



Investigation Report

PROTECTED

Complaint Information

Complainant: Mushkegowuk Council, Grand Chief Stan Louttit and George Wesley **Referred to Preliminary Assessment:** Yes

Respondent(s): Indian and Northern Affairs Canada and Public Safety and Emergency Preparedness Canada **Parties Participated in Preliminary Assessment:** Yes

File Number(s): 20070826, 20070993 **Referred to Mediation:** Yes

Date Accepted: July 13, 2007 **Parties Participated in Mediation:** No

Section(s) of the Act: 5

Relevant Ground(s): Race, National or Ethnic Origin

Purpose

This investigation report is not a decision of the Canadian Human Rights Commission (the Commission). The purpose of this report is to assist Commission members to determine whether:

- a) a conciliator should be appointed to attempt to resolve the complaint and/or;
- b) further inquiry by a tribunal is warranted or;
- c) the complaint should be dismissed.

The Commission members do not determine whether discrimination has actually occurred, but whether a complaint requires further inquiry by the Canadian Human Rights Tribunal. In determining whether or not to refer a complaint for further inquiry, the Commission members take into consideration all of the circumstances of the complaint.

When making a decision, the Commission members may also consider the following

- circumstances:
- a) What measures have been taken by the parties to resolve the issues which give rise to the complaint?
 - b) What are the positions of the parties with respect to an appropriate remedy to the complaint, if the parties do take a position? What remedies may be available to the parties?
 - c) How is the public interest engaged by this complaint?

The Canadian Human Rights Tribunal is a separate agency from the Canadian Human Rights Commission and is comparable to a court. It is the Tribunal which decides if discrimination under the *Canadian Human Rights Act* has occurred. The Tribunal conducts a fair and impartial hearing in which it considers and weighs all the evidence introduced by all parties before issuing its written decision, setting forth its reasons and the remedy, if applicable.

N.B.: THIS INVESTIGATION REPORT IS NOT A PUBLIC DOCUMENT AND IS NOT FOR DISTRIBUTION EXCEPT TO THE PARTIES TO THE COMPLAINT.

Signature

D. Hilary
Signature:

Dec 23 / 2010
Date

The Complaint

1. At issue in this complaint is whether the First Nations of Mushkegowuk Council, Grand Chief Stan Louttit and George Wesley* (the complainants) are being discriminated against by the respondents, Indian and Northern Affairs Canada (INAC) and Public Safety and Emergency Preparedness Canada (PS). The complainants allege that they are treated 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 because the respondents are not providing adequate funding.

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The Investigation Process

2. Alleged Adverse Differential Treatment

Step 1:

The investigation will examine whether there is support for the complainants' allegation of adverse differential treatment by considering:

- i. Are the complainants treated differently in the provision of policing as compared to non-Aboriginals?
- ii. Does the treatment result in negative consequences for the complainants?
- iii. Is the differential treatment based on one or more prohibited grounds of discrimination?

Step 2:

Depending on the investigator's findings, the investigation may also consider:

- i. whether the respondents can provide a reasonable explanation for its actions that is not a pretext for discrimination on a prohibited ground.

Background to Complaint

3. The context for the complaints is the 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 due to insufficient funding.
4. The Nishnawbe-Aski Police Service (NAPS) is the biggest First Nations Police Service in Canada, and the second largest in North America. 135 uniformed officers are spread across an area that equals two thirds of Ontario, from the Manitoba border, up the James Bay Coast over to the Quebec border. (See Appendix A)
5. The First Nations Policing Policy and Program indicates that the federal government has a role in setting up the frameworks for First Nations policing, and in deciding what kinds and quality of services are provided. The tripartite agreement says 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."
6. The complaints were filed simultaneously with the CHRC and the OHRC (now OHRT) because both levels of government share responsibility for policing in the area; however, the complaints are not being pursued at the HRTTO. The respondents raised objections under sections 41(1)(c) and 41(1)(d) of the Act. An Assessment Report was disclosed to

the parties on June 24, 2009, and on September 23, 2009, the Commission decided to return the complaint for investigation. The letter of decision states:

The Commission adopts the reasons of the Assessment Report on the issue of the Commission's jurisdiction to deal with the complaint pursuant to section 41(1) of the Canadian Human Rights Act. The Commission is of the view that the Complainant has provided reasonable grounds for believing that they have been discriminated against in the provision of services on the basis of one or more prohibited grounds under the Canadian Human Rights Act. The Commission is satisfied that it is not plain and obvious that there is no prima facie case of discrimination and has therefore decided to deal with the complaint.

