CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Investigations Division
Division des enquêtes

JUN 24 2009

File: 20070826 and 20070993

PROTECTED **XPRESS POST**

Mr. Murray Klippenstein
Klippensteins
Barristers and Solicitors
160 John Street, Suite 300
Toronto, ON M5V 2E5

Dear Mr. Klippenstein:

The assessment of the complaints of the Mushkegowuk Council, Grand Chief Stan Louttit and George Wesley against Indian and Northern Affairs Canada and Public Safety and Emergency Preparedness Canada has been completed. A copy of the Assessment Report is enclosed for your review.

If you would like to submit comments on the report, you can do so by writing to me at the address below. Your submission must be no more than 10 pages in length including attachments and must not include any information related to confidential settlement discussions in the course of mediation or conciliation. Any such confidential information or any pages over the 10 page limit will not be placed before the Commission.

You can provide your submission on or before July 20, 2009. In order to avoid delay in the handling of this matter, extensions to this period will not be granted. Your submission may be disclosed to the other party.

The complaint form, the assessment report and submissions which we receive from the parties will be submitted to the Commission at one of its upcoming meetings. After reviewing these documents, the Commission will make a decision on the disposition of the case. The Commission can accept or reject the recommendation in the report. You will be advised of the Commission's decision as soon as it is rendered.

Yours sincerely,

Natalie Dagenais
Director, Investigation

Encl.: Assessment Report

CANADIAN HUMAN RIGHTS COMMISSION | COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Assessment Report **PROTECTED**

Complaint Information

File Number(s):	20070826, 20070993
Date of Complaint(s):	July 13, 2007
Complainants:	Mushkegowuk Council, Grand Chief Stan Louttit and George Wesley
Respondents(s):	Indian and Northern Affairs Canada and Public Safety and Emergency Preparedness Canada
Section(s) of the Act:	5
Ground(s):	Race and National or Ethnic Origin
Referred to Mediation:	No
Parties Participated in Mediation:	No

Recommendations

It is recommended, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, that the Commission deal with complaints.

It is also recommended, pursuant to section 49 of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal constitute a tribunal to inquire into the complaints.

Signature

Deirdre Hilary June 24, 2009

Summary of Complaints

1. The First Nations of Mushkegowuk Council, Grand Chief Stan Louttit and George Wesley (the complainants) allege that Indian and Northern Affairs Canada (INAC) and Public Safety and Emergency Preparedness Canada (PSEPC) discriminate against them by treating them in an adverse differential manner in the provision of police services and facilities, on the grounds of race and national or ethnic origin. They allege that First Nations communities in Ontario are receiving lower quality policing services and facilities compared to services customarily available to the public in Ontario.

2. The context for the complaint is the spending framework detailed in a tripartite agreement between the Nishnawbe-Aski Nation (of which the Mushkegowuk First Nations are members), the federal government (52% of funding) and the Ontario government (48% of funding). The complainants allege they are receiving lower quality police services and facilities in and around the Mushkegowuk communities compared to services customarily available to non-Aboriginal communities.

3. According to the complainants, various studies (listed at Appendix A) support the need for adequate funding for police services in and around the affected communities, and a remedy that considers the unique difficulties associated with policing in remote northern aboriginal communities.

The Parties

4. Grand Chief Stan Louttit is the elected Grand Chief of Mushkegowuk Council. Chief Louttit brings this complaint both in his personal capacity and as the elected representative of all the First Nations of Mushkegowuk Council, and through them, all their individual community members. George Wesley brings this complaint in his personal capacity as the father of Ricardo Wesley, who died in a fire in the police detention facility in Kashechewan, due to alleged poor policing services and facilities. George Wesley is also a member of the Kashechewan First Nation and resides on its reserve.

5. The complaints are filed against the Queen in Right of Canada (PSEPC and INAC). A related complaint has been filed against the Queen in Right of Ontario with the Ontario Human Rights Commission. Under the legislated changes to the human rights system in Ontario, the complainants have until June 30, 2009 to transfer their complaints from the Commission and file an application with the Human Rights Tribunal of Ontario (HRTO).

