i am a witness
Canadian Human Rights Tribunal Hearing

fncaringsociety.com
Phone: 613-230-5885
Fax: 613-230-3080
info@fncaringsociety.com

Summary of the positions of the parties to the judicial review (Appeal) of Canadian Human Rights Chair Chotalia's decision to dismiss the First Nations child welfare case

January 13, 2012

Case background

The on-reserve child welfare program is controlled by Aboriginal Affairs and Northern Development (AANDC) which was formerly known as the Department of Indian Affairs and Northern Development (INAC). AANDC provides the First Nations Child and Family Services Program through federally controlled treasury board authorities, policies and funding agreements with First Nations child and family service agencies. There are currently over 100 First Nations child and family service agencies across Canada. They operate pursuant to AANDC First Nations Child and Family Service Program requiring that agencies accept provincial/territorial child welfare laws. AANDC currently has three funding arrangements (Directive 20-1 (B.C. and New Brunswick), enhanced funding (Alberta, Saskatchewan, Manitoba, Quebec and Nova Scotia) and the 1965 Welfare Agreement (Ontario) which regulate the levels and structures of funding for First Nations child and family services. In 2008, the Auditor General of Canada reviewed all three funding arrangements in the context of AANDC's overall First Nations Child and Family Services Program and found them all to be flawed and inequitable although the enhanced funding arrangement offered some improvements over the Directive. AANDC policy says that child welfare services should be provided on reserve according to the provincial standard. There are various government reports and independent studies indicating that child welfare services on reserve do not meet the standard of benefit offered by provincially funded child welfare agencies off reserve. The Auditor General of Canada in her 2011 report notes that although the federal government has made some efforts to fix the program by making the enhanced funding arrangement available in more areas of the country but progress overall has been unsatisfactory.

In 2007, the Assembly of First Nations (AFN) and the First Nations Child & Family Caring Society (Caring Society) put in a complaint to the Canadian Human Rights Commission (the Commission) alleging Canada's failure to ensure culturally based equity in its First Nations Child and Family Service Program and to fully implement Jordan's Principle (www.jordansprinciple.ca) was discriminatory. The Commission assessed the complaint and in September of 2008 referred it to a separate organization called the Canadian Human Rights Tribunal for a full hearing.

The Chiefs of Ontario and Amnesty International intervened on the case (when an organization requests to be part of the court case). The government raised technical arguments and tried to stop the tribunal from going forward with a judicial review (where a court of law is asked to rule on the appropriateness of the decision of an administrative agency or tribunal). The government also argued that the service provided to First Nations children on reserve could not be compared to the same service given by the provinces to children off reserve. A hearing on the merits began in September of 2009 with an opening statement made by the Caring Society. Other dates were set for November 2009 and January 2010 to continue the hearings.

A newly appointed Tribunal Chair, Shirish Chotalia, (Chairperson) began work in November of 2009 and vacated all of the hearing dates. The Government of Canada then brought a motion to dismiss the case on the service and comparator issues. The motion to dismiss was heard in June of 2010. In March of 2011, Tribunal Chair Chotalia ruled in favour of the government and dismissed the child welfare case on the comparator issue. Chair Chotalia concluded that the federal government does not provide child welfare service to any other Canadians and so there is no comparator group. The Tribunal did not hear the merits of the case. The Assembly of First Nations, the First Nations Child and Family Caring Society and the Canadian Human Rights Commission disagreed with the Chair's decision and all filed applications with the Federal Court to have the decision judicially reviewed (appealed). The factums (documents that set out the positions and arguments of each party) argue the Tribunal Chair made errors in law and that the full case on its merits should proceed but be heard by another Tribunal member. The Government of Canada agrees with Chair Chotalia and wants the Chair's decision to dismiss the case upheld.

