

The Canadian Human Rights Act

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
AND ASSEMBLY OF FIRST NATIONS**

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**THE ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)**

Respondent

- and -

**CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA**

Interested Parties

**NOTICE OF MOTION
OF RESPONDENT
For an Order to dismiss the Complaint**

The Respondent, the Attorney General of Canada, is making this motion to the Canadian Human Rights Tribunal.

The motion is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure*.

The motion is to be heard by the Tribunal at the 11th floor 160 Elgin Street, Ottawa, Ontario, on Tuesday January 19, 2009 commencing at 10:00 am, or as soon thereafter as it may be heard.

The motion is for an order under Rules 1(6), 3(1), 3(2)(d), 5(2), 5(3)(c) and (f) to dismiss the Complaint before the Tribunal in this proceeding (T-1340-07008) for lack of jurisdiction as the Complaint does not come within the provisions of ss. 3 and 5 of the *Canadian Human Rights Act*.

The grounds for the motion are:

1. The Complaint filed by the Complainants before the Canadian Human Rights Commission in or about February 2007 and referred by the Commission to the Tribunal by decision dated September 30, 2008 and communicated to the Respondent on October 14, 2008, says in material respects:

"On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula"

2. The allegations in the Complaint deal exclusively with INAC's funding to provincially-authorized child and family service providers for them to provide child welfare to Indian children and families ordinarily resident on reserve or in the Yukon, as compared to funding provided by the provinces to Indian and non-Indian children and families for child welfare off reserve, and non Indians living on reserve, and provided by the Yukon Government for child welfare to non-Indian children and families resident in the Yukon.

3. INAC provides funding to the provincially-authorized providers of child welfare services who, in turn, provide child welfare services or arrange for the provision of child

welfare services to Indian children and families ordinarily resident on reserves in the province or resident anywhere in the Yukon. This funding is provided to the provinces, the Yukon, First Nations Child and Family Services Agencies, Indian Bands and Tribal Councils ("First Nations Service Providers").

4. The funding provided by INAC to the Yukon Government is used by the Yukon to provide child welfare services to all Indian children and families ordinarily resident in the Yukon.
5. The provinces fund and deliver child welfare services for all other residents of their respective province, including status and non-status Indians, the Métis and Inuit. The Yukon Government funds and delivers child welfare services for all non-Indian children and families within the Territory.
6. Child welfare services in the Northwest Territories and Nunavut are provided by or through the territorial governments with funding from their own budgets. The federal government provides annual unallocated transfer payments to the governments of the Northwest Territories and Nunavut which make up a portion of their annual budgets, and those governments decide how and where to spend funds.
7. INAC does not deliver child welfare services on or off reserve in Canada. INAC's role and actions are confined and directed solely to funding so that First Nations Service Providers can provide child welfare services to Indian children and families on reserve in the provinces, and so the Yukon Government to provide child welfare services to Indian children and families residing in the Yukon.
8. INAC provides funding for child welfare on reserve as a policy decision made by the Government of Canada.
9. The funding provided by INAC is not a service within the meaning of the *Canadian Human Rights Act* s. 5, or at all.

10. Child Welfare funding by INAC as described above for children and families ordinarily resident on reserve cannot be compared to the actions or funding by provinces or the Yukon for child welfare off reserve because provincial and territorial governments are independent actors separate and apart from INAC and / or they operate under a different jurisdictional regime and authorities from INAC.

11. INAC provides the above referenced funding under Directive 20-1 in the case of British Columbia, Manitoba, Newfoundland and Labrador, New Brunswick, the Yukon and two First Nations Child and Family Services Agencies in Saskatchewan.

12. INAC provides this funding under the Enhanced Prevention-Focused Approach, an enhanced and alternative funding approach to Directive 20-1, first approved in 2007, in Alberta, Saskatchewan (except for the two Agencies referred to above), Nova Scotia, Quebec and Prince Edward Island.

13. INAC funding for the provision of child welfare services to Indian children and families ordinarily resident on reserve in Ontario is provided under the terms of a federal-provincial agreement, known as the 1965 Welfare Agreement.

14. In Ontario, child welfare services on reserve are provided by non-profit organizations approved by the Province as Children's Aid Societies or Indian or native child and family service authorities (collectively, "Societies"). Societies are funded by the Province to provide child welfare services to all families and children ordinarily resident in Ontario. The provincial funding is provided pursuant to a provincial funding framework.

15. Pursuant to the 1965 Welfare Agreement, INAC reimburses the Province of Ontario for the cost of child welfare services provided to First Nations people ordinarily resident on reserve according to a cost-sharing formula. Currently, INAC pays approximately

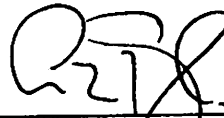
93% of the costs. Ontario pays the difference, or approximately 7% of the costs, to make up 100%.

16. In all cases, INAC provides funding, or reimbursement in the case of Ontario, to First Nations Service Providers under the applicable and agreed upon formula applicable in the particular province or the Yukon and does so equitably and in like manner to all First Nations Service Providers without distinction or differentiation in approach or treatment between First Nation Service Providers. It is then the responsibility of each provincially-authorized First Nations Service Provider to provide child welfare services to Indian children and families ordinarily resident on reserve in the province, or residing anywhere in the Yukon, in accordance with provincial or territorial legislated standards.

17. The following documentary evidence will be used in support of the motion:

- a. Affidavit of Odette Johnson sworn December 20, 2009
- b. Complaint dated in or about February 2007
- c. Directive 20-1
- d. Enhanced Prevention Approach funding formula
- e. Such other material as may be advised.

Dated at the City of Vancouver, British Columbia, this 21st day of December 2009.



Mitchell Taylor, Q.C.
Counsel for the Respondent,
the Attorney General of Canada

TO: Registrar
Canadian Human Rights Tribunal
160 Elgin Street, 11th Floor
Ottawa, Ontario K1A 1J4
Fax: (613) 995-3484

- AND TO: Paul Champ**
Counsel for First Nations Child and Family Caring Society of Canada
Champs & Associates
Equity Chambers
43 Florence Street
Ottawa, Ontario K2P 0W6
Fax: (613) 232-2680
- AND TO: Jonathan Thompson / Valerie Richer**
Assembly of First Nations
473 Albert Street, 8th Floor
Ottawa, Ontario K1R 5B4
Fax: (613) 241-5808
- AND TO: Daniel Poulin**
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1
Fax: (613) 993-3089
- AND TO: Michael W. Sherry**
Chiefs of Ontario
Barrister & Solicitor
1203 Mississauga Road
Mississauga, Ontario L5H 2J1
Fax: (905) 278-8522
- AND TO: Owen Rees / Vanessa Gruben**
Amnesty International Canada
Stockwoods LLP
The Sun Life Tower
Suite 2512, 150 King Street West
Toronto, ON M5H 1J9
Fax: (416) 593-9345