Background

6. The Mushkegowuk Council is the regional tribal council and aboriginal government for the Mushkegowuk Aboriginal people, whose traditional territories are around the western James Bay region of northern Ontario. The various Mushkegowuk First Nations are: the Attawapiskat First Nation, the Kashechewan First Nation, the Fort Albany First Nation, the Moose Cree First Nation, the Taykwa Tagamou Nation (formerly New Post Nation), the Chapleau Cree First Nation, and the Missanabie Cree First Nation.

7. According to its website, the respondent, Indian and Northern Affairs Canada *"...is responsible for two separate yet equally important mandates: Indian and Inuit Affairs and Northern Affairs. This broad mandate is derived largely from the Department of Indian affairs and Northern Development Act, the Indian Act, territorial acts and legal obligations arising from section 91(24) of the Constitution Act, 1867; however, the department is responsible for administering over 50 statutes in total." "In general INAC has primary, but no exclusive*

responsibility for meeting the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Northerners."

8. Public Safety and Emergency Preparedness Canada is the federal department responsible for policing and law enforcement. PSEPC also administers the First Nations Policing Policy which sets the funding and operational framework for the NAPS tripartite Agreement. The NAPS tripartite agreement is the agreement between Canada, Ontario and the Nishnawbe-Aski Nation which governs policing in the Mushkegowuk territory.

9. The Nishnawbe-Aski Police Service (NAPS) is funded 52% by Canada and 48% by Ontario. Clause 2.1 of the NAPS agreement provides that:

....It is intended that the police service in the Nishnawbe-Aski area will be appropriate to the culture and traditions of the people of the Nishnewbe-Aski area....responsive to the policing needs of the community, and at least equivalent in level and standard of service to that provided in non-Aboriginal communities in Canada with similar characteristics.

10. The Nishnawbe-Aski Police Service is governed by its own Police Service Board consisting of a representative of each Nishanawbe-Aski Nation Tribal Council. There are several tribal affiliations within Nishanawbe-Aski Nation (NAN) which result in 3 distinct languages including: Ojibwe, Oji-Cree and Cree. NAPS attempts to hire individuals who are from the aboriginal region, or have considerable knowledge of the regions.

Contact with the parties

11. The federal respondents were notified of the complaint by letter dated August 9, 2007. The notification letter included a copy of the Complaint Form. Efforts to bring the parties together in mediation or an initial informational meeting were made by the Early Resolution Services Team Leader, in August 2007. On November 1, 2007, John Chamberlin, Manager, Investigations, spoke with Grand Chief Stan Louttit who reaffirmed the complainants' interest in mediation. The same day, John Chamberlin spoke with Allan Maclure, who said, as the legal representative of both federal respondents, he would seek instructions regarding mediation. On November 23, 2007, the complainants advised the Ontario Human Rights Commission and the Canadian Human Rights Commission that constructive discussions were proceeding, and they hoped that the Commissions would allow the respondents additional time for filing their defences.

12. On December 14, 2007, John Chamberlin wrote to the parties stating that in the event the parties chose not to mediate, a defence was to be received by January 31, 2008. Some delays were incurred due to a change in counsel for the respondents, and on April 7, 2008, the Commission was informed that there was a new counsel for the respondents.

13. From April to July 2008, the Commission made several requests to the respondents for a position. On July 29, 2008 the respondents' counsel confirmed by letter that they were not interested in pursuing mediation and requested further information, especially regarding:

- the mandate of Grand Chief to bring the complaint on behalf of the First Nations;
- the nature and source of the specific obligations of the federal respondents;
- information regarding the police services and facilities referred to, and the link to the allegedly discriminatory practices and actions of the federal government;
- details regarding the role and responsibilities of the two federal government departments named in the complaint.

These issues will be discussed later under Section 41 Issues.