Parties to the Federal Court Hearing

Party	Status	Case Position	Legal Counsel
Assembly of First Nations	Applicant	Opposes Tribunal decision to dismiss the case. Wants hearing on the merits at Tribunal.	David Nawegahbow
First Nations Child and Family Caring Society	Applicant	Opposes Tribunal decision to dismiss the case. Wants hearing on the merits at Tribunal.	Nicholas McHaffie and Sarah Clarke
Canadian Human Rights Commission	Applicant	Opposes Tribunal decision to dismiss the case. Wants hearing on the merits at Tribunal.	Daniel Poulin and Samar Mussalum
Amnesty International	Interested Party	Opposes Tribunal decision to dismiss the case. Wants hearing on the merits at Tribunal.	Owen Rees
Chiefs of Ontario	Interested Party	Opposes Tribunal decision to dismiss the case. Wants hearing on the merits at Tribunal.	Michael Sherry
Attorney General of Canada representing AANDC	Respondent	Supports the Tribunal decision to dismiss the case	Jonathan Tarlton

Factum Summaries: the legal arguments of the parties

The following documents summarize the factums (documents describing the positions and arguments of each party). These are summaries only and we encourage readers to view the full documents available on www.fnwitness.ca under documents and time-lines:

The Applicants

The First Nations Child & Family Caring Society 'The Caring Society':

- The Caring Society submits the Chairperson erred in dismissing the Complaint for lack of a perfect mirror comparator group, dismissing the Complaint on a preliminary motion before a full hearing and for relying on material outside the record before her.
- The Caring Society argues that the Tribunals' decisions should all be made on a standard of correctness..
- The words in the *Canadian Human Rights Act* are to be read in their entire context and should receive a large, liberal and purposive interpretation. The purpose of the Act is to promote and safeguard substantive equality by preventing discriminatory practices based on the Act's enumerated grounds. In this case social, economic and historical disadvantages facing on reserve First Nations children and communities must be considered when discussing substantive equality.
- The interpretation that a comparator group is required to demonstrate discrimination under s.5 of the *Canadian Human Rights Act* is contrary to the language of the Act. Courts and the Tribunal have concluded a comparator group is not required. For example, for maternity leave a comparator group is pointless because only women take maternity leave. (*Lavoie* v. *Canada (Treasury Board of Canada))*. Similarly, First Nations children would receive child welfare services from provincial and territorial governments if they did not have on reserve status.
- As well, the federal Crown has an obligation to act in a fiduciary capacity towards First Nations peoples.
- The Supreme Court reasoned in *Withler* v. *Canada* that comparator groups are not required under s.15 *Canadian Charter of Rights and Freedoms* cases. By extension human rights cases under the *Canadian Human Rights Act* should not be held to a higher standard than constitutional claims and should not be required to have comparator groups.
- A cross-jurisdictional comparison should be used to answer how these children and families would be treated if they were not First Nations living on reserve.
- In other cases where no comparator group is adequate to capture the differential treatment, the courts have allowed for a flexible and liberal approach, applying claimants' unconventional choice of comparator group. The comparator group that should be used is off-reserve children receiving child protection services from off-reserve child welfare services, INAC uses this as a comparator group.
- The Chairperson erred in concluding she had the jurisdiction to dismiss the complaint on a preliminary motion because it was not an abuse of process. Deciding a case does not have a *prima facie* (on its face) case of discrimination has been granted by Parliament to the Commission and not the Tribunal.
- Cindy Blackstock, the Executive Director of the Caring Society, was excluded from a number of meetings with INAC and so the Caring Society filed a motion with the Tribunal to add an allegation of retaliation by the Government however, the Tribunal Chairperson did not address this motion.

- Even though the Caring Society wrote on several occasions for the Chairperson of the Tribunal to release her decision, it took nine and a half months for the decision to be released.
- As well, the Caring Society argues that the principles of natural justice and procedural fairness require that a party be given the opportunity to respond to evidence put before a tribunal where such evidence is contrary to its own position. The Chairperson failed to confine her reasoning to the motion material filed and as a result the parties were not given an opportunity to respond with respect to the Dismissal Motion materials.
- **The Caring Society requests an order quashing the decision of the Tribunal and to remit the complaint back to a different Tribunal for a hearing on the merits.**

The Assembly of First Nations (AFN):