7. The respondents continue to maintain that the question of whether funding for 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. The respondents also argue that the federal government is not the appropriate respondent, as policing remains a provincial responsibility.

<i>Funding as a Service</i>

8. The allegations in the complaint forms are in relation to PS and INAC's role in the provision of police services on reserve, which includes funding. The respondents argue that policing on First Nations reserves, such as that under the Nishnawabe-Aski Police Service Agreement, falls under provincial jurisdiction. However, these complaints have not been filed against a First Nations police service. They have been filed against federal government departments, namely INAC and Public Safety. The allegations in the complaints are in relation to the federal government's role, which includes funding, of police services on reserve. The Commission does have jurisdiction over federal government departments and allegations of discrimination against them.
9. The stated purpose of the Tripartite Agreement is to ensure that culturally sensitive police services are provided to the communities, and "continue with the development of policing services that are based on First Nations laws, culture, customs, values, traditions, and standards." A number of provisions in the Agreement are designed to achieve this goal, including:
 - Training officers for the purpose of enforcing Band Council by-laws (2003-05 Agreement 3.3(h), 2009-12 Agreement art. 5.2(h)).
 - The Police Service Board (the Board) makes recommendations on the appointment of officers while the Commissioner of the Ontario Provincial Police (the Commissioner) cannot suspend or terminate the appointment of First Nations Constables without consulting the Board (2003-05 Agreement art. 3.4, 2009-12 Agreement art. 5.4).
 - First Nations Constables not only enforce federal and Ontario laws, but also Band Council by-laws enacted under the Indian Act (2009-12 Agreement art. 4)
 - The Police Services Board is "independent and autonomous" from the Ontario Provincial Police (OPP) (2009-12 Agreement art. 5.1).
 - NAPS has its own Policy Manual on service standards separate from that of the OPP though it is consistent with that under the *Police Services Act* (2009-12 Agreement art. 6).
10. Further, a September 2007 amendment to the Agreement created a new section entitled "Modular Police Facilities", which provides that the NAPS Board shall "maintain and effect all necessary repairs to keep police facilities in proper and safe conditions consistent with the Canadian Labour Code, the National Building Code, and the Canadian Electrical Code", as opposed to their provincial counterparts.

11. While in *D'Cruz v. Stl'at'imx Tribal Police Board and others (No. 2)*, 2008 BCHRT 457 the authority of the First Nations police was delegated under BC's policing legislation, the NAPS Agreement contains a provision to the effect that the parties will discuss statutory amendments so as to provide a legislative foundation for NAPS.
12. The federal government has decided to provide the majority of funding, and is a contracting partner in the service agreement. The Federal Court of Appeal in *Chief and Council of the Shubenacadie Indian Band v. MacNutt and Canadian Human Rights Commission et al* (2000), 187 D.L.R. (4th) 741 (F.C.A.) confirms the exercise of the federal government's spending power can fall under the jurisdiction of the CHRA because the exercise of the spending power comes under the legislative authority of Parliament.

The respondents' position

13. The respondents are 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.
14. The respondents emphasize that the intent of the FNPP is to enhance existing police services by providing additional funding, not to replace those services. The federal government's provision of police services and facilities in respect of the complainants is limited to 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 respondents argue that the NAPS Agreement for the establishment of a Police Service Board (the Board), which in turn governs the NAPS, which has primary police responsibility in the Nishnawbe-Aski area.

The complainants' position

15. The complainants state that, for the purposes of section 5 of the Act, the respondents are engaged in the provision of services, particularly since the level of funding is key to the discrimination at issue. The complainants maintain that the federal respondents are clearly engaged in the provision of Mushkegowuk police services and infrastructure. The framework for the NAPS tripartite agreement is based on the federal First Nations Policing Policy. The respondents negotiated the first tripartite agreement, and also negotiated the renewals and extensions of that initial agreement. Those negotiations largely determine the level of services and facilities provided for Mushkegowuk policing. Under the agreement, the respondents have obligations and accountability mechanisms that indicate an active oversight role. The respondents also have *de facto* control as the primary funder. The complainants also note that the respondents set their own funding levels and provide over half of the overall funding.