14. On September 11, 2008, counsel for the complainants stated that they had established a *prima facie* case of discrimination, and it was their position that only a thorough investigation would answer the issues raised by the respondents. On January 14, 2009, the parties were apprised in a

letter from John Chamberlin that the Commission would be addressing the section 41 issues, and may decide to do either an assessment or investigation. On February 11, 2009, the complainants advised that they had not received the letter, and it was re-sent by this assessor.

Section 41(1)(c)

15. In his letters of July 29, 2008, and February 10, 2009, Sean Gaudet, the lawyer for the respondents, requested that pursuant to paragraphs 41(1)(c) and (d) of the *Act*, the Commission decline jurisdiction over the complaint.

16. Section 41(1)(c) of the Act allows the Commission to deal with complaints over which it has jurisdiction. This means that the Commission can only accept complaints involving parties that fall within the legislative authority of Parliament and alleging acts that fall within its prescribed mandate under the Act. If a prohibited ground and a discriminatory practice are not identified in the complaint, the Commission is without jurisdiction. However, the Federal Court of Canada previously stated and recently affirmed in *Hicks v. Canada (Attorney General)* 2008 FC 1059 that the Commission can only decide not to deal with a complaint if it is "plain and obvious" that there is no *prima facie* discrimination.

17. The Commission's mandate is limited to the discriminatory practices that are described in sections 5 to 14.1 of the Act. Complaints relating to practices that are not described in the Act are beyond the jurisdiction of the Commission. The Act is very specific and, as such, does not extend to every situation where a person feels that he/she has been aggrieved. Although a complainant may feel that he/she has been subjected to unfair treatment, unless that treatment would constitute a discriminatory practice under the Act, the Commission does not have jurisdiction to address it.

18. Section 5 prohibits discrimination in the provision of goods, services, facilities or accommodation customarily available to the general public. The question of whether programs and policies specific to First Nations constitute a "service" within the meaning of section 5 of the *Canadian Human Rights Act* is an outstanding legal issue that remains to be determined, and it does not appear to be "plain and obvious" that the Commission lacks jurisdiction to deal with this complaint. The language of the Act is interpreted broadly to give effect to the quasi-constitutional rights that it protects.

19. The respondents request that pursuant to paragraphs 41(1)(c) and (d) of the *Act*, the Commission decline taking jurisdiction over the complaint for the following reasons:

a) Lack of Mandate

20. The respondents ask whether Grand Chief Louttit has been mandated to bring this complaint on behalf of all of the First Nations of the Mushkegowuk Council.

21. The website for the First Nations of Mushkegowuk Council states that the individual Chiefs of the seven (7) First Nations, the Grand Chief and Deputy Grand Chief form the governing body that oversees the Mushkegowuk Council.

22. The Commission has dealt with many complaints filed, for example, by associations, unions etc. on behalf of other people. In this case, the Chief has filed on behalf of his communities, and not for his own benefit. Given the large number of persons involved, it is simply impossible to obtain consent, and it is suggested by this assessor that the public interest in this matter would support the Commission exercising its jurisdiction under paragraph 40(2) of the Act which reads: *If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.*

b) Lack of Clarity

23. The respondents say that they are unable to respond to the complaint because of the lack of specificity with respect to the allegation that policing services and facilities are not being provided to the Mushkegowuk First Nations in a manner that results in services and facilities that are customarily available to the other communities and members of the public. The respondents state that the complaint lacks clarity with respect to the meaning of "the general public", "other communities", and "services and facilities". The respondents' counsel states that the federal respondents do not provide a service within the meaning of section 5 of the Act.

24. The complainants state that, within the context of the complaint, this means that the Aboriginal people living in Mushkegowuk communities are being discriminated against in the provision of police services and infrastructure when compared to non-Aboriginals in communities either in Ontario or Canada.

