Court File No. T-762-11

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GRAND CHIEF STAN LOUTTIT in a representative capacity on behalf of the First Nations of MUSHKEGOWUK COUNCIL, GRAND CHIEF STAN LOUTTIT in his personal capacity, and GEORGE WESLEY

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

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OVERVIEW

1. In 2007, the Mushkegowuk First Nations filed a human rights complaint alleging that the policing provided in the Mushkegowuk communities is inferior to the policing provided to non-First Nations communities in Canada. The Canadian Human Rights Commission (the "Commission") conducted a preliminary investigation, and decided that the Canadian Human Rights Tribunal (the "Tribunal") should hear the complaint. The Applicant challenges that preliminary, interlocutory decision.

2. The Mushkegowuk First Nations' primary submission is that this application should be dismissed as premature. In essence, the Applicant is asking the Court to usurp the Tribunal's role under the *Act* to determine whether the complained-of actions and decisions constitute discrimination. The Tribunal should be allowed to consider and decide this matter as Parliament envisioned under the *Act*.

3. Furthermore, this Application rests on an incorrect interpretation of the *Act* that would lead to absurd results. The Applicant's position would mean that discrimination against First Nations people would be permitted under the *Act* as long as it aligns with the federal/provincial divide in Canada's federal structure.

4. The Applicant states that the Commission erred by comparing the policing services provided to the Mushkegowuk First Nations (under federal jurisdiction) with the services provided to neighbouring non-First Nations communities (under provincial jurisdiction). It argues that a complaint under the *Canadian Human Rights Act* (the "*Act*") cannot, in any circumstances, be based on this kind of federal/provincial comparison. If that were the case, residents of First Nations communities would not be legally entitled to the same quality of government services as in non-First Nations communities, and could be systematically discriminated against. This is because, generally speaking, the government services provided to most Canadians by the provincial governments are provided to First Nations communities by the federal government.

5. The Attorney General effectively argues that the residents of First Nations communities cannot, in any circumstances, bring a human rights complaint seeking the same quality of government services as in non-First Nations communities. This interpretation of the *Act* is legally incorrect, leads to absurd and unjust results that are contrary to the remedial purposes of the *Act*, and directly conflicts with Supreme Court of Canada jurisprudence.

PART I – FACTS

The Parties and Policing in the Mushkegowuk Communities

6. The First Nations of Mushkegowuk Council are seven separate Cree First Nations located on the coast and rivers of western James Bay in northern Ontario. Mushkegowuk Council is the regional First Nations government for the area, consisting of the seven First Nations. The seven Mushkegowuk First Nations are Attawapiskat, Chapleau Cree, Fort Albany, Kashechewan, Missanabie Cree, Moose Cree, and Taykwa Tagamou First Nations.

Human Rights Complaint, paras. 4 to 6 [Application Record Vol. 1, Tab 2, pg. 44]

7. The Mushkegowuk First Nations are policed by the Nishnawbe-Aski Police Service ("NAPS"). NAPS is funded primarily by the federal government (52%). The remaining 48% is provided by Ontario. NAPS was created and operates under the federal First Nations Policing Policy.

Investigation Report (Dec. 23, 2010), paras. 3,5 [Application Record Vol. 1, Tab 2, pg. 18]

8. The federal First Nations Policing Policy states that "First Nations communities should have access to policing services … which are equal in quality and level of service to policing services found in communities with similar conditions in the region."

Letter to the Commission (Jan. 28, 2011), pg. 7 [Respondents' Record Vol. 1, Tab 1-H, pg. 89]

9. Contrary to the Applicant's arguments before the Commission, the federal government plays a central and essential role in the provision of policing services to the Mushkegowuk First Nations.