Analysis

16. In determining whether an action or activity which forms the object of the complaint is a service pursuant to s. 5 of the CHRA, the Commission may look at the following:
- Does the funding provide a benefit or assistance to recipients?
 - Is the essential nature of the funding to confer a benefit or assistance?
 - Is the funding held out as a service and offered to the public?
 - Is the funding customarily available to the general public?

Does the funding provide a benefit or assistance to recipients?
Is the essential nature of the funding to confer a benefit or assistance?

17. Policing services and facilities, which include services such as protection by the police, investigation of crimes, and emergency response have been viewed as "services" under s.5 of the CHRA. The government's role in providing for the maintenance of law and order is generally considered to confer a benefit. The essential nature of the funding to NAPS, and in fact, the only purpose of NAPS, is to provide culturally appropriate policing in First Nations communities in the region.
18. The respondents provide 52% of the funding to NAPS, as a third party intermediary. Thus, the respondents can be seen to be holding out their activities as a service. Furthermore, the respondents exercise a level of control over the intermediary organization in that it is one of the main architects of the NAPS tripartite agreement that underpins the policing regime in Mushkegowuk communities. The framework for the NAPS tripartite agreement is based on the respondents' First Nations Policing Policy.

**Is the funding held out as a service and offered to the public?
Is the funding customarily available to the general public?**

19. There is evidence suggesting that the respondents have a role in the provision of the service. The respondent plays a lead role in determining the level of service that will be provided under the NAPS tripartite agreement; have contractual obligations and oversight mechanisms under the agreement; have *de facto* power as a funder to influence the policing services and infrastructure provided, and provide the majority of police funding and can determine funding levels.
20. An analogous argument in the context of employment was accepted by the Federal Court of Appeal in *Canadian Pacific Ltd. v. Canada (Human Rights Commission)* [1991] 1 F.C. 571. Additional support for this can be found in the case of *British Columbia (Ministry of Education) v. Moore*, 2008 BCSC 264 where the Supreme Court of British Columbia found that through the funding of school boards, which included the power to tell school boards to spend certain money to provide programs to special needs students, the Ministry of Education was providing special education services to special needs students.
21. For the CHRC to have jurisdiction, the funding must be customarily available to the general public. Funding for policing is customarily available to the general public. In *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 at para. 8 (C.A.) the Federal Court of Appeal characterized "customarily available to the public" in this manner:

In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.

.....

... It is difficult to contemplate any government or branch of government contending that a service it offered was a private one, not available or open to the public. Indeed, it may well be said that virtually everything government does is done for the public, is available to the public, and is open to the public. Moreover, to allow a government to evade the operation of the Code merely by setting up eligibility requirements and then arguing that the program is not open to the public is unacceptable; a program is still offered to the public, even though all members of the public cannot avail themselves of it.

Conclusion

22. Having regard to the above, it appears that the funding of policing confers a benefit, and is a service customarily available to the public. The evidence reviewed indicates that the respondents are involved in the provision of the service of policing in the complainant's

communities. As such, the respondents' role is considered a "service" for the purposes of this report.

The Investigation

23. In the course of investigation the following individuals were interviewed:

Grand Chief Stan Louttit, First Nations of Mushkegowuk Council
 Councilor Tom Wassaykeesic, Mishkeegogamang Ojibway First Nation
 Chief Julian Solomon, Kasechewan First Nation
 Ron van Straalen, Commander, OPP Northwestern Ontario
 Jay Rowe, NAPS officer
 Chief Robin Jones, NAPS (Acting Chief of Police)
 Sgt James Etherington, NAPS
 Merle Loon, NAPS officer
 Brad Blair, Superintendent, Aboriginal Policing Bureau, OPP