25. Policing in the communities is provided by the Nishnawbe-Aski Police Service (NAPS). According to the complainants, underfunding and lack of support by the respondents have meant that NAPS is unable to provide adequate policing services and facilities. The complainants allege that various studies (listed in Appendix A) support their contentions of substandard and lower quality of police services and facilities, which include the following:

- frequent lack of 24 hour policing, 7 days a week;
- insufficient and/or lack of experienced and trained officers, staff, and other support;
- inability to conduct "community policing" and non-receipt of proper law enforcement in general;
- lack of proper policing facilities;
- the fact that the Nishnawbe-Aski Police Service (NAPS) replaces and is not supplemental to the OPP;
- NAPS' jurisdiction is limited to reserves and OPP barely polices areas immediately outside reserve;
- destructive legacies of colonialism and neglect;
- different roles played by police in these communities; and
- lack of consideration of the costs and impacts associated with policing in remote areas.

The issue of "service" will be discussed below in section (d).

c) Lack of Comparator Group

26. The respondents maintains that, in this case, it is not appropriate to compare the funding and delivery of police services by the Nishnawbe-Aski Police Service with that of non-Aboriginal communities since the federal government is not responsible for policing in non-Aboriginal communities in Ontario. The respondents state that there cannot be a cross-jurisdictional comparison of policing throughout Ontario, in that the Commission cannot undertake an analysis of alleged differential treatment by different entities.

27. The complainants maintain that the Mushkegowuk communities are being discriminated against when compared either to the average non-Aboriginal Ontario community or the average non-Aboriginal Canadian community. The complainants also note that the federal government provides police services and facilities to many non-native communities through the Royal Canadian Mounted Police (RCMP). Furthermore, the complainants state that Canada is engaged in the provision of Mushkegowuk policing because it is one of the main architects of the NAPS tripartite agreement; plays a lead role in negotiations regarding the level of service; has contractual obligations and oversight mechanisms under the agreement; and, as a funder, influences the funding levels, services and infrastructure provided.

28. The Federal Court in *Morris v. Canada (Canadian Armed Forces)* [2005] F.C.J. No. 731 at par. 27 rejected the notion that a comparative analysis is necessary to prove discrimination. The Court held that the "legal definition of a prima facie case does not require the Commission to

adduce any particular type of evidence to prove the facts necessary to establish that the complainants was the victim of a discriminatory practice as defined in the Act". The Court reaffirmed the test in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 for establishing a complaint of discrimination.

29. In examining the issue, the obligations of Canada to the Aboriginal communities as articulated by the Supreme Court in *R v. Sparrow* [1990] 1 S.C.R. 1075 clearly states that:

"The government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples, the relationship between the government and Aboriginals (sic) is trust like, rather than adversarial and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship."

30. As noted in paragraph 9 above, while the tripartite agreement does not expressly provide for a comparator group, it does say that policing in the communities should be *"at least equivalent in level and standard of service to that provided in non-Aboriginal communities in Canada with similar characteristics."*

d) Funding not within the definition of "service customarily available to the public"

31. The respondents are also of the view that providing funding to the Nishnawbe-Aski Police Service is not a service within the meaning of section 5 of the *Act*. They note that provisions of the NAPS agreement state that the Police Service Board shall be independent and autonomous, and is responsible for most aspects of the policing provided for the Mushkegowuk communities. The respondents cite *Watkins v. Canada*, 2008 F C A, 170, wherein the Federal Court of Appeal determined that not all government actions constitute "services" within the meaning of section 5 of the Act.

32. The complainants explain that, as outlined above, the federal role in Mushkegowuk policing is more than a funding role. The complainants cite federal documents on the First Nations Policing Policy and Program which indicate that the federal government has a role in setting up the frameworks for First Nations policing, and the kinds and quality of services provided. The complainants also maintain that the respondents have a contractual role within the NAPS agreement as regards ensuring complement levels are sufficient, and housing and infrastructure requirements are met.

33. In addition, the respondents ask for clarification as to the federal government's role, other than funding, with respect to First Nations policing. According to the respondents, the federal Government's role in the provision of police services and facilities in respect of the Mushkegowuk First Nations under the tripartite agreement is, as outlined above, limited to the provision of contribution funding. The complainants have alleged that both provincial and federal governments are responsible for First Nations policing. Thus, complaints were filed separately, but simultaneously in the two respective federal and provincial human rights processes.