Investigation Report (Dec. 23, 2010), paras. 15-22 [Application Record Vol. 1, Tab 2, pg. 20]

The Human Rights Complaint – Inferior Policing

10. In their human rights complaint, the Mushkegowuk First Nations allege that policing in the Mushkegowuk communities is inferior to the policing provided in non-First Nations communities. This disparity in service levels is detailed in various reports, studies, and government documents provided to the Commission investigator. For example, in the Report of the Ipperwash Inquiry (2007), the Honourable Sidney B. Linden wrote that:

> 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.**
>
> **Letter to Commission (Jan. 28, 2011), pg. 4 [Respondents' Record Vol. 1, Tab 1-H, p. 86]**

11. A federal government report concluded that "NAPS detachments generally fall a long way short of acceptable facility and operational standards for the RCMP and OPP in remote locations." As discussed in submissions made to the Commission, these inferior policing facilities resulted in the deaths of two young First Nations men in a police station fire in one of the Mushkegowuk communities. Excerpts from various reports submitted to the Commission regarding the inequality in services are excerpted in Appendix "B" to this factum.

> **Letter to Commission (Jan. 28, 2011), pg. 5 [Respondents' Record Vol. 1, Tab 1-H, pg. 87]**
>
> **Letter to Commission (Aug. 27, 2011), pg. 2 [Respondents' Record Vol. 1, Tab 1-E, pg. 65]**
>
> **Recommendations and Explanation Re Coroner's Inquest into Deaths in Kashechewan Police Station Fire [Respondents' Record Tab 1-D]**

12. In their complaint, the Mushkegowuk First Nations are simply asking for at least the same quality of policing services as in neighbouring non-First Nations communities.

Complaint not Limited to Funding Issues

13. The Applicant states that this complaint is about inadequate funding. In fact, this complaint is not by any means limited to funding issues. The Complainants assert the discrimination stems from a variety of the Applicant's actions, decisions, and policies,

including from fundamental flaws in the federal government's First Nations Policing Policy.

Letter to Commission (Nov. 15, 2010), pgs. 5, 6 [Respondents' Record Vol. 1, Tab 1-G, pg. 79]
Letter to Commission (Jan. 28, 2011), pg. 4 [Respondents' Record Vol. 1, Tab 1-H, pg. 86]

Procedural History of the Complaint – Motions to Dismiss and Judicial Reviews

14. The Mushkegowuk First Nations filed their human rights complaint in July 2007. Although the Commission treated it as two complaints, for readability they are described herein as a single complaint.

Human Rights Complaint [Application Record Vol. 1, Tab 2, pg. 43]

15. The Applicant made a preliminary objection, requesting that the Commission refuse to deal with the complaint under section 41 of the *Act*. This preliminary objection was based in part on the same grounds at issue in this judicial review (i.e. the proper comparator). After lengthy submissions and due consideration, the Commission denied the Applicant's request to dismiss.

Assessment Report (June 24, 2009) [Application Record Vol. 1, Tab 2, pg 31]

16. The Applicant filed a judicial review of this initial decision to investigate the complaint (Court File T-1825-09). The Applicant later discontinued that first judicial review application.

17. The Commission subsequently conducted an investigation, and decided that a Tribunal inquiry is warranted. The Investigation Report and Commission Decision fairly and reasonably addressed the Applicant's "comparator" arguments, including in the following two passages:

> 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.

Investigation Report (Dec. 23, 2010), para. 61 [Application Record Vol. 1, Tab 2, pg. 29]

> The following factors speak to the reasonableness of the comparators in these complaints: the need to provide policing in isolated, impoverished First Nations communities that have no other comparators than the rest of Canada in which policing is provided by the provinces, the need to meet the unique policing needs of First Nations communities at a standard that is at least comparable to that enjoyed by other Canadians, the shared history of federal and provincial responsibility for First Nations communities, and the unique and current tripartite nature of First Nations policing. In particular, it is noted that the federal government itself appears to contemplate such a comparison because the tripartite agreement states: "it is intended that the police service in the Nishnawbe-Aski area ... will be.... at least equivalent in level and standard of service to that provided in non-Aboriginal communities in Canada with similar characteristics".
>
> **Commission Decision (Apr. 4, 2011), pg. 2 [Application Record Vol. 1, Tab 2, pg. 12]**

18. The Investigation Report and Commission Decision did not make final or binding conclusions on the points raised by the Applicants (the above quotes refer to a "preliminary" analysis and the "reasonableness" of the comparison). The Commission did not determine the merits of the complaint, or whether discrimination had in fact occurred. The Commission simply decided that further inquiry at the Tribunal is warranted.