24. In the course of investigation the following documents were reviewed:

- NAPS Police Service Agreements and Amendments, from 1993 to 2009
- Jury Verdict from the Coroner's Inquest into the custody deaths of Ricardo Wesley and Jamie Goodwin
- First Nations Policing Policy
- Ontario Police Services Act
- Policing Standards Manual of the MCSCS
- Royal Canadian Mounted Police (RCMP) guidelines
- Public Works Canada, NAPS Building Condition Reports and Needs Analysis, 2001 (including summary of findings and the detailed reports on each First Nation)
- Smith and Associates, et. al., Evaluation of the Nishnawbe-Aski Police Service, 1996
- Public Works and Government Services Canada, Facilities Under CTA and SA Agreements as of September 2005 (Ottawa: Supply and Services Canada)
- Jamieson, Beals, Lalonde and Associates, Evaluation of the First Nations Policing Policy and Program: Final Report, volume 1 and 2 (Ottawa: Solicitor General, 1995)
- Evaluations of the First Nations Policing Policy conducted under the First Nations Policing Policy Results-based Management and Accountability Framework 2 and Risk-based Audit Framework
- Video "A Sacred Calling", NAPS, 2008

Adverse Differential Treatment

(i) In relation to the conduct complained of, were the complainants treated differently from non-Aboriginal persons?

the complainants' position

25. The complainants allege that they are receiving lower quality police services and facilities in and around the Mushkegowuk communities compared to services customarily available to non-Aboriginal communities. Policing in the communities is provided by the Nishnawbe-Aski Police Service (NAPS), and 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 provide a number of documents and studies (listed at Appendix A) that support their position.

the respondents' position

26. The respondents state that while policing in and around the Mushkegowuk communities is a provincial responsibility, the federal First Nations Policing Program (FNPP) provides funding to provide culturally appropriate police services. The respondents state that the FNPP is a discretionary and non-statutory transfer payment program.

The Investigation

27. The complainants maintain that the Mushkegowuk communities are treated differently from the average non-Aboriginal Ontario community or the average non-Aboriginal Canadian community. In *Morris v. Canada (Canadian Armed Forces)* [2005] F.C.J. No. 731 at par. 27, the Federal Court rejected the notion that a comparative analysis is necessary to prove discrimination. However, a comparator group may be helpful in illustrating what the complainants say is unequal levels of policing service by NAPS and the Ontario Provincial Police (OPP). As such, a brief comparison of the service and infrastructure of policing in Mishkeegogamang First Nation with police services in Pickle Lake, and policing in Kashechewan First Nation with police services in Moosonee is provided in the chart below.
28. A number of concerns arise in attempting a comparison. Notably:
- Analysis of areas served and police/population ratios does not capture the role of the OPP resources and personnel in policing NAPS territory. The OPP detachments in Pickle Lake and Moosonee provide services to more than just the towns in which they are located, and assist in the provision of police services in Mishkeegogamang and Kashechewan.
 - Social issues common to many First Nations communities (such as poverty, unemployment, suicide, higher youth population, and alcohol related problems) give rise to different, more complex and specialized policing needs.
 - Difficulties in numerically comparing calls for service between the communities. The OPP has a system for tracking and recording all calls received, while there is not the same consistency in the way that service calls are dealt with in NAPS communities.

The CommunitiesMishkeegogamang and Pickle Lake

29. These two communities were selected because they are close together and face some of the same issues, such as being fairly northern and remote. Pickle Lake is policed by the OPP and Mishkeegogamang Ojibway Nation reserves are part of NAPS territory.
30. Just over 900 people live on the two Mishkeegogamang Ojibway Nation reserves, while about 500 live off the reserve, either on Crown Land or in other communities. Reserve 63a is 50 kilometers from Pickle Lake, 63b is 30 kilometers from Pickle Lake. The community is accessible year-round by Highway 599.
31. Pickle Lake is the most northerly, non-First Nations community in Ontario that has year-round access by road. Located 530 kilometers north of Thunder Bay, highway access is provided by Highway 599, the only access road to the town from the south. The main industries are transportation (by air and land) and tourism. Pickle Lake's airport serves as the supply point to northern First Nations communities.

