

# KAWASKIMHON MOOT 2019

## **FACT PATTERN**

*Version française à venir beintôt/French translation to come soon*



Child welfare services, or child and family services, are designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect. Each province and territory has its own child and family services legislation and standards and provides those services within its jurisdiction. However, the provision of child and family services to First Nations on reserves and in the Yukon is unique. Canada's federal government, through its Department of Indigenous Services Canada (DISC)<sup>1</sup>, manages the First Nations Child and Family Services Program (FNCFS Program). Pursuant to the FNCFS Program and other agreements, child and family services are provided to First Nations on-reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. DISC funds the child and family services provided to First Nations by FNCFS Agencies or the province/territory.

Dr. Cindy Blackstock is a Gitxan woman, a social worker, the executive director of the First Nations Child and Caring Society (Caring Society), and a tireless advocate on behalf of First Nations children. She was a child protection worker for a provincial child and family services agency for eight years before she joined

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<sup>1</sup> Formerly Indigenous and Northern Affairs Canada (INAC) and also Aboriginal Affairs and Northern Development Canada (AANDC)

a FNCFS Agency operated by the Squamish First Nation, where she worked for several years before joining the Caring Society. Comparing her experience working in the provincial system with the First Nations child welfare system, Dr. Blackstock quickly realized the profound inequities of the system on-reserve and the harms this was causing to First Nations children and families. She would go on to collaborate with other First Nations child welfare experts to produce two reports in the early 2000s outlining the problems of the FNCFS Program; in particular, problems in its funding formulas. Although DISC co-commissioned these reports with the Assembly of First Nations (AFN) and made some changes to the FNCFS funding formulas in response, the changes failed to address significant problems with the FNCFS Program and the recommendations identified in the reports.

Given the lack of commitment by Canada to make real reforms, Dr. Blackstock and the AFN filed a human rights complaint with the Canadian Human Rights Commission in 2007. The complaint alleged that the funding of child welfare services on-reserve is inequitable and insufficient, and that FNCFS Agencies on-reserve received significantly less funding than agencies funded by the provinces. The Commission referred the complaint to the Canadian Human Rights Tribunal in October 2008. The complaint overcame several procedural challenges raised by Canada, including an attempt to prohibit the Aboriginal Peoples Television Network from recording the hearing,<sup>2</sup> as well as an attempt to dismiss the case on the basis that the Tribunal lacked jurisdiction to hear the complaint under the Canadian Human Rights Act.<sup>3</sup> The Caring Society's funding was cut<sup>4</sup>, and Dr. Blackstock faced retaliation from

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<sup>2</sup> 2010 CHRT 16 rev'd 2011 FC 810.

<sup>3</sup> 2011 CHRT 4 rev'd 2012 FC 445 aff'd 2013 FCA 75.

<sup>4</sup> Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare," (2016) 62 McGill L.J. 285 at 316.

Canada for pursuing the complaint<sup>5</sup> and was subject to extensive government surveillance.<sup>6</sup> Further, failure by Canada to disclose documents prejudicial to its case, resulting in additional delays in hearing the case on its merits, led the Tribunal to comment that Canada's conduct was "far from irreproachable."<sup>7</sup>

The Tribunal's decision was finally released on Jan. 26, 2016. The Tribunal found that DISC's design, management, and control of child welfare services on-reserve, along with its funding formulas, cause a number of harms to First Nations children and families that amount to discrimination. The Tribunal called on DISC to "REFORM" its child welfare program "in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve."<sup>8</sup> The Tribunal also mandated governments to take a broad interpretation of Jordan's Principle.<sup>9</sup> The Tribunal also found that First Nations children and their families are entitled to family and caring services that meet their "cultural, historical, and geographical needs and circumstances."<sup>10</sup> The Tribunal retained jurisdiction over the case to assist the parties in working out a number of remedial issues, including a request for compensation by the Caring Society for each child taken into care since the filing of the complaint.<sup>11</sup>

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<sup>5</sup> 2015 CHRT 14.

<sup>6</sup> Blackstock *supra* note 4 at 317-18.

<sup>7</sup> 2013 CHRT 16 at para 53.

<sup>8</sup> 2016 CHRT 2 at para 463.

<sup>9</sup> According to the Tribunal (*ibid* at para 351): "Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them."

<sup>10</sup> *Ibid* at para 465.

<sup>11</sup> The Caring Society has requested such compensation be put in a trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services: see *ibid* at paras 485-490.

