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Our File: 2-589339
Notre dossier:

Your File:
Votre dossier:

July 6, 2010

BY COURIER

Deirdre Hilary
Investigations
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario
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Dear Ms. Hilary:

Re: LOUITT, Joseph, Grand Chief of Mushkegowuk - Human Rights Complaint
Tribunal File Nos.: 2007 0826 and 2007 0993

As solicitor for the respondents, the Department of Indian and Northern Affairs Canada (INAC) and the Department of Public Safety and Emergency Preparedness, also known as Public Safety Canada (PS) (referred together as the "federal respondents"), I am writing in response to your letter of April 13, 2010, in which you requested our response to all allegations as specified in the complaint form, and any documents which support our position and that are deemed relevant to the investigation. You also indicated in your letter that the Commission would not provide further information to assist Canada in responding to these complaints.

As expressed in earlier exchanges, the federal respondents remain of the view that the complainants have failed to advance a reasonable basis for asserting they are the victims of discrimination on the part of either INAC or PS, and that further information is required for Canada to properly comprehend and respond to their claims. We elaborate on this issue in this submission.

Background to the complaints – the First Nations Policing Program

The First Nations Policing Program (FNPP) is a discretionary and non-statutory transfer payment program introduced by the federal government in June 1991, as an exercise of the federal spending power.

Although originally the responsibility of the Department of Indian Affairs and Northern Development, the FNPP was transferred to PS (formerly the Solicitor General) in 1992 and has since been administered by the Aboriginal Policing Directorate at PS. The Directorate works with First Nation and Inuit communities, provincial/territorial governments, and other law enforcement partners to implement the FNPP.

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The FNPP facilitates First Nation and Inuit communities' access to professional, dedicated, and culturally appropriate police services, with due regard to the provincial or territorial jurisdiction.

The FNPP provides funding to support the following objectives:

- to improve safety and security in First Nation and Inuit communities;
- to ensure First Nation and Inuit communities have access to policing services that are responsive to their needs;
- to support First Nation and Inuit communities in establishing structures free of political influence for the management, administration and accountability of their police services; and
- to implement and administer the FNPP in a collaborative arrangement with First Nation and Inuit communities and the provinces/territories.

A copy of the First Nations Policing Policy is included at **annex A**.

It should be noted however that PS is currently conducting a comprehensive review of the First Nations Policing Policy and Program. The review will result in an examination of police service delivery models, funding mechanisms and potential revisions to the FNPP policy framework. The review will conclude in the fall of 2010 with the development of options that will address the relevance, effectiveness and sustainability of the FNPP into the future.

The federal government provides funding for First Nations police services based on tripartite agreements between the federal government, the provincial/territorial government, and the First Nation or Inuit community. Under the FNPP, the federal government pays 52% and the provincial or territorial government pays 48% of the government contribution towards the cost of the First Nations policing service.

Under the current FNPP, there are two types of agreements:

1. **Self-Administered (SA) Agreements**, which are negotiated among the federal government, provincial or territorial government and First Nation or Inuit community. In these arrangements, the First Nation or Inuit community manages its own police service under provincial legislation. Independent police commissions provide oversight for these self-administered police services. Mainly Aboriginal officers staff these autonomous police services.
2. **Community Tripartite Agreements (CTA)** are a direct result of the signing of a framework agreement, which is a bilateral agreement between the federal government and a province or territory that allows for the future signing of individual CTAs. Like SA agreements, CTAs are negotiated among Canada, the partnering province or territory, and the First Nation or Inuit community. Under a CTA arrangement, the First Nation or Inuit community has dedicated officers

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from an existing police service, typically the Royal Canadian Mounted Police (RCMP).

Within the funds available, the federal and provincial/territorial governments and First Nations will determine the number of police officers and civilian staff to be supported by this government funding on the basis of the following factors, which are not exhaustive:

- the level of service provided by the provincial police service to the First Nations;
- the comparative level of service provided to neighbouring communities;
- the appropriate officer to population ratio;
- the demographic characteristics of the population to be served;
- the size and nature of the geographic area to be covered; and,
- the police workload in the community based on crime statistics and crime prevention activities.

While not all policing costs are covered by the FNPP, eligible costs do include: program administration, including governance mechanisms; recruiting, training and education (including formal in-service training); salaries and benefits for police officers and civilian staff; and expenditures such as operating, maintenance and minor capital costs. In the event that activities such as an analysis of policing needs, research and development activities, tripartite negotiations, evaluations and public education are undertaken, funding may also be provided to the First Nation community under the FNPP.

It is important to emphasize that the intent of the FNPP is to enhance existing police services by providing additional funding, not to replace those services. Moreover, policing in Canada is within provincial jurisdiction and the legislature of Ontario has created a responsibility for the Government of Ontario to provide police services on the province's territory. As such, it is the Government of Ontario's responsibility to provide policing services for its residents.

The NAPS Agreement

The Nishnawbe-Aski Police Service Agreement ("NAPS Agreement") is an example of a Self-Administered (SA) agreement made pursuant to the terms and conditions of the FNPP.

The federal government's initiative regarding the provision of police services and facilities in respect of the complainants is limited to the provision of contribution funding to the Police Board established under the tripartite NAPS Agreement negotiated under the FNPP. The purpose of the NAPS Agreement is to provide for the continuation of effective policing in the Nishnawbe-Aski area by the Nishnawbe-Aski Police Service. The NAPS Agreement, which has a specific term and is the subject of negotiations,

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provides for the establishment of a Police Service Board (the Board). The Board in turn governs the NAPS, which has primary police responsibility in the Nishnawbe-Aski area.

The parties to the NAPS Agreement are the Nishnawbe-Aski Nation, the Government of Ontario and the federal government. Under the NAPS Agreement, the Nishnawbe-Aski Nations are responsible for managing their own police service through the Board. For their part, Canada and Ontario agree to make financial contributions in accordance with a formula whereby Canada pays 52% and Ontario pays 48% of the costs for each fiscal year, as per the FNPP. A copy of the NAPS Agreement for the period 2003-2005, with extensions to **March 31, 2009** is included as **annex B**. A copy of the new NAPS Agreement for the period 2009-2012 is also included as **annex C**.

The Nishnawbe-Aski Police Service encompasses almost two-thirds of Ontario, from the Manitoba to Quebec borders. To cover this large geographic area, NAPS is divided into two regions. The NAPS is made up of 35 detachments, many of which are in very remote locations that can only be accessed by air or by winter-road.

The respondents do not provide police services or facilities to the complainants.

The underlying premise in these complaints is that the respondents have discriminated against the complainants in the provision of police services and facilities.

As mentioned earlier, the federal government does not provide police services or facilities to the complainants or to the Mushkegowuk First Nations. Under the NAPS Agreement, police services and facilities are provided by the Police Service Board, which is "independent and autonomous" (article 3.1). Articles 3.2, 3.3 and 4.1 of the NAPS Agreement, which are set out below, demonstrate that it is the NAPS Police Service Board that is responsible for the provision of police services and facilities within the geographic area served by the NAPS:

- 3.2 The Police Service Board shall be responsible for governing NAPS and for providing and implementing through the Chief of Police, planning, direction and policy for NAPS.
- 3.3 The Police Service Board shall have the following responsibilities:
 - a) to govern NAPS;
 - b) to approve the objectives, priorities and the budget for NAPS;
 - c) to develop policies for the management of the Nishnawbe-Aski Officers and civilian staff;
 - d) to hire and employ the Chief of Police, Nishnawbe-Aski Officers and civilian staff;
 - e) to manage the Police Service Board budget for NAPS;

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- f) to provide the mechanisms necessary for the impartial and independent review of public complaints, improper exercise of the police powers, violations of codes of conduct, and mechanisms for grievance and redress on matters related to discipline and dismissal.
- g) to maintain standards of performance for the Chief of Police and an evaluation procedure for that performance; and
- h) to ensure that all Nishnawbe-Aski Officers have the necessary training and authorities to enforce the Band by-laws, enacted pursuant to the *Indian Act*, R.S.C. 1985, c. 1-5, and the laws of Ontario and Canada.

4.1 The mandate of NAPS shall be:

- a) to maintain the peace throughout the Nishnawbe-Aski area;
- b) to enforce all provincial, federal and band by-laws applicable in the Nishnawbe-Aski area;
- c) to provide such services to the people of the Nishnawbe-Aski area as may be necessary or appropriate in order to prevent or discourage crime and disorder in the Nishnawbe-Aski area;
- d) to provide such other policing services as may be required in accordance with the terms and conditions of this agreement; and
- e) to provide assistance to victims of crime.

The federal respondents have expressed to the Commission in earlier correspondence that the provision of funding under the NAPS Agreement does not constitute a service within the meaning of section 5 of the *Canadian Human Rights Act*, and that the Commission is without jurisdiction to investigate this complaint. The Commission failed to address this question in its June 24, 2009 assessment report and its September 30, 2009 decision to investigate these complaints. The federal respondents reiterate this submission here – the funding provided by the federal government (52%) is not a service. The NAPS provides police services and facilities pursuant to **provincial legislation**. The Commission has no jurisdiction over these complaints.

The FNPP is a discretionary transfer payment program (**not** a statutory program) and is limited to the provision of financial contributions to the cost of police services. The current federal contribution is capped at 52% of the government contribution towards the cost of the police service and can only be used for eligible expenses set by the FNPP. The federal government is not involved in the day-to-day operations of the police service nor does it dictate or control how the Police Service Board spends the money it has been provided. It is the Police Service Board that is responsible for managing the NAPS and the Board's budget (NAPS Agreement, article 13.3).

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Local policing is a provincial responsibility.

Local policing is a provincial responsibility and in Ontario, policing falls within the mandate of the Ontario Ministry of Community Safety and Correctional Services. The Ontario *Police Services Act* is the legislation that dictates the way policing will be provided to communities within the Province of Ontario by Municipal Police Services and by the Ontario Provincial Police (OPP). Section 19.1 of the *Police Services Act* provides that the OPP is responsible for providing policing services to all areas of the Province, except those that have municipal police services.

While the NAPS is the primary police service within the geographic jurisdiction of the Nishnawbe-Aski Nation, article 8.2 of the NAPS Agreement states that the OPP will continue to provide assistance to NAPS as required in accordance with the terms, conditions and guidelines set out in an agreement between the NAPS and the OPP dated June 27, 2003. A copy of this agreement is attached as **annex D**.

In terms of the hiring of Nishnawbe-Aski officers, section 54 of the Ontario *Police Services Act* provides that the decision is made by the Commissioner of the OPP, with the approval of the Ontario Civilian Police Commission, upon the recommendation of the NAPS Police Service Board. Once appointed, the OPP Commissioner has the power to suspend or terminate the appointment, provided that the NAPS Police Service Board is consulted before this is done.

In those provinces where the RCMP does act as a local police force, it does so as a provincial police force pursuant to **provincial** legislation and pursuant to agreements with those provinces.

There is no proper comparison on which to base a case of discrimination

In earlier submissions to the Commission, the federal respondents submitted that the Commission lacked the jurisdiction to investigate these complaints because they required the Commission to engage in a cross-jurisdictional comparison of policing throughout Ontario. The federal respondents argued that section 5 of the *Canadian Human Rights Act (CHRA)* did not permit this; that the *Act* does not authorize an analysis of alleged differential treatment by different entities.

In your assessment report dated June 24, 2009, and your letter of April 13, 2010, you rejected this submission, asserting that no comparator group is necessary to establish discrimination under the *CHRA*. *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 is cited in your assessment report as authority for this position. This case does not stand for this principle. In fact, the Tribunal member in that case concluded that the respondent had failed to rebut the presumption of discrimination by failing to adduce rebuttal evidence of comparative treatment. The Court acknowledged that this comparative analysis was relevant to the outcome of the case.

In any event, in this case, the complainants' allegations of discrimination are expressly based on allegedly discriminatory treatment relative to other communities in Ontario and

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Canada. This is clear based on the following passages from the complaints filed jointly with the Commission and the Ontario Human Rights Commission:

2. The complainants are receiving lower quality police services and facilities in and around the Mushkegowuk communities **compared to services customarily available to the public**. As the respondents Canada and Ontario are ultimately responsible for overseeing and funding these services and facilities, the respondents' practices in this regard amount to discrimination as they are unequally providing services and facilities on an adversely differentiated basis due to the complainants' ancestry, ethnic origin and race.

Your summarization of the complaints in your assessor's report makes it clear that you accept that a comparative analysis is required:

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

Moreover, the recent letter from the complainants' counsel to the Commission dated February 24, 2010 confirms that the discrimination alleged in this case is based on a comparison between the quality of policing allegedly provided by the federal government to the complainants and that in "non-Aboriginal communities in Canada and Ontario":

My understanding is that the investigation will potentially involve, among other things, a **comparison** of some communities to examine some possible specific points of difference between the quality of policing in Mushkegowuk territory and the quality of policing in non-Aboriginal communities in Canada and Ontario. We have made some requests and suggestions below regarding this **comparison**, including some suggested "indicators of service", the timeframe for this human rights complaint (the "Application"), **the comparison communities**, and contact information for some potential interviewees.

Indeed, the complainants suggest that the Commission compare the OPP detachment in Pickle Lake with the NAPS detachment in Mishkeegogamang First Nation.

It is clear that the complaints are based on the assertion that the complainants are receiving lower quality police services and facilities from the federal government compared to police services and facilities that the federal government would be providing to other Ontarians. This analytical approach is fundamentally flawed. Not only do the federal respondents not provide police services and facilities to the complainants (this is done by the NAPS and the OPP, as detailed earlier in this submission), they do not provide police services and facilities to other Ontarians either. This is the responsibility of the OPP and municipal police services, where applicable.

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The federal government has no control over how these other jurisdictions carry out their local policing responsibilities.

In order to find discrimination in this case, the Commission would need to find that the federal and provincial governments are a single entity. This is inconsistent with the division of powers established in the *Constitution Act, 1867*. Each level of government is legally and practically distinct; they cannot be treated as one entity, as recognized by the Supreme Court of Canada in *R. v. S. (S.)*, [1990] 2 S.C.R. 254.

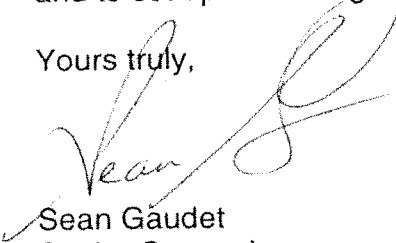
Canada's witness

The following individual should be contacted by the person assigned to investigate this complaint as a witness for the federal respondents:

Mary Donaghy
Director General
Aboriginal Policing Directorate
Public Safety Canada

You may contact the undersigned to obtain further contact information for Ms. Donaghy and to set up a meeting time with her.

Yours truly,



Sean Gaudet
Senior Counsel
Regulatory Law Section

SG/dt