Mishkeegogamang**Pickle Lake**

Police Service	Nishnawbe-Aski Police Service	Pickle Lake OPP
Population	900 people on the two Mishkeegogamang Ojibway Nation reserves, and about 500 living off reserve	4,100 in winter (because of the ice road) 3,300 in summer
HUMAN RESOURCES -Officer complement -Average Working hours	Currently 3 officers 1 sergeant Sergeant worked 700 hours overtime in 2009, 90 - 95 % of time has been spent working alone, with frequent 24 hour shifts officers usually work 10 hour shifts, rotation as follows; 4 nights, 3 rest days, 7 days, 2 rest days, 5 nights, 7 rest days	Currently 5 officers 1 sergeant Usually two or three officers at a time, often officers working in First Nations communities, attending court or doing prisoner transfer to southern communities
INFRASTRUCTURE -Facilities -technology - equipment	-modular, large main room -shared bathroom for staff -no clerical or cleaning staff -people go into storage area if privacy is needed - no breathalizer	-large constable area -men's and women's bathrooms -sergeant's office -workout room -fingerprinting room -guard area -private area for telephone use -cleaning room, storage room, interview room, property vault
OFFICER HOUSING	Band has provided a trailer for officers since there was no accommodation for officers - sergeant lives in Pickle Lake. Officers do not generally bring their families	90% live in Ontario Realty Corporation homes, not elaborate by southern Ontario standards but "warm and dry", most or all are with their families Northern Duration Posting Incentive is paid out in equal amounts over the term of the duration posting. This bonus is up to \$30,000.

Kasechewan and Moosenee

32. Kasechewan and Moosenee were chosen because they are both fly in communities for much of the year. The Kashechewan First Nation is a Cree First Nation policed by NAPS, located near James Bay, on the northern shore of the Albany River. Kashechewan has an on-reserve population of 1180, and shares a land base of 36,346 hectares with Fort Albany First Nation. In 2006 a fire at the detachment severely injured an officer and killed two inmates who could not be rescued.
33. The town of Moosonee is located on the Moose River, 12 miles south of James Bay, and has an OPP detachment. It has a population of approximately 3,500 with about 85% being Cree. The main language is English with Cree as a second language. Moosonee is not connected to the road system in Ontario and all travellers arrive in Moosonee by train or air.

Kasechewan

Moosenee

Police Service	Nishnawbe-Aski Police Service	Moosenee OPP
Population	1180	3500
HUMAN RESOURCES -Officer complement -officer caseload -Average Working hours -training	- 1 sergeant, 6 officers (full complement is 7 officers) - Schedules based on 10 hours per shift (day and night) 20 hours per day x 7days a week = 140 hours per week. - Not all shifts are covered so overtime is used to fill in the blanks by means of call outs -Statistics vary but there is generally a significant amount of time spent working alone, and frequent 24 hour shifts	- 2 sergeants, 10 constables * 2 officers on duty at a time * 10 hour shifts 10 hr rotating schedule * 160hrs/month per officer (0800-1800hrs and 1800 to 0400hrs) * Office closed between 0400-0800hrs daily
INFRASTRUCTURE -Facilities -security -fire and safety -inmate capacity -technology - equipment	- Modular unit assembled in 2007, some problem with building shifting, occasionally door will not close and pipes freeze. - 3 computers and workstations, one fax line, no cell phones, one copier, no breathalyzer, finger print set up in hallway - Fire alarms system and video cameras in the holding cell area, hall way and entrances of the detachment - Steel doors with locked security keyed entrance	Built in late 1940's , Single story brick detached building (1600sq/ft) * Basement storage/property vault/evidence lockers * Interview room, admin office, Sgt office, constable office, kitchen/boardroom/breathalyser and fingerprint room. *24/7 police call box at front entrance - Attached 2 bay garage 2 Detached storage sheds (10 x 10), (6 X 6 - Generator shed) 5 points of access - 4 X steel reinforced doors equipped with security punch keypads, double bay garage with automatic door openers - Audio/video monitored cell block with DVD/DVR recording equipment *No exterior monitoring Established fire safety plan, posted and approved - Central/integrated smoke detector/heat sensor system with portable fire extinguishers. - No sprinkler system
INFRASTRUCTURE (continued)	<u>Vehicles</u> 1 van and 1 pick-up, (van needs repairs) <u>Telecommunications</u> If no one is at detachment, calls go directly to the officers portable radio system, on or off duty.	<u>Vehicles</u> 2009 Ford F250 Crew cab 4x4 truck 2010 Chev Suburban 2500 4x4 2002 Ford Econoline E350 Van 2001 Yamaha Kodiak ATV (2 units) and ATV trailer 2002 Skidoo Touring 500 MSV (2 units) and MSV trailer 1998 Metalcraft 22ft skiff with trailer <u>Telecommunications</u> O.P.P. Communication Centre in Thunder Bay

