



SUMMARY OF THE FEDERAL COURT OF CANADA DECISION IN CHIEF SIMON ET AL. v.

ATTORNEY GENERAL OF CANADA, 2013 FC 117

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BACKGROUND

In the early part of the 20th century, there was no formal system of welfare on reserve and this led to significant gaps in First Nations getting basic social assistance. To address this problem, in 1964, the Canadian government authorized a system of welfare to be provided on reserve and for this to be based on provincial welfare rates and standards. This was done not by legislation, but through a Treasury Board Directive and then a later Treasury Board MOU that replaced the Directive.

From about 1967 to 2011, Canada, through Aboriginal Affairs and Northern Development Canada (AANDC), developed regional policy manuals in the Maritimes for social assistance on reserve, which were based on provincial rates and standards but they also accommodated specific circumstances on reserve. This has been called the 'reasonably comparable' approach, in that First Nations followed similar, but not identical, rates and criteria for welfare that made some accommodation of differences on reserve. The last regional policy manuals were developed in 1991 and had not been updated since 1994.

In the spring of 2011, AANDC announced that it was going to require welfare rates and standards on reserve to be identical to provincial rates and standards and make First Nations follow just provincial manuals, instead of having regional manuals. This has been called the 'strict mirroring' approach. AANDC told First Nations that it was required to do this in order to be in "compliance" with its funding authorities, and this was a non-negotiable change.

The First Nations of New Brunswick, Nova Scotia and Prince Edward Island (the Maritime First Nations) voiced many concerns about this decision including that it was done unilaterally and without consultation, it would lead to welfare recipients on reserve receiving far less than people off-reserve since people under provincial systems have access to complementary and supplemental programming that is not available on reserve, it would result in many people becoming ineligible

for assistance, and several other problems related to further impoverishing such a vulnerable group of people.

The Maritime First Nations therefore sought judicial review to quash the decision for being (1) an unconstitutional delegation of federal jurisdiction of "Indians" to provinces, (2) an abuse of power and unreasonable because it was taken without studying the full impacts of the decision and would cause significant harm to welfare recipients and First Nations communities, and (3) it breached the First Nations' right to procedural fairness because they were not meaningfully consulted about the decision.

THE DECISION

Canada argued that the Court had no jurisdiction to review the decision because it was a funding decision and therefore purely political (i.e., not something for the courts to interfere with). The Court disagreed, finding that the First Nations would otherwise have no recourse to challenge or appeal the decision, and that the decision could be reviewed on the basis of whether (1) it was inconsistent with AANDC's legal basis for providing welfare (i.e., the Directive and later MOU), (2) it was so unreasonable to be an abuse of discretion, or (3) it breached procedural fairness.

On the first issue, the Court found that it was not illegal for Canada to adopt the mirror approach in principle since a literal interpretation of the words 'adopt', 'consistent with' and 'comparable' to provincial rates and standards in the Directive and MOU could mean adopting identical rates and standards to the provinces. The Court did not accept the First Nations' arguments that constitutional and other legal principles prevented Canada from adopting the mirror approach altogether.

Note that the Court's finding does not mean that Canada is *required* to take the mirror approach (as AANDC staff had told the First Nations). The reasonably comparable approach is also a valid interpretation of the Directive and MOU and the Court certainly did not say that AANDC was prevented from taking this approach.

On the second issue of whether Canada's adoption of the mirror approach was unreasonable in the circumstances, the Court considered the various impacts and concerns that had been raised by the First Nations. Although a number of AANDC internal documents supported that staff had identified similar serious impacts arising from the changes, AANDC employee, Barbara Robinson, gave evidence in the case that AANDC had come up with 'fixes' to several of these concerns. The Court accepted these proposed fixes at face value and found that they addressed many (but not all) of the First Nations concerns.

The First Nations had argued that Ms. Robinson's proposed fixes were not to be believed in light of all the other evidence, and so it is disappointing, on the one hand, that the Court took her at face value. However, on the other hand, the effect of the Court's finding is now that AANDC, if it continues in wanting to adopt a mirror approach, is obligated to carry out the fixes that Ms. Robinson promised (and its failure to do so would be grounds to return to court). The fixes that AANDC committed to include:

- There are federal programs offered by AANDC and Health Canada that provide a comparable level of the majority of supplemental benefits and programs available to off-reserve welfare recipients;
- Hardships caused by the fact that AANDC will not provide a shelter subsidy under the mirror approach will be avoided by the ability of the Block Funding bands to shift any savings in their social budgets to their capital budgets and pay for CMHC rents from there.
- If the new Block Funding agreements require AANDC permission to make such a transfer from social to capital for this purpose, AANDC will provide such approval.
- For those bands who are not in Block Funding, AANDC has made the commitment that, whatever difference in costs arises out of moving to provincial rates, the difference will be retained in a reserve fund by AANDC for the use of that band.
- First Nations in Nova Scotia will continue to receive the full National Child Benefit and also receive the Nova Scotia Child Benefit.
- With regards to new software requirements resulting any move to mirroring, funding is available from AANDC as part of service delivery to purchase off-the-shelf case management software programs.

One area the Court found where the mirror approach would cause significant impacts and there was no apparent fix was with regard to the change in eligibility rules. It appeared that many First Nations recipients would no longer be eligible for welfare under the mirror approach. In this regard, the Court noted that AANDC had not conducted any comprehensive study to measure actual impacts of moving to a mirror approach. The Court also noted AANDC internal documents had highlighted a number of significant risks arising from the decisions, but yet AANDC went no further to measure and quantify those risks. The Court concluded that this was unreasonable.

On the final issue of procedural fairness, the Court agreed with the First Nations that they were never consulted about the actual decision to go to a mirroring approach, but were only told they had to implement the decision after the fact. The duty of procedural fairness requires that persons affected by a decision be given an opportunity to be informed about a decision at the time it is being considered and provide the decision-maker with their views and evidence about possible impacts.

The Court found there was a number of factors supporting a serious duty of procedural fairness in the circumstances: (1) the UN Declaration on the Rights of Indigenous Peoples; (2) there was no mechanism available to challenge the Minister's decision; (3) Canada had been following a 'reasonably comparable' approach for at least 20 years; (4) the decision was going to have significant impacts on First Nations welfare recipients and yet Canada had not studied and did not fully understand the extent of impacts; and (5) AANDC / Canada had made commitments in a number of policy documents that it would work cooperatively with the First Nations and not act unilaterally with regard to social reform and had therefore created a legitimate expectation in the First Nations that it would consult.

The Court concluded that Canada had not meaningfully consulted about the mirror approach and serious consultation was required in the circumstances. The Court also suggested there ought to have been discussions with the First Nations about whether the strict mirroring approach was advisable in the context of overall AANDC Policy towards greater autonomy for First Nations in the management of their affairs.