34. The complainants state that the PSEPC is the federal department responsible for policing and law enforcement, including First Nations policing. The Department's Aboriginal Policing Directorate works with Aboriginal communities, provincial/territorial governments and other law enforcement partners to implement the First Nations Policing Policy and Program.

35. The complainants also allege that INAC, as the federal department responsible for Canada's relationships with First Nations, has a role and responsibility for Aboriginal policing. The determination of federal responsibility for first services which are typically provided to the general public by the provinces has often involved a review of whether the services provided are culturally sensitive, and promote and protect "Indianness", pursuant to constitutional responsibilities under sections 91 and 92 of the *Constitution Act, 1867.*

36. As noted above, Clause 2.1 of NAPS agreement specifically provides that:

... It is intended that the police service in the Nishnawbe-Aski area will be appropriate to the culture and traditions of the people of the Nishnawbe-Aski area... responsive to the policing needs of the community...

37. NAPS, for the most part, replaces and is not supplemental to the Ontario Provincial Police ("O.P.P.") in these communities (i.e. NAPS is the primary police force). NAPS's jurisdiction is usually limited to reserves only, yet the O.P.P. does not practically police the areas outside reserve.

38. Federal responsibility is also triggered by the different role the police play in such communities (e.g. more service-oriented and informal), particularly given the communities' small nature, rapid change, and a lack of resources to deal with issues involving mental health and domestic violence. In addition, the complainants argue that the role of the police is different because of the destructive legacies of colonialism and neglect (including significantly higher rates of unemployment, poverty, substance abuse, and violent crime as well as low educational attainment and the impact of the rapid disappearance of a traditional way of life).

39. As a result, the complainants submit that the funding and direction provided by INAC and PSEPC fall within the jurisdiction of the Commission as part of the Federal spending power or alternatively, under section 91(24) of the *Constitution Act*. The Commission therefore has jurisdiction over these complaints.

Section 41(1)(d)

40. The respondents also raise objection to the complaints under section 41(1)(d) of the Act which gives the Commission the discretion to refuse to deal with a complaint that is trivial, frivolous, vexatious, or made in bad faith.

41. The respondents maintain that the allegations in the complaints do not make out a *prima facie* case of discrimination based on "ancestry, ethnic origin, or race", and should be dismissed pursuant to section 41(1)(d) of the Act which states: *Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that : d) the complaint is trivial, frivolous, vexatious or made in bad faith."*

42. In support of their allegation that the alleged underfunding and lack of support is discriminatory, the complainants provided a range of studies and reports which, in their view, establish pursuant to paragraph 40.1 of the Act, that they have "reasonable grounds for believing" that the practice is linked to one or more of the grounds of the *CHRA*. The Report of the Ipperwash Inquiry is cited, at page 247, wherein the Honourable Sidney B. Linden notes the need for police services to be on "much firmer financial, operational and legal ground" and he recommends that, "In my view, provincial, federal and First Nation governments need to jointly commit to renewing First Nation police services in Ontario."

43. A report prepared by Don Clairmont, Aboriginal Policing in Canada: An Overview of Developments in First Nations, prepared for the Ipperwash Inquiry outlines in detail the problems in policing in the NAPS communities, and notes at page 97, "the fundamental need for new thinking on the part of federal and provincial authorities." The first recommendation in the review by Allan Pelletier, A Matter of Injustice: An Independent Review and Analysis of Nishnawbe-Aski Police Service Within Mushkegowuk Communities, is that the Mushkegowuk inform both the federal and provincial governments that persons and property are not being protected in the same manner as municipal police services, OPP services and federal police services elsewhere in Canada. The second recommendation is that the Mushkegowuk inform the two levels of government that they have not provided the minimum requirements for an adequate and effective police service or funding comparable to that of municipal police services and O.P.P.