officer housing	5 officers are staying in an old motel, their families remain down south	OPP officers rent government housing, often officers buy homes and stay with their families for several years, Northern Duration Posting helps finance
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Conclusion

34. It is important to note that while the above communities are fairly reflective of the region as a whole, there are exceptions. For example, the NAPS police facility in Moose Factory is a large modern facility which includes fire and ambulance facilities, while the nearby OPP detachment is in poor condition. In addition, as noted above, the OPP provides services outside the towns in which they are located.
35. Notwithstanding the above concerns, the evidence gathered indicates that there are some clear differences in the policing on First Nations communities, and the policing in non-First Nations communities. The evidence gathered indicates that the buildings and resources in the OPP communities appear to be in a better state than those in the NAPS communities. The evidence gathered indicates that officers in the NAPS communities work longer shifts more frequently, often work alone, and have problems finding suitable accommodation.

(ii) Did this treatment involve negative consequences for the complainants?

36. The complainants allege that the differential treatment involves negative consequences for them. The complainants maintain that the differences in infrastructure and service levels exacerbate the social problems, such as substance abuse, in the First Nations communities.
37. The respondents state that policing is a provincial responsibility, and as such, INAC and PS are not in a position to determine whether the complainants are being treated in an adverse differential manner.

Differences with respect to personnel

38. At first glance, the per capita ratio of officers in NAPS communities does not seem inadequate as compared to the OPP. However, NAPS Police Chief Robin Jones says that the area served encompasses almost two-thirds of Ontario, from the Manitoba to Quebec borders. She also notes that according to Statistics Canada Crime Severity Index, the region has one of the highest rates of violent crime in the country. Police Chief Robin Jones says that there is no authority in the mandate for anything other than front-line (officers) and NAPS is not sufficiently funded to provide policing 7 days a week, 24 hours a day. She says that officers do end up providing 24 hour coverage, in that they sleep with the portable radios beside them, so that they can respond to serious calls in the middle of the night, often alone.
39. NAPS also does not have the capacity to hire full-time drug officers to fight prescription drug abuse in the communities. Constable Jay Rowe, who has been a NAPS officer for 10 years, said NAPS is trying to do whatever it can for the communities especially as regards drugs and alcohol, but, for example, usually does not have the coverage for critical issues for investigation, such as the arrival of a plane with contraband cargo.
40. Constable Rowe says that shift coverage is inadequate, and over the course of his career he has worked alone about 75% of the time. He told the investigator that on-call officers make an effort to be at home, but it is not uncommon to be working alone in a community such as Kasechewan, patrolling weekend nights, and dealing with alcohol related violence. He said with the distances involved, it is difficult to call on back up in the middle of the night. Const. Rowe says many NAPS officers do not feel safe patrolling alone. He recalled getting assaulted by several people once while trying to wake up an intoxicated individual.

