tribunal hearing.
- Canada filed an application in Federal Court, challenging the Tribunal's jurisdiction to hear the complaint. The Federal Court ruled to stay (suspend) Canada's application until after the Tribunal decision. Canada applied for a judicial review (similar to an appeal) of the Federal Court ruling, but the decision was upheld in March 2010. Canada did not apply for a judicial review at the Federal Court of Appeal.
- Opening statements were made before the Canadian Human Rights Tribunal in September of 2009. Cindy Blackstock gave an opening statement on behalf of the First Nations Child and Family Caring Society. The hearing was set to resume in November 2009.
- Two weeks before the November hearing the Government of Canada appointed a new Tribunal Chair, Shirish Chotalia. Without application by any of the parties or an explanation that was clearly understood by the Caring society, Chair Chotalia vacated the scheduled hearing dates.
- One month later, Canada filed a motion with the Tribunal to dismiss the human right complaint. The motion claims that the Tribunal does not have jurisdiction to hear the complaint, which is the same argument rejected by the CHRC and Federal Court.
- Canada's motion to dismiss the case was heard by the Tribunal Chair in June 2010. Eight months passed with no decision, despite Tribunal guidelines indicating that the ruling must be made within six months. Considering the vulnerability of the children and families at the center of the complaint, the Caring Society filed an application in February 2011 to compel the Tribunal to render a decision.
- On March 14, 2011, Chair Chotalia dismissed the human rights complaint on a legal technicality. Chair Chotalia ruled that the Human Rights Act does not allow complaints comparing services by different providers or levels of government. Since child-welfare off-reserve is provided by the provinces and child-welfare on-reserve is provided federally, the Chair said discrimination could not be determined. The ruling contradicts previous decisions by both the CHRC and the Federal Court. The judgement is available online at: www.fnwitness.ca/tribunal-timeline

The Caring Society, AFN and the CHRC have each filed a judicial review of Chair Chotalia's decision in Federal Court. Canada should not be exempt from discrimination claims arising from its funding and policy regimes because of a legal technicality. The hearing is expected to take place February 13-15, 2012 in Ottawa.

Caring Society, AFN Human Rights Complaint Timeline



The Aboriginal Peoples Television Network Fights to Provide Access to Information

- Separate from the human rights complaint was a motion by the Aboriginal Peoples Television Network (APTN) to broadcast the Tribunal hearing. APTN fought to televise the Tribunal proceedings so that First Nations children and youth would have equal access and opportunity to follow a complaint about them and with a direct impact on their lives. All parties except Canada were in favor of the hearing being televised.
- In May 2010, Chair Chotalia dismissed APTN's motion to broadcast the hearing.
- APTN appealed the decision and the ruling was overturned by the Federal Court in July 2011.

Why is This Human Rights Complaint Important?

- **Chair Chotalia's decision has the potential to nullify human rights protections for First Nations living on-reserve.** In essence the ruling says the Federal Government can provide lesser services to First Nations, so long as it does not provide the same services to anyone else.
- Three years after the 2008 residential school apology, this case is in many ways a truth and reconciliation commission into how Canada is treating First Nations children today. **It will decide whether or not it is acceptable for Canada to discriminate and provide less for First Nations children because of who they are.**
- **The implications of this case go beyond child welfare as there are many other services on-reserve that are also under-funded by the Federal Government.** For example, children on-reserve receive about \$2000-3000 less funding per year for elementary and secondary school than children off-reserve.

I Want to Help! How Can I Get Involved?

- **Sign up to be a witness at www.fnwitness.ca.** As a witness you commit to following the case, either in person or through local media. Anyone can sign up - it is free and takes under two minutes!
- **Buy an 'I Am a Witness' button and spread the word! Hold a brown bag lunch** at your workplace, school or neighbourhood to raise awareness about the Tribunal and I Am a Witness campaign.
- **Encourage your local paper and television news to cover the hearings.**
- **Write to your Member of Parliament and to Prime Minister Harper** to demand equity for First Nations kids! Please copy us on any emails or letters at info@fncaringsociety.com.
- **Make a donation** to support our work for First Nations children.

For more information, including the date and time of the upcoming court dates, visit I Am a Witness at: www.fnwitness.ca.