44. Only a Tribunal can determine whether or not a prima facie case has been made out. In order to file a complaint, it is necessary to meet the requirements of paragraph 40(1) of the *Act*, which

reads: *Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission."*

45. To meet the requirements of paragraph 40.(1) therefore, a complainant needs to allege that a respondent is carrying out a practice that discriminates in employment or in the provision of services and cite "*reasonable grounds for believing*" that this practice is linked to one or more of the 11 grounds of the *Act*. It is this assessor's view that the complainants have satisfied these requirements. Whether or not a *prima facie* case exists cannot be determined at this stage.

Assessment - Section 49 of the Canadian Human Rights Act

46. If after having considered the preliminary issues, the Commission decides to deal with the complaint, the issue for the Commission to decide is whether it should refer the complaint to the Canadian Human Rights Tribunal under section 49 of the Act. Specifically, the Commission is being asked to decide whether the information contained in the complaint, this report and the parties' submissions to this report is sufficient to justify an inquiry by the Tribunal, or whether further investigation is required before making that determination.

47. Section 49 of the Act states:

"At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted."

48. The duty of the Commission is to assess whether a complaint requires further inquiry by the Canadian Human Rights Tribunal. In doing so, the Commission does not determine whether discrimination has actually occurred, but only if there is sufficient evidence before it to justify proceeding to the next stage. In determining whether or not to refer a complaint to the Tribunal for further inquiry, the Commission takes into consideration all of the circumstances of the complaint.

49. The Commission may consider the following factors in deciding whether to refer the complaint to the Canadian Human Rights Tribunal under section 49:

a)What is the nature of the dispute between the parties? Is it a purely private dispute or are there allegations of systemic discrimination?

b)Does the available information support the allegations of discrimination in the complaint?

c)Is the information provided by the parties contradictory?

d)Has the respondent already addressed the complainant's allegations? Have substantial and comprehensive remedies already been provided by the respondent?

e)Did the respondent provide one of the statutory defences permitted under the Act?

f)Would further investigation assist the Commission in making a final determination in the complaint?

50. The complainants allege that they are receiving lower quality police services and facilities in and around their communities, compared to services customarily available to the public. They allege that Aboriginal policing in general is inadequate. To clarify, they point to evidence that the Canadian governments, including the federal government, are discriminating against Aboriginal people in the provision of police services and infrastructure, as indicated by these findings of the Honourable Sidney B. Linden and Professor Donald Clairmont, after close examinations in an

extensive public judicial inquiry:

> "Our research, consultations, forums, and submissions from the parties have consistently confirmed that First Nation police services are working with restricted budgets and substandard facilities, which frustrates their efforts to provide high quality police services."
>
> The Honourable Sidney B. Linden, Ontario, Report of the Ipperwash Inquiry: Policy Analysis, vol. 2 (Toronto: Queen's Printer, 2007) at Chapter 10 [First Nations Policing], p. 265

> "The [federal First Nations Policing Policy] assumes that First Nation policing will be an add-on or enhancement to basic policing services provided by the RCMP or a provincial police service. That assumption leads to inadequate funding where self-administered First Nation police services are actually the primary service providers for their communities, as is the case in Ontario and some other provinces."
>
> The Honourable Sidney B. Linden, *ibid*, p. 252

> "The comparative lack of capital and operational funding for First Nation police services has significant consequences in a number of areas, including their ability to recruit and retain qualified police officers, respond to occupations and protests, provide professional, efficient police services, train and support their officers, and meet even basic capital and infrastructure requirements."
>
> The Honourable Sidney B. Linden, *ibid*, p. 265

> "Government documents ... have identified the central challenges for NAPS as capital requirements (facilities for the 35 detachments), recruiting and retaining officers, inexperienced front-line officers, service levels and the quality of investigations, logistics with policing widely scattered, isolated small communities, and social problems such as suicide and substance abuse. These are quite valid comments but stop short of the fundamental need for "new thinking" on the part of federal and provincial authorities. On the federal side, there has to be more focus on the fact that NAPS and other SA police services, certainly in Ontario and Quebec, are here to stay and have replaced OPP policing, not just enhanced it."
>
> Prof. Don Clairmont, Aboriginal Policing in Canada: An Overview of Developments in First Nations (research paper prepared for the Ipperwash Inquiry, September 2006)