Although the federal government did not appeal the decision, the Tribunal has had to rule on a number of complaints of non-compliance against Canada since its January 2016 decision.<sup>12</sup> In a ruling from February 2018, the Tribunal emphasized that its January 2016 decision “was not a recommendation; it is legally binding”<sup>13</sup> and suggested that Canada had been more focused on financial considerations than the best interest of First Nations or on addressing its liability since the decision.<sup>14</sup>

Following this last ruling, Canada announced a plan to address First Nations child welfare, including a commitment to “continu[e] to work to fully implement all orders from the Canadian Human Rights Tribunal,” giving more focus on prevention, early intervention and culturally appropriate reforms to the FNCFS Program and supporting communities “to draw down jurisdiction in the area of child and family services, including exploring co-developed federal legislation.”<sup>15</sup> Since January 2018, Canada has been engaging various parties in the creation of legislation on Indigenous child and family services<sup>16</sup>, and the government may be tabling draft legislation in early 2019.<sup>17</sup>

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<sup>12</sup> 2016 CHRT 10; 2016 CHRT 11; 2016 CHRT 16; 2017 CHRT 14; and 2018 CHRT 4.

<sup>13</sup> 2018 CHRT 4 at para. 41.

<sup>14</sup> *Ibid* at para 123.

<sup>15</sup> CBC, “Jane Philpott unveils 6-point plan to improve 'perverse' First Nations child welfare system” (January 25, 2018).

<sup>16</sup> Canada, “Engagement on potential legislation co-created with Indigenous communities on child and family services,” online: <https://www.sac-isc.gc.ca/eng/1536260064233/1536260142039>.

<sup>17</sup> CBC, “Ottawa to hand over child welfare services to Indigenous governments” (November 30, 2018).

## **HYPOTHETICAL**

Although Dr. Blackstock acknowledges that Canada has taken some positive steps, it took over two years from the Tribunal's ruling to get here, and she feels there is still a long way to go in order for Canada to fully implement the Caring Society decision. The effectiveness and structure of the proposed legislation in addressing the various shortcomings of the FNCFS Program, including chronic underfunding by DISC in child welfare and related services, remains to be seen. She is also mindful of the fact that has taken nearly 20 years of tireless advocacy, at great cost, to bring Canada to this point on child welfare, and she knows there are several other human rights complaints similar to Caring Society in areas like education, health, and social assistance on-reserve that are heading to the Tribunal.<sup>18</sup> Currently, there is no clear mechanism for holding Canada in contempt for failing to respect a Canadian Human Rights Tribunal decision or to force it to act. Dr. Blackstock wants to find legal mechanisms to compel Canada to respect and fully implement the Caring Society decision and any future decisions that impact First Nations children. She also believes that now is the time to bring Indigenous peoples and their allies together— independent from the federal and provincial governments—to brainstorm what reform of the FNCFS Program should look like. This will enable Indigenous peoples to craft well-informed responses to the initiatives that Canada has said it will soon introduce.

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<sup>18</sup> According to the Canadian Human Rights Tribunal, there are similar complaints in the areas of special education, health services, assisted living and income assistance benefits, and policing: Canadian Human Rights Commission, "Submission to the Committee On The Elimination Of Racial Discrimination On The Occasion Of Its Consideration Of Canada's 21st – 23rd Periodic Reports", July 2017 at 10/

Dr. Blackstock is convening a meeting of the Indigenous organizations and ally organizations to discuss these questions:

1. What mechanisms could be put in place to ensure that Canada meets its obligation to provide equitable and culturally appropriate services to First Nations children? Are there any models or mechanisms that look particularly promising? Are there any models or mechanisms that may be attractive to some parties but that should be avoided?
2. What should long-term reform of the First Nations Child and Family Services Program look like? Be sure to consider both process as well as substantive issues such as oversight, accountability, and standards. Such reform could also include extension of the Program to Indigenous peoples beyond First Nations living on-reserve. What role would federal and provincial governments play in light of their obligations to protect the rights of all children in accordance with international law such as the Convention on the Rights of the Child and their *parens patriae* obligations? Are there any aspects of Canada's obligations that the provincial, territorial, and federal governments need to effectively address among themselves?

These questions have been carefully crafted to permit an exploration of a range of mechanisms, including those supported in Canadian, Indigenous, or international law and institutions, as well as non-legal mechanisms. Parties are also encouraged to explore whether there is a role for provincial, territorial, or Indigenous governments in supporting Canada to meet its obligations.

The parties represented at the negotiation tables will be expected to debate the merits of the proposals they are bringing forward. For each of the key questions posed (No. 1 and No. 2), each table should reach consensus on the top two most achievable approaches that Dr. Blackstock should move forward on. As part of the moot, those at the tables will have the opportunity to ask questions and seek feedback from Dr. Blackstock.

## **FURTHER DIRECTIONS**

Since this is a hypothetical implementation exercise, teams should NOT contact the Caring Society, Dr. Cindy Blackstock, or any of the actual organizations upon which the parties to this negotiation are modelled. Please use only publically available information (i.e., on the parties' websites, in cases, in news or academic articles, etc.) to inform your team of your party's positions beyond what is provided in these instructions.