> **Investigation Report (Dec. 23, 2010), pg. 1 [Application Record Vol. 1, Tab 2, pg. 17]**
> **Commission Decision (Apr. 4, 2011), pg. 2 [Application Record Vol. 1, Tab 2, pg. 12]**

19. The Applicants judicially reviewed the decision to refer the complaint to the Tribunal. This is the second judicial review application in these proceedings.

20. The Tribunal proceedings have not been stayed. In the Tribunal proceedings, the Applicant has indicated that it will raise as a preliminary issue the jurisdiction of the Tribunal to proceed on the bases that (a) the case does not involve the delivery of a "service" within the meaning of the Canadian Human Rights Act, and (b) the analysis proposed by the complainants of adverse differentiation is legally deficient, being founded on an improper comparator. A Tribunal hearing will likely only occur after this preliminary motion has been resolved.

PART II – POINTS IN ISSUE

21. The Applicant incorrectly characterizes the issue as being whether the Commission erred in coming to certain conclusions relating to the kinds of comparisons allowed under the *Act*. However, the Commission did not make final or binding conclusions in that regard. Instead, the Commission held that the Tribunal should inquire into these issues.

Applicant's Factum at para. 23 [Application Record Vol. 1, Tab 3]

22. The issues in this Application are:

a. Is the Application premature?

b. What is the standard of review?

c. Was the Commission's decision to refer the Complaint to the Tribunal for further inquiry unreasonable?

PART III – SUBMISSIONS

The Application is Premature

23. This Application should be dismissed as it is premature.

24. The Applicant seeks a discretionary remedy. Discretionary remedies will be denied where, as in this case, the question posed to the Court is premature.

Brown & Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2011) pgs. 3-1,63,64 [Respondents' Book of Authorities, Tab 8]

25. The Commission's decision was preliminary. It did not make any decisions as to the state of the law or its impact on those concerned. Those decisions will be left to the Tribunal. The Commission merely decided, under section 44 of the *Act*, that a Tribunal inquiry is warranted. That section, and the related section 41, read as follows:

> 44. (3) On receipt of a report referred to in subsection (1) [the investigator's report], the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

41. (1) 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

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

***Canadian Human Rights Act*, R.S.C., 1985, c. H-6, ss. 44, 41 (emphasis added) [Respondents' Book of Authorities, Tab 4]**

26. The Investigation Report expressly notes that "The Commission members do not determine whether discrimination has actually occurred, but whether a complaint requires further inquiry by the Canadian Human Rights Tribunal."

Investigation Report (Dec. 23, 2010), pg. 1[Application Record Vol. 1, Tab 2, pg. 17]

27. The Court should not pre-empt the Tribunal by prematurely deciding questions of law that are within the jurisdiction of the Tribunal, and which should be decided by the Tribunal only after a full inquiry. As Thurlow A.C.J. stated in *Canada v. Cumming*, "The preferable course for the Court is to leave the Tribunal free to carry out its inquiries and

not to prohibit it save in a case where it is clear and beyond doubt that the Tribunal is without jurisdiction to deal with the matter before it."

> ***Attorney General of Canada v. Cumming*, [1980] 2 F.C. 122 (T.D.) at para. 23 (see also paras. 16, 17, 21 [Respondents' Book of Authorities, Tab 10]**

28. The Attorney General in *Canada v. Cumming* made very similar arguments as the Attorney General in this case. In both cases, the Attorney General alleged that the Commission made various errors of law, and that a Tribunal inquiry was not warranted because a finding of discrimination could not possibly be made out on the facts. The Federal Court made the following comments, which apply equally to the present Application:

> It appears to me that in substance what the Court is being asked to do on this application is to pre-empt the Tribunal and to decide a question that the statute gives the Tribunal the authority to decide. To accede to the application involves a decision that what is complained of cannot be unlawful discrimination, that the Tribunal can only dismiss the complaints and that, therefore, the Tribunal has no jurisdiction to hold its inquiry or even to decide that unlawful discrimination has not been established and that the complaint should be dismissed.
>
> ***Attorney General of Canada v. Cumming*, [1980] 2 F.C. 122 (T.D.) at para. 17 [Respondents' Book of Authorities, Tab 10]**

29. Generally speaking, interim, preliminary, or interlocutory administrative decisions should not be reviewed, absent true jurisdictional errors, since such review is premature and will cause delay, fragmentation, and frustration of the statutory process.

> **Brown & Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2011) pgs. 3-1, 63, 64, 67 [Respondents' Book of Authorities, Tab 8]**
>
> ***Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 at paras. 10-13 (C.A.) ["*Zündel I*"] [Respondents' Book of Authorities, Tab 23]**

30. The concerns in *Canada v. Cumming* and *Zündel v. Canada* ("*Zündel I*") apply to the case at hand. The Applicant's judicial reviews have led to needless fragmentation, delay, and expense. Furthermore, Parliament intended that the Tribunal – not the Courts – should hold inquiries under the *Act* and decide whether the case for discrimination has been made out. The Applicant asks the Court to usurp that role, contrary to the clear intent of Parliament. The Court should exercise its discretion to dismiss the complaint on those grounds.

The Standard of Review is Reasonableness

31. If the Court declines to dismiss this complaint as premature, the Commission's decision should be reviewed on a standard of reasonableness.

32. Most importantly, as discussed above, the Commission did not make any final determinations of fact or law in deciding to refer the complaint. Instead, it merely decided that further inquiry was warranted. The Federal Court of Appeal has held that there is a "low threshold" for a referral decision under section 44 and that the "*Act* grants the Commission a remarkable degree of latitude" in discharging this function.

> ***Bell Canada v. Communications, Energy and Paperworkers Union of Canada,* [1999] 1 F.C. 113 (C.A.) at paras 35, 37, 38 [Respondents' Book of Authorities, Tab 11]**
>
> ***Zündel v. Canada (Attorney General),* 195 D.L.R. (4th) 394 at para. 4 (FCA) ["*Zündel 2*"] [Respondents' Book of Authorities, Tab 25]**

33. Despite the discretionary nature of this decision, the Applicant argues that the standard of correctness should apply because the Commission purportedly made erroneous legal conclusions in its comparator analysis. In *Zündel v. Canada* ("*Zündel 2*"), the Federal Court of Appeal expressly rejected the notion that the correctness standard applies to the legal assumptions made by the Commission in referring a complaint to the Commission under section 44. The Court reasoned as follows:

> … legal assumptions made by the Commission in deciding to request the formation of a Tribunal do not amount to decisions as to the state of the law or its impact on those concerned. As was stated in Cooper v. Canada (HRC), [1996] 3 S.C.R. 854 at 891, when deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission performs a screening function somewhat analogous to that of a judge at a preliminary inquiry. It decides none of the issues which underlie its decision to proceed to the next stage; these are left to the Tribunal (see Bell Canada v. Communications, Energy and Paper Work-ers Union of Canada (C.A.), [1999] 1 F.C. 113 at 137 per Décary J.A.)
>
> The sole task of the Commission was therefore to determine whether "having regard to all the circumstances of the complaint, an inquiry into the complaint (was) warranted" (subsections 44(3) and 49(1). It follows, in my view, that the motions judge applied the proper standard of review when he concluded at paragraph 49 of his reasons that his intervention would only be justified:
>
> > ...if I am satisfied that there is no rational basis in law or on the evidence to support the Commission's decision that an inquiry by a Tribunal is warranted in all the circumstances