- The Tribunal should have used the standard of correctness and not on reasonableness (which is a lower standard and easier to satisfy by the government).
- AFN argues it was wrong for the Tribunal to dismiss the complaint without a full hearing on the merits and that it was wrong to reject the comparison of provincial funding especially because of the history and constitutional situation of First Nations peoples.
- In its own reports INAC (Indian and Northern Affairs Canada) has used provincial programs to compare federal service programs of First Nation children on reserve.
- Both the provincial and federal governments are representatives of the Crown and so the comparison of the two is reasonable.
- If the decision of the Tribunal is upheld the effects on children and other 'victims' of discrimination on First Nations reserves could be extreme and there would be no preventive recourse against the government or effective remedy.
- The Tribunal recommended 'the remedy may lie elsewhere' which is incorrect because the Tribunal is often the final refuge and the Tribunal should not be suggesting the complainants to pursue a constitutional challenge to the Act, or political action.
- International norms are to be part of the context which domestic statutes are interpreted. As well, courts may look to customary international law to aid in the interpretation of statutes unless parliament expresses a clear intention to default on an international obligation.
- **The AFN wants the decision of the Tribunal to be set aside and for the Federal court to remit the matter back to a differently constituted Tribunal with a direction to proceed to hear the complaint on its merits at a full hearing on this matter. The costs of the application, and further and other relief as counsel may request and the court may permit.**

The Canadian Human Rights Commission:

- All people in Canada are to be treated equally and the *Canadian Human Rights Act* should protect First Nations peoples.
- The Tribunal made an error because it is not allowed to dismiss a complaint without a hearing unless there is an abuse of process. The Human Rights Commission can decide to dismiss the case if there is no reasonable prospect of success, but the Commission did not find this in this case.
- The Tribunal's decision goes against the *Canadian Charter of Rights and Freedoms* because it makes Aboriginal Peoples the only group that cannot file complaints against the federal government for alleged discrimination of services, this is discrimination based on an ethnic group.

- The Tribunal can only dismiss cases that are: trivial, vexatious, frivolous or made in bad faith. The subject matter of this case is serious and complex and needs to be heard to fully appreciate the matters at issue, the Federal Court had already found this.
- The Tribunal should be held to a standard of correctness because the general questions of law fall outside of the expert knowledge of the Tribunal.
- When determining what comparator group is the standard of review is also correctness.
- The provincial child welfare program is a correct and reasonable group to compare to the federal on reserve child welfare program. Even the federal government compares itself to provincial services.
- The process did not respect First Nations cultures because it is the only case that did not give complainants the option to submit oral evidence even though all of the parties agreed to oral evidence.
- **The Canadian Human Rights Commission seeks for the decision of the Tribunal to be quashed and the Court to substitute its decision for the Tribunal's. Or, for the case to be sent back to the Tribunal to be re-determined.**

Interested Parties

Chiefs of Ontario

- The Canadian Human Rights act says "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated without discrimination" and this includes First Nations children on reserves.
- This unequal treatment has caused hardship individually, within families and the communities as a whole.
- The Tribunal should have based its decision to dismiss the case on the standard of correctness and not on reasonableness (which is a lower standard and easier to satisfy by the government).
- The procedure taken by the Chairperson of the Tribunal was unusual. For example, she cancelled hearing dates, gave suggestions to the federal counsel, extended deadlines for the filing of the federal expert report, did not hear the merits or evidence of the case, did not permit oral evidence or respect for First Nations traditions of oral history.
- Federal on-reserve child welfare funding should be compared to provincial off reserve child welfare funding otherwise, there is no comparison option. This would continue the standard that First Nations peoples are 'separate and unequal'.
- The Tribunal needs to consider the fiduciary relationship between the Crown (government) and First Nations and the responsibility on the government to protect the disadvantaged and vulnerable groups in Canada.
- The Tribunal also needs to consider international standards of the United Nations Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples.
- **Chiefs of Ontario want the application for judicial review to be granted and the decision of the Tribunal to be quashed and have the matter put before the Tribunal again for a hearing on the merits.**

Amnesty International Canada:

- Amnesty International is a non-governmental organization that was given 'Interested Party' status..
- Children and families on reserve have access to fewer preventative child protection services than children off reserve.
- The Tribunal did not consider Canada's binding international legal obligations and the legislature is supposed to respect the values and customs of international law.
- The decision to ignore Aboriginal rights does not fulfill Canada's obligation to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, The Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination, and resolutions and recommendations made by the United Nations Social and Economic Council, and the United Nations Human Rights Committee.
- The UNDRIP imposes an obligation on states to impose appropriate measures to not discriminate against indigenous peoples.
- The Canadian Human Rights act does not explicitly say it will not follow Canada's international obligations and so it is bound by them and is obligated to give adequate resources to child welfare for all children in Canada in a non-discriminatory way.
- The Tribunal should have allowed for a full hearing on the merits of the case to provide an effective forum to enforce and monitor its responsibilities when international human rights obligations have potentially been violated.
- **Amnesty International wants the judicial review to be have the matter put before the Tribunal again for a hearing on the merits.**

Respondent

Federal Government of Canada (Attorney General of Canada):

- To have a comparison group the discrimination of the alleged victims needs to be compared with someone else who is receiving the same services from the same provider. The *Canadian Human Rights Act* does not allow a comparison between two different service providers and so the Tribunal correctly made their decision.
- The decision of the Tribunal to hear the motion and dismiss the complaint was reasonable and the Tribunal followed procedure and it had authority to do so.
- The standard of review is reasonableness when deciding an appropriate comparator group and was not met by the complainants in this case.
- The government argues that because the federal government does not offer any other child welfare services to any other people, it does not differentiate adversely.
- A comparison of different service providers (the federal and provincial government) does not make sense. The *Canadian Human Rights Act* was created to ensure there is no discrimination by a service provider to the class of persons seeking the service. As well, the Tribunal rightfully took into account the differences between provincial and federal powers.
- The case must be considered under the current social and political setting, which includes that Canada, is a federal country (has a federal government and provinces/territories).

- The government argues that the international conventions mentioned by Amnesty and the Assembly of First Nations have not been incorporated into Canadian laws and so they are not directly enforceable in Canadian courts. The United Nations Declaration on the Rights of Indigenous Peoples is a political expression and not a legal commitment.
- The fiduciary duty between the Crown and Aboriginal Peoples does not create a duty for the Tribunal to make a decision in the best interests of the claimants.
- The honour of the Crown is for the process of treaty making and treaty interpretation, which are not engaged in this case. It also includes the duty to consult and if appropriate accommodate. The Court must examine pre-contract Aboriginal practice and decide whether there is a modern right. This is the s.35 right of the *Canadian Charter of Rights and Freedoms* which is not being claimed in this case.
- The Tribunal is not a commission of inquiry, and the Supreme Court has previously rejected the proposition that there must be inquiries made first, this is not suitable for the fair and expediency of claims.
- The government argues no provisions of the *Indian Act* are engaged in this complaint. The federal government's funding of child welfare is not statutorily based. The federal government funds the child welfare given to the recipients (not individuals) which are responsible for the budgeting, administration and delivery of child welfare programs to on-reserve children, but the mandate for the programs comes from provincial law.
- Child welfare falls under provincial legislation because of who actually administers the child welfare service (the organizations which are under provincial statute) and so it is not to be considered under the *Indian Act*.
- S.67 of the *Canadian Human Rights Act*, states that nothing in the Act affects provisions of the *Indian Act*. Whether s.67 would be applied depends on the degree to which a tribunal can find a relation of the complaint to a provision of the *Indian Act*. This is decided by the tribunal but, in this case, s.67 was never raised or considered by the tribunal so has no significance.
- Procedural fairness was met because all parties entitled to notice received notice. There is no evidence the material the Caring Society claims to be extraneous was relied upon for the Tribunal's decision and so it was not in error.
- The decision on the conduct of the hearing and the form of the evidence is up to the Tribunal. All parties were given full and amply opportunity to present evidence and make representations; there is no requirement an oral hearing must be held.
- **The Government of Canada requests the applications for judicial review to be dismissed.**

Factum Sheet prepared by Kelsey Lang, University of Ottawa law student