41. Councilor Tom Wassaykeesic also expressed concerns about officers having to work alone, and being called to situations where they are in danger, including domestic assaults and alcohol related incidents. He recalls one constable telling him that he was dealing with 15 different complaints and investigations, and was expected to deal with everything by himself. The situation leads to high turnover, burnout and stress leave.
42. Kasechewan Chief Julian Solomon told the investigator that there is a retention and morale problem with NAPS officers working in the community. He said that in the winter, there is more work because of the ice road, and alcohol being brought in by car or snow mobile. Chief Solomon recalls officers working 24 hours straight, sleeping for a few hours, then working again.
43. Chief Solomon stated that youth suicide is a concern in the community, and during his four years as chief, there have been 8 suicides, mostly young people. He said that when someone takes their life, the NAPS officer is the first person called and the last to leave the site. Chief Solomon believes debriefing for these officers is inadequate, and can lead to exhaustion and stress for officers.
44. Superintendent Brad Blair says that the OPP detachment in Moosonee responds to calls from unorganized areas (non-municipal areas) surrounding Moosonee and along the coast of James Bay and Hudson Bay. The Moosonee detachment is also responsible for marine enforcement of waterways in the surrounding area. In the winter, officers from the Moosonee detachment are responsible for enforcement on snowmobile trails in the area and for patrolling and responding to incidents on the ice road between Moosonee and Attawapiskat. The Moosonee detachment also provide support to NAPS, e.g., completing prisoner escorts to Cochrane and *Mental Health Act* escorts across the province. However, while most witnesses generally agreed that NAPS officers rely heavily on the OPP because it has more expertise and resources, this can often be difficult with the distances involved.
45. Chief Jones told the investigator that she currently has a \$1.8 million deficit, and needs 22.5 million to keep her existing payroll, which is 30 officers short. She told the investigator that several weeks before, she had to lay off 8 offender transport positions for financial reasons, and that the OPP would have to take on this responsibility. Chief Jones said that at any given time there are 16 - 20 communities with either one officer on duty, or no-one on duty.

Differences with respect to Infrastructure and Resources

46. NAPS does not have access to capital funding to build detachments in the communities due to its status as a program and not a policing service, NAPS Police Chief Jones said. "When you look at the police stations we have, in many cases they are modular instead of being built from the ground up employing people in the communities," Jones said. "That is not our wish, we don't have funding authority for major capital."
47. The coroner's inquest into the deaths of two First Nations men in the Kashechewan police detachment fire made a recommendation related to the continuing use of modular buildings: "*Permanent purpose-built detachments speak to equality of service, pride of policing and professionalism. The standard for NAPS detachments should be brick and mortar*" (recommendation number 39).
48. The respondents state that through commitments made in Canada's Economic Action Plan for fiscal years 2009-2010 and 2010-2011, a significant amount of money was managed by Public Safety Canada to cost-share contributions for band-owned infrastructure. This one time funding envelope temporarily expanded the FNPP's authorities to fund the construction of permanent 'brick and mortar' type facilities.
49. The complainants maintain that a "one-time injection of funds" cannot solve the problems arising from a lack of budget predictability or sustainability. They note that

despite the increased funding for new buildings in the last few years there are, according to the respondents' own facilities chart, 6 NAPS detachments in need of replacement. One officer told the investigator that individuals detained in the OPP facilities will complain if their breakfast is not hot enough, while individuals detained in NAPS facilities may have to use a pail for a toilet.

50. Police Chief Jones states that the *Police Services Act* provides adequacy standards for radio communications and towers. However, in NAPS communities radio communication is often inadequate, since radio towers are major capital, and therefore not eligible expenses. She noted that NAPS can use OPP telecommunications facilities south of Moose Factory, but telecommunications is a challenge in more remote NAPS communities. First Nations Chiefs and Councilors told the investigator that when individuals cannot get through to a NAPS officer, they receive the calls at home or at their offices. Constable Rowe said that there are frequently situations where several officers are sharing one computer, which can lead to administrative delays.
51. Councilor Wassaykeesic told the investigator that at any given time, one of the NAPS vehicles is getting fixed. He said several days before speaking to the investigator he saw the NAPS officer on the side of the road twice with vehicle trouble. He said there are problems because there are not a lot of paved roads. Councilor Wassaykeesic noted that pickups are used which are high off the road and this causes difficulties for intoxicated or disabled individuals. Sgt. Etherington said there are similar problems in Kasechewan and usually one of the two vehicles is not running. A mechanic from Cochrane has to fly in, and the police officers borrow a vehicle from the band office or do without.

Differences with respect to housing for Officers

52. The housing shortages experienced in First Nations communities affects the quality and availability of housing for police officers. "We have one community where we simply don't have a place for the officers to go," Chief Jones said. "The last officer that went in is sharing a room in a house with community members and we have another officer that we are waiting to post there coming out of recruit at Aylmer in a couple of months that we have yet to find housing for."
53. Constable Rowe states that accommodation for police officers in NAPS has included rodent infested shared accommodation, and the shortage of housing means that NAPS officers do not live in the community, or bring their family with them. It would appear too that the lack of incentives such as the OPP's incentive program for officers working in the north mean that many NAPS officers do not stay in the postings for a long period.

Conclusion

54. The evidence gathered indicates that the differential treatment results in negative consequences for the complainants, as well as community members, in the NAPS region. It appears that the level of funding by the respondents leads to a shortage of police officers and services, difficult and unsafe working conditions for officers, and concerns about the safety and quality of the infrastructure.
- iii. Is the differential treatment based on characteristics that relate to one or more prohibited grounds of discrimination?**
55. Many of the differences in policing are the result of different legislative regimes. The current regime means that policing in NAPS is, as submitted by the respondents, an "enhancement" to the core services provided by the OPP. As such, the respondents maintain that there is no legislative obligation to fund or provide local policing services to the Nishnawbe Aski Nation communities. The respondent maintains that the FNPP is a non-statutory transfer payment program to enhance provincial or territorial core levels of service. In Ontario, the Ministry of Community Safety and Correctional Services has a wide range of responsibilities for policing. Under the *Police Services Act* and related

regulations, the Ministry sets the standards for police services and spells out who is responsible for police services and how they will operate, including the OPP.

56. Policing in the respondents' communities is provided by NAPS. The Nishnawbe-Aski Police Service Agreement ("NAPS Agreement") was created pursuant to the First Nations Policing Program (FNPP). The FNPP was introduced by INAC in 1991, and transferred to PS (formerly the Solicitor General) in 1992, where it is administered by the Aboriginal Policing Directorate at PS.
57. The FNPP facilitates First Nation and Inuit communities' access to professional, dedicated, and culturally appropriate police services, while recognizing 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.
58. Under the FNPP tripartite agreements, such as the NAPS agreement, federal and provincial/territorial governments and First Nations determine the number of police officers and civilian staff to be supported 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.
59. According to the complainants, the existing scheme results in no funding for capital expenses, limited resources and restrictions to full time police coverage, as outlined above. The complainants note that in other Ontario communities, municipal police forces have the power to appeal to an independent commission for a hearing and a binding decision regarding the adequacy of its budget (section 39 of the *Police Services Act*). NAPS has no equivalent provision. The coroner's inquest into the deaths in Kasechewan recommended that NAPS be given the same opportunity to appeal its budget (recommendation 46 of the Coroner's inquest).
60. It appears that the different regimes result in gaps in the services provided. For example, First Nations constable duties are restricted to policing within the reserve, and any policing outside the reserve boundaries falls within the purview of OPP. This can mean that when contraband drugs and alcohol are delivered to sites off the reserve, NAPS officers may not have jurisdiction, yet it is often not feasible for the OPP to be policing such areas.

Conclusion

61. While it is not always necessary to provide a comparator when addressing historical disadvantage, comparative analysis is helpful. Preliminary comparative analysis in this case leads to the conclusion that individuals living in communities served by NAPS are disadvantaged as compared to other, non-First Nations communities. It appears that this adverse differential treatment may be linked to the complainants' national and ethnic origin. As such, further inquiry is warranted.

<i>How is the public interest engaged by this complaint?</i>

62. It is within the public interest to refer this complaint to the Canadian Human Rights Tribunal for inquiry in order to determine whether the actions of the respondents are discriminatory. The evidence gathered during this investigation suggests that individuals living in the complainants' communities are disadvantaged as compared to other, non First Nations communities in regard to the police services they are receiving.
63. The lack of adequate police resources in this community was noted by the Honourable Sidney B. Linden at page 265 of his Report of the Ipperwash Inquiry. He stated:
- "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."
64. The evidence gathered also supports the complainants' position that the role police play in first Nations communities is different from non-First Nations communities, particularly given the communities' small nature, youthful population, 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 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.

<i>Recommendation</i>

65. It is recommended, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
- the evidence gathered appears to show that the respondents are service providers within the meaning of section 5 of the *Canadian Human Rights Act*,
 - the evidence gathered suggests that individuals living in communities served by NAPS are disadvantaged as compared to other, non-First Nations communities.

APPENDIX A