> of the complaints. Any more searching examination of the questions of statutory interpretation or application raised by Mr. Zündel should, in my opinion, be deferred until the Tribunal has completed the hearing and ren-dered a reasoned decision.
>
> ***Zündel v. Canada (Attorney General)* (2000), 195 DLR (4th) 394 at paras. 4, 5 (FCA) [Respondents' Book of Authorities, Tab 25]; affirming *Zündel v. Canada (Attorney General)*, [1999] 4 FC 289 at paras. 49-50 [Respondents' Book of Authorities, Tab 24]**

34. In sum, a Commission referral decision is entitled to significant deference because it does not amount to a decision on the state of law or its impact on those concerned. The Federal Court of Appeal in *Sketchley v. Canada* affirmed the above statement from *Zündel 2*. The Court in *Sketchley v. Canada* also held that review of the Commission's decision to refer the complaint to the Tribunal attracts more deference than a decision to dismiss a complaint, since the referral decision is not determinative of the issues.

> ***Sketchley v. Canada*, 2005 FCA 404, at paras. 79, 80 [Applicant's Record Vol. II, Tab 5]**

35. The Attorney General argues (incorrectly) that the Commission decided a true jurisdictional question, and erred in doing so. While jurisdictional questions attract a correctness standard, they constitute a narrow category of questions. A question is generally not a true jurisdictional question if the administrative body has the authority to make the inquiry at issue. The Commission clearly has this authority under section 44 of the *Act*. Furthermore, no true jurisdictional questions are at issue here as no final conclusions of law were made by the Commission.

> ***Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 59 [Applicant's Record Vol. II, Tab 4]**
>
> ***Canada v. Public Service Alliance of Canada*, 2011 FCA 257 at paras. 28, 30-31 [Respondents' Book of Authorities, Tab 12]**

36. Even if the Commission had made final conclusions of law it would still be entitled to deference because deference will usually result where, as in this case, an administrative body is interpreting its home statute. The Commission is part of a specialized administrative regime making a screening decision under its own statute; it therefore deserves deference in its referral decisions.

> ***Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 54 [Applicant's Record Vol. II, Tab 4]**
>
> ***Canada v. Pankiw*, 2010 FC 555 at para. 26 [Respondents' Book of Authorities, Tab 14]**

37. Thus, the Commission decision should only be overturned if there was "no rational basis in law or on the evidence to support the Commission's decision that an inquiry by a Tribunal is warranted."

> ***Zündel v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 394 at para. 4 (FCA) [Respondents' Book of Authorities, Tab 25]**

38. However, regardless of the standard of review, this Application should be dismissed as the Commission's decision was correct.

First Nations Complainants May Rely on Federal/Provincial Comparisons in Appropriate Human Rights Cases

39. The Mushkegowuk First Nations assert that First Nations complainants may rely on federal/provincial comparisons in appropriate human rights cases.

40. The Applicant, on the other hand, argues that federal/provincial comparisons are *never* legally valid because they involve a comparison between the services provided by two service providers (i.e. the provincial and federal government). The Applicant relies on a single decision by the Tribunal in *First Nations Child and Family Caring Society v. Canada* ("*Caring Society v. Canada*"). In that case, Chairperson Chotalia came to the following conclusion on that point:

> Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) of the Act? The answer is no. …
> [T]he Act does not allow an Aboriginal person, or any other person, to claim differential treatment if another person receives better service from a <u>different government</u>. (emphasis in original)
>
> ***Caring Society v. Canada*, 2011 CHRT 4 at paras. 11, 13 [Applicant's Record Vol. II, Tab 9]**

41. For the reasons detailed below, the Mushkegowuk First Nations assert that First Nations complainants can rely on federal/provincial comparisons, and that *Caring Society v. Canada* is incorrect to the extent that it holds otherwise.

Applicant's Interpretation Leads to Absurd and Unjust Results

42. The Applicant's interpretation of the *Act* leads to an absurd and patently unjust result – that the residents of First Nations communities cannot, in any circumstances, bring a human rights complaint seeking the same quality of government services as in non-First Nations communities.

43. Basic government services (including policing, healthcare, education, clean water, etc.) are generally provided to First Nations communities under federal jurisdiction and to non-First Nations communities under provincial jurisdiction. If First Nations complainants cannot rely on federal/provincial comparisons, the federal government can provide First Nation communities with grossly inferior services (compared to non-First Nation communities) without running afoul of the *Act*.

44. In other words, according to the Applicant, the *Act* does not guarantee First Nations communities the same quality of government services as in non-First Nations communities.

45. First Nations people would be the only racial group singled out and excluded in this way. That is because "Indians" are the only racial group subject to federal jurisdiction under the *Constitution Act, 1867*.

***Constitution Act, 1867*, s. 91(24) [Respondents' Book of Authorities, Tab 7]**

46. Again, the corollary of the Applicant's argument is that residents of First Nations communities cannot, in any circumstances, bring a human rights complaint seeking the same quality of basic government services as non-First Nations communities receive. This result is even more unreasonable in light of the historical disadvantages suffered by First Nations communities and the often substandard government services available in First Nations communities.

47. The widespread disadvantage and discrimination suffered by First Nations people is long-standing and well known, including high rates of suicide, incarceration, substance abuse, and more. Disadvantaged groups should receive more, not less, protection under the *Act*.

Assessment Report (July 13, 2007) at para. 50 [Application Record Vol. 1, Tab 2, pg. 39]

Recommendations and Explanation Re Coroner's Inquest into Deaths in Kashechewan Police Station Fire [Respondents' Record Tab 1-D, pg. 55]

***R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 58-69 [Respondents' Book of Authorities, Tab 20]**

48. It is further alleged that First Nations communities consistently receive government services that are below provincial standards. The Auditor General of Canada's 2011 Report on Programs for First Nations on Reserves found that:

> Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, **we have seen a lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor.** Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. (emphasis added)

Auditor General of Canada, Report on Programs for First Nations on Reserves at pg. 5 [Respondents' Record Vol. 1, Tab 2-A, pg. 117]

49. The Applicant is asking this Court to decide, without any evidence and prior to a Tribunal hearing, that First Nations cannot challenge this kind of discrimination under the *Act*. On what logic, one might ask, should First Nations communities (which are historically disadvantaged) be legally subjected to discrimination in the provision of basic government services? Parliament cannot have intended to single out First Nations people for substandard and unequal treatment in the way suggested by the Applicant.

Words and Purposes of the Act

50. Federal/provincial comparisons are consistent with the words and purposes of the *Act*. Section 5 of the *Act* reads as follows:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

***Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 5 [Respondents' Book of Authorities, Tab 4]**

51. The purpose of the *Act* is the amelioration of discrimination.

> ***Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 2 [Respondents' Book of Authorities, Tab 4]**
>
> ***Canada (Attorney General) v. Rosin (C.A.)*, [1991] 1 F.C. 391 at para. 6 [Respondents' Book of Authorities, Tab 13]**

52. First Nation people are one of the very groups that the *Act* is meant to protect; they have been historically disadvantaged, stereotyped, and discriminated against. The purposes of the *Act* require that First Nation communities receive government services that are at least equivalent in quality to those provided to non-First Nation communities. The purposes of the *Act* are not advanced by allowing widespread substantive discrimination between the basic government services provided to First Nations and non-First Nations communities.

> **Assessment Report (July 13, 2007) at para. 50 [Application Record Vol. 1, Tab 2, pg. 39]**
>
> **Recommendations and Explanation Re Coroner's Inquest into Deaths in Kashechewan Police Station Fire [Respondents' Record Tab 1-D, pg. 55]**
>
> ***R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 58-69 [Respondents' Book of Authorities, Tab 20]**

53. Chairperson Chotalia in *Caring Society v. Canada* held that the grammatical and ordinary sense of section 5(b) contemplates a comparison involving one – not two – service providers. This finding was largely based on a lengthy discussion of the definition of the words "differentiate adversely." However, the *Act* simply does not state that a comparison between two service providers is prohibited, nor does it define discrimination using a technical, algebraic formula. Further, the word "differentiate" in section 5(b) does not expressly or impliedly foreclose the possibility of federal/provincial comparisons in appropriate cases. The grammatical and ordinary meaning of section 5(b) is consistent with federal/provincial comparisons in appropriate First Nations cases.

> ***Caring Society v. Canada*, 2011 CHRT 4 at paras. 128, 108-117 [Applicant's Record Vol. II, Tab 9]**

54. Chairperson Chotalia held that section 5(a) of the *Act* (re the denial of services) does *not* require a comparator, unlike section 5(b) (re adverse differentiation), which does require a comparator. In contrast to *Caring Society v. Canada*, section 5(a) is expressly raised in this case. For example, it is alleged that the Mushkegowuk First Nations are *denied* the

"24/7" policing services available in non-First Nations communities. Therefore, even according to the decision in *Caring Society v. Canada*, this complaint is valid.

> ***Caring Society v. Canada*, 2011 CHRT 4 at para. 125 [Applicant's Record Vol. II, Tab 9]**
>
> **Submissions to the Commission re Jurisdiction at paras. 30, 31 (March 6, 2009) [Respondents' Record Tab 1-A, pg. 11]**

55. Furthermore, human rights codes are to be given a broad, liberal, and purposive interpretation. Overly technical and restrictive approaches are to be avoided. The *Act*, which is meant to combat discrimination, does not countenance grossly inferior services being provided to a historically disadvantaged group.

> ***Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 12 [Respondents' Book of Authorities, Tab 18]**
>
> ***Canada (Attorney General) v. Rosin (C.A.)*, [1991] 1 F.C. 391 at paras. 6, 15 [Respondents' Book of Authorities, Tab 13]**
>
> ***Interpretation Act*, R.S.C. 1985, C. I-21, s. 12 [Respondents' Book of Authorities, Tab 5]**

The Applicant's Position is Overly Formalistic & Contrary to Supreme Court Jurisprudence

56. The Applicant effectively argues that, as a matter of law, a specific "comparator" is always required in order to establish discrimination, and that a federal/provincial comparison can never satisfy this comparative requirement. This analysis is overly technical and restrictive. In *Withler v. Canada (Attorney General)*, the Supreme Court rejected this kind of formalistic and technical approach, holding that care must be taken to avoid "a formalistic and arbitrary search for the 'proper' comparator."

> **Applicant's Factum at para. 23, 48, 51 [Application Record Vol. 1, Tab 3]**
>
> ***Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 2, 51 [Respondents' Book of Authorities, Tab 22]**

57. The unanimous Court in *Withler v. Canada* discussed a number of concerns with the use of mirror comparator groups. The Court recognized that "the focus on a precisely corresponding, or 'like' comparator group, becomes a search for sameness, rather than a search for disadvantage…." Furthermore, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison." The Court concluded that:

> a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify - and, indeed, thwart the identification of - the discrimination at which s. 15 is aimed.
>
> ***Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 57, 59, 60 [Respondents' Book of Authorities, Tab 22]**

58. Although *Withler v. Canada* concerned discrimination under section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), its discussion of comparator groups applies equally to the concept of discrimination under the *Act*. Formalistic, restrictive, and technical approaches to discrimination should be avoided under both the *Charter* and the *Canadian Human Rights Act*.

This Case will not Open the "Flood Gates" to Invalid Complaints

59. Allowing federal/provincial comparisons in appropriate First Nation cases will not, contrary to the concerns expressed in *Caring Society v. Canada*, "open the flood gates to a barrage of new types of complaints." There is nothing to suggest that this precedent would be expanded to allow the comparison of multiple service providers in other, inappropriate circumstances outside the First Nations context. This is because there are unique and unusual circumstances facing Aboriginal people in Canada that justify a federal/provincial comparison.

> ***Caring Society v. Canada*, 2011 CHRT 4 at para. 129 [Applicant's Record Vol. II, Tab 9]**

60. Most importantly, First Nations people have a unique constitutional and legal status in Canada. Under section 91(24) