Taylor, Mitch

From: Taylor, Mitch
Sent: Wednesday, August 19, 2009 11:35 AM
To: 'Jeffery@wilsonchristen.com'; 'Daniel.poulin@chrc-ccdp.ca'; 'Nicole.bacon@chrt-tcdp.gc.ca'
Cc: Taylor, Mitch
Subject: T1340-07008 - FNCFCS et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)

Attachments: Scanned_.pdf

Please find enclosed for service upon you the Submissions of the Respondent, The Attorney General of Canada, in response to the Motion of the Chiefs of Ontario.

Scanned_.pdf (323 KB)

The original will be couriered overnight to the Registry for the Tribunal. We will also be faxing and couriering a copy of the attached to the Registry, the lawyers for the parties and the Chiefs of Ontario.

Thank you

Mitchell R. Taylor, Q.C./c.r.
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File No.: T-1340-07008

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985. c. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

AND:

CANADIAN HUMAN RIGHTS COMMISSION

Commission

AND:

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

Respondent

SUBMISSIONS OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA, IN RESPONSE TO THE MOTION OF THE CHIEFS OF ONTARIO

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

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TO:

Jeffrey Wilson, Counsel for Respondent's FNFCSC and AFN

Daniel Poulin, Counsel for the Commission

Michael Sherry, Counsel for Chiefs of Ontario

Nicole Bacon, Registry Officer

These submissions are made on behalf of the Respondent INAC and pursuant to the Direction of the Tribunal made August 13, 2009.

1. The Respondent opposes the joinder of the Chiefs of Ontario ("COO") as a party Complainant. These submissions set out the basis for that opposition and why the Motion should be dismissed with costs.

2. The Motion by the COO to be joined as a party Complainant should be dismissed for the reasons set out below, any one of which is a sufficient basis to dismiss the motion and in combination they overwhelmingly lead to dismissing the motion.

3. The Tribunal has set a rigorous hearing schedule for the Inquiry, which is to begin on September 14th and continue for many weeks through to late February 2010, at which time further weeks are expected to be scheduled. The parties, specifically the Respondent who we represent, have a lot of work to do to prepare for, participate in the hearing, and otherwise defend against the Complaint. It would be unreasonable in the circumstances and on the eve of the opening of the Inquiry to add a further Complainant with the attendant extra work that would require. The extra work would be a significant burden piled on top of an already voluminous amount of work to do.

4. It is evident from the Applicant's material that they have known about this Complaint for years. For example, see the reference in paragraph 13 of the affidavit of Lori Jacobs to the 2006 AFN resolution authorizing the filing of this Complaint, which was filed in early 2007. Ms. Jacobs deposes that the state of First Nation Child and Family Services in Ontario, as impacted by the 1965 Agreement, is to be included in the Complaint (as it is). It is reasonable to expect that the COO have been monitoring this case ever since. In these circumstances, any application to be joined as a party should have been brought long ago, not on the eve of the commencement of an Inquiry when "the stage is set" and preparation is underway with the already set parameters, issues and existing parties in mind.

5. Regardless and importantly, the Applicant is not an aggrieved person or victim of alleged discrimination. The Applicant is a corporate entity who does not deliver child and family services and is not entitled to receive such services. The Applicant is an umbrella organization who, according to their Motion and Affidavit, have public interest reasons to seek to be a party. That is not a sufficient basis for being made a party in circumstances where there are other capable and ably represented Complainants who are doing just that - mounting a challenge to all aspects of the funding for Child and Family Services throughout Canada, including Ontario.

6. On this, the Complainants have consistently said that the 1965 Welfare Agreement for Ontario is part of the Complaint and will be part of the Complainants' evidence and argument in support of their Complaint. This fact of the 1965 Welfare Agreement being part of the Complaint was confirmed most recently by the Complainants in their letter of July 31, 2009 to the Respondent (copy attached).

7. The Complainants' July 31st letter is the Complainants' reply to the Respondent's Request for Particulars made in the Respondent's Statement of Particulars at paragraph 22. Paragraph 3 of the Complainants' July 31, 2009 letter responds to para. 22(c) of the Respondents' Statement of Particulars where it asks "..if the Complaint relates to all funding provided by Indian Affairs under the Directive, the 1965 Welfare Agreement, the Enhanced Prevention-Focused Approach, or any other arrangement or agreement that may be in place, or some combination of these various funding arrangements". The Complainants respond that, "The Complaint refers to all funding structures, policies, practices carried out by INAC under any and all arrangements related to First Nations child and family services."

8. Further, the Complainants have conduct of the prosecution of this Complaint. They will decide what evidence to call and, in turn, the Respondent will defend against the evidence presented. While it is for the Complainants to decide, they may and could easily call evidence that is in the possession of the COO, and advance the Complaint through that means. The Complainants are proficient and capable of mounting the Complaint in respect of the 1965 Welfare Agreement and all other aspects. They allege that the Respondent underfunds CFS on reserve throughout Canada in a way that is discriminatory. Their task is to prove that, and that is

what they will presumably seek to do with respect to all provinces and the Yukon. The Applicant should properly be speaking with the Complainants as to evidence to tender, not seeking to be named as a party Complainant.

9. The foregoing submissions apply equally to the two jurisdictional issues that the Applicant refers to in paragraph 16 of its Motion. The existing Complainants have their counsel before the Tribunal to address these issues and, as well, two major law firms are working on this on their behalf in the Federal Court judicial review. Complainants' counsel in the Federal Court are from Torys LLP (for the AFN) and Stikeman Elliott LLP (for the First Nations Child and Family Caring Society of Canada). These counsel are more than able to address all aspects of the legal issues, including obtaining evidence and other input from the Applicant and its lawyer.

10. If the Applicant has a separate complaint from what is alleged by the Complainants (which is not evident from their Motion), then they should bring their own Complaint before the Commission who will address it. They ought not to seek to graft their issues onto an already well-advanced Complaint brought by others, particularly given the unreasonable burden it would impose on the parities, particularly the Respondent, at this stage.

11. What the Applicant seeks to do, as evidenced by the content of its Motion and Affidavit, is to ask this Tribunal to conduct an inquiry into the merits and funding of CFS on reserve in Ontario and to pass judgment on the wisdom and merits of the funding and delivery. While this is precisely what the Complainants also seek to do, it is submitted that is not the proper role of this Tribunal. This Tribunal is tasked with determining whether there is discrimination by the Respondent in funding CFS on reserve (which alleged discrimination is denied).

12. If, contrary to the foregoing, the Tribunal were to decide that the Applicant should be joined as a party Complainant, the commencement of the hearing should be adjourned and case management of this Complaint should resume to address pre-hearing disclosure, particulars, witnesses and other matters.

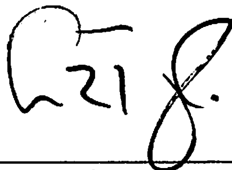
13. It is submitted it would result in a disorderly inquiry if the hearing were to proceed on September 14th without proper disclosure and preparation. Further and in particular, it would be an unreasonable burden to expect the Respondent to be ready to proceed with an expanded list of Complainants, incorporating the COO, and new issues/evidence tendered by the COO in an Inquiry to start on September 14th.

14. The COO clearly have ideas what evidence and argument they intend to advance and, by reason of their application to be made a party, they intend to tender evidence and argument in addition to and different from the existing Complainants. The Respondent is entitled in law to know the case it has to meet and all parties and the Tribunal would be best served, by an orderly pre-hearing disclosure of Particulars, Documents and Witness identities of any new and additional Complainant.

15. Wherefore the Motion by the Chiefs of Ontario to be added as a party Complainant should be dismissed with costs.

All of which is respectfully submitted.

Dated: August 19, 2009 at Vancouver, BC



Mitchell R. Taylor, Q.C.
Counsel for the Respondent

WilsonChristen LLP
BARRISTERS

JEFFERY WILSON
Certified by the Law Society of Upper Canada as a specialist in family law
jeffery@wilsonchriston.com
direct 416.956.5622

July 31, 2009

SENT BY FACSIMILE TO (613) 996-1810

Attention: Karen Cuddy
Department of Justice, Resolution Branch
Indian Residential Schools/FosterCare/Day Schools
Legal Services (5th Floor)
Floor 01, Room 033
90 Sparks Street
Ottawa, Ontario
K1A 0H4

Dear Ms. Cuddy:

RE: First Nations Child and Family Caring Society of Canada et al. and Attorney General of Canada – Human Rights Tribunal File: T1340/7008
Your File: 20100-0

This letter serves as our fulfilment of the July 24, 2009 direction pertaining to the provision of particulars arising from subparagraphs 22(a) through to and including (e) on pages 5 & 6 of Canada's July 21, 2009 "Disclosure Brief".

Responding *seriatim and* with reference to the sub-paragraphs, please note:

1. sub-paragraph 22(a): The language of a "comparator group" is your language, and not necessarily the language to which we accede for the purpose of our case. That said, the comparator group may refer (i) to all children (and their families) in Canada requiring child welfare and protection programs for whom such child welfare and protection programs are funded by the provincial or territorial governments; and (ii) as between children and their families for whom child welfare and protection programs are funded by Canada pursuant to different funding structures, policies and practices.

2. sub-paragraph 22(b): For the purpose of this hearing, we will accept that "culturally based" is the same as "culturally appropriate".

3. sub-paragraph 22(c): The Complaint refers to all funding structures, policies and practices carried out by INAC under any and all arrangements related to First Nations' child and family services.

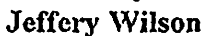
4. sub-paragraph 22(d): 1989 to the present and on-going.

5. sub-paragraph 22(e): It pertains to all elements of Canada's funding structures, policies and practices, including all of those that you have chosen to list, related to First Nations Child and Family Services. .

I trust this answers your queries.

Have a good Civic Holiday long weekend.

Yours sincerely,



Jeffery Wilson
JW/tbl

c. First Nations Child and Family Caring Society of Canada
Assembly of First Nations
Daniel Poulin, Canadian Human Rights Commission