51. The studies provided by the complainants appear to provide considerable support that the policing provided to Mushkegowuk First Nations is inadequate and underfunded. The question before the Commission, however, is whether or not the alleged lack of support and funding is discriminatory. The complainants have provided sufficient information in the complaints for them to be in a form acceptable to the Commission and demonstrate a sufficient link to a prohibited ground and an alleged discriminatory practice. Furthermore, in this case, any jurisdictional issues are inextricably linked to the merits of the complaint, are not settled in law, and require further inquiry.

52. Essentially, the complainant's allegation is that different treatment (the separate funding regime for Aboriginal policing) is resulting in discriminatory results (inadequate services provided to aboriginal peoples in the Mushkegowuk region). In other words, the difference in regimes is creating a different and unequal result or substantive inequality.

53. The respondents argue that they cannot be discriminating since they only provide funding to "one" group of people. However, in their funding agreement they have committed to providing police services at a comparable level to the provinces which creates a basic standard for service delivery.

54. The overall effect of the two different regimes in Canada is that aboriginal peoples appear to be receiving substandard police services in the Mushkegowuk communities. This is an issue of substantive inequality. Since human rights principles dictate that the Commission take a broad

and purposeful interpretation of our mandate and provisions of the legislation, the respondent's argument effectively suggests that a substandard level of police services on reserve for Aboriginal peoples is acceptable because they are not bound by any other standard. This argument is contrary to the spirit of the *CHRA* and the principles of substantive equality. Human rights analysis in this case requires a very broad view of the impact of the tripartite funding agreement in this case, and the effective result.

55. It is not the role of this assessor, or indeed, the Commission, to determine whether or not Canada is providing adequate policing services to the Mushkegowuk First Nations communities. Nor, should it indeed be found to be true, is it the role of the assessor or the Commission to determine whether or not the level of services provided is discriminatory or not.

56. The Commission has discretion to use s.49 when it deems it appropriate. In this case, after having reviewed the positions of both sides and the studies provided, it would appear that an investigation would likely not be administratively efficient or effective in exploring the human rights allegations and reaching conclusions, as the main arguments being adduced are legal and not factual in nature and are not settled in law. Consequently, for these reasons, as well as the public interest issue that is raised in these complaints, it is the assessor's recommendation that the Commission use its discretion under s.49, and refer the complaint to Tribunal.

Recommendations

57. It is recommended pursuant to subsection 41(1) of the *Canadian Human Rights Act* that the Commission deal with the complaints because:

- the Commission has jurisdiction; and,
- the complaints are not trivial, frivolous, vexatious, or made in bad faith.

58. It is further recommended that, pursuant to section 49 of the *Canadian Human Rights Act*, the Commission request the Chairperson of the Canadian Human Rights Tribunal to constitute a Tribunal to inquire into the complaints because:

- having regard to all the circumstances, an inquiry is warranted.

APPENDIX A

The following studies were provided by the complainants and reviewed by the assessor:

Ontario, Report of the Ipperwash Inquiry: Policy Analysis, vol. 2 (Toronto: Queen's Printer, 2007) at Chapter 10 [First Nations Policing];

Clairmont, Don, Aboriginal Policing in Canada: An Overview of Developments in First Nations (research paper prepared for the Ipperwash Inquiry, September 2006);

Allan Pelletier & Associates, A Matter of Injustice: An Independent Review and Analysis Nishnawbe-Aski Police Service Within Mushkegowuk Communities (prepared for Mushkegowuk Council and dated February 23, 2007);

Family Service Agency Funding; (2) WEN: DE We Are Coming to the Light of Day; and (3)WEN: DE The Journey Continues.