

Child Welfare Tribunal Briefing Note

First Nations Child and Family Caring Society and the Assembly of First Nations
VS

The Attorney General of Canada

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The Problem:

- First Nations children are drastically over represented in child welfare care. As of May of 2005, 0.67% of non Aboriginal children were in child welfare care in three sample provinces in Canada as compared to 10.23% of status Indian children. Overall there are more First Nations children in child welfare care in Canada than at the height of residential schools.
- First Nations children are entering child welfare care at increasing rates. According to INAC figures the number of status Indian children entering child welfare care rose 71.5% nationally between 1995-2001
- Provincial child welfare laws apply both on and off reserves. The provinces fund child welfare for children off reserve but expect the federal government to fund it on reserve. If the federal government does not fund the services or funds them inadequately, the provinces typically do not top up the funding levels. This results in a two tiered child welfare system where First Nations children on reserves get less funding for child welfare than other children (see Auditor General of Canada (2008) and Standing Committee on Public Accounts (2009))
- The Canadian Incidence Study on Reported Child Abuse and Neglect (CIS) has found that First Nations children come to the attention of child welfare authorities for different reasons than non Aboriginal children. Non Aboriginal children are more likely to be reported for sexual abuse, physical abuse, emotional abuse and exposure to domestic violence than First Nations. First Nations children are more likely to be reported for neglect which is driven by poverty, poor housing and caregiver substance misuse.
- **The Department of Indian Affairs funds First Nations child welfare delivery on reserve. Repeated reports have indicated that the funding levels are inequitable to what other children receive and do not enable FN agencies to respond adequately to reports of neglect. The Department of Indian Affairs website says "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."**

The First Nations Solution:

- In 2005, the Department of Indian Affairs in partnership with the Assembly of First Nations commissioned FNCFCFS to oversee a team of more than 20 leading researchers (including about 9 researchers with PhD credentials) to develop an affordable and evidence based solution. Confirming the findings of the National Policy Review report completed in 2000 FNCFCFS found that the federal child welfare funding formula was inadequate to ensure that First Nations child and family service agencies could meet mandated child welfare requirements and provide culturally based services. Shortfalls in prevention and least disruptive measures were

particularly severe and undermined the capacity of First Nations families to safely care for their children at home. Overall, the report found that the federal government needed to invest an additional 109 million in the first year of a seven year funding cycle (excluding Ontario) to achieve a basic level of equity to what other Canadian children receive. INAC did not implement this solution.

What about INAC's Enhanced Funding Approach in Alberta, Saskatchewan and Nova Scotia?

- INAC has only provided funding to partially alleviate the inequality in Alberta, Saskatchewan and Nova Scotia (and the degree to which equality has been achieved is still to be determined as specific and final information about the funding formula and amounts are yet to be made public).
- These deals do nothing to relieve the inequity experienced by children in other provinces/territories in Canada. The Department has not announced or committed to a timetable for dealing with the inequities across the country although they have verbally stated that it will optimistically be about 2-3 years.
- INAC's new child welfare funding approach relies on provincially driven models that have often not proven effective for First Nations children.
- The Auditor General of Canada (2008) found INAC's new funding approach to be inequitable.

Why a Human Rights Complaint?

- Because Canada failed to implement two joint solutions to address the inequality and the numbers of First Nations children going into child welfare care was increasing as result.
- We believe that children should not get less government funding for essential services than other children on the basis of race and national ethnic origin.
- The Canadian Human Rights Tribunal has the authority to determine whether discrimination has occurred or not. If the Tribunal decides that discrimination has occurred it can order a remedy that is enforceable in federal court.

How has Canada responded to the Human Rights Complaint?

- Immediately after the complaint was filed, Canada began to question the jurisdiction of the Canadian Human Rights Case to hear this matter on the basis of two legal technicalities:
 1. Canada argues funding is not a service and thus not subject to the Canadian Human Rights Act
 2. Canada argues there is no comparator group to First Nations children on reserves accessing child welfare.
- We refute Canada's claims on two primary fronts: 1) child welfare services could not be delivered without federal funding and the feds impose significant child welfare practice and policy requirements to receive the funding and 2) child welfare is a statutory service available to all children in a given province therefore children receiving child welfare services off reserve are a legitimate comparator group as are First Nations children who are receiving services pursuant to the various child welfare funding arrangements used by Canada.
- The Canadian Human Rights Commission conducted an investigation of the complaint. The investigators report was completed in July of last year and recommends to the Commissioners that there be a full tribunal on this matter.
- September of 2008, The Commissioners meet and order the tribunal

- October of 2008, Canada applies to federal court to try to stop the tribunal on the grounds that the Canadian Human Rights Commission does not have jurisdiction to hear the complaint. The application to federal court is scheduled for preliminary hearing in September but will not stop the tribunal from proceeding.
- **The tribunal is scheduled to begin on September 14, 2009. Witnesses who will be called to testify include the Honorable Minister Strahl (INAC), Auditor General Sheila Fraser as well as a host of leading academic experts and First Nations agency directors.**
- Canada has not identified any expert witnesses to support their claims that their current levels of child welfare funding are comparable. The only witnesses to be called by Canada are government officials.
- We address correspondence to Canada's lawyers to the Indian Residential Schools/Foster Care/Day school division of Justice Canada Floor 1, Room 3, 90 Sparks Street, Ottawa ON.

Why is this case important?

A year after the apology for residential schools, this case is in many ways a truth and reconciliation commission on how Canada is treating First Nations children today. It will decide whether or not it is acceptable for the Government of Canada to provide First Nations children with a lesser standard of child welfare services than other children on the basis of race. The implications of this case go beyond child welfare as there are many other children's services on reserves which are also under funded. One of the most important examples is in education – children on reserve receive about 2000-3000 per year less funding for elementary and secondary school than their peers off reserves.

Where will the tribunal hearing be held?

In Ottawa. Exact location TBA

I want to help – how can I get involved?

1. We strongly encourage people to come to the tribunal and witness the proceedings. This is a historic case and we welcome people coming to hear the evidence and making up their own mind as to whether or not the federal government is treating First Nations children and families fairly.
2. You can tell your friends and family about the tribunal and encourage them to watch the proceedings on television
3. You can encourage your local paper and television news to carry the story of the tribunal
4. You can make a donation to help fund the legal costs by either making an online donation at www.fncaringsociety.com (Click on the Donate Now icon) or sending a cheque payable to the First Nations Child and Family Caring Society of Canada, Suite 302 251 Bank Street, Ottawa, ON K2P 1X3

More information?

- Visit www.fncaringsociety.com and www.afn.ca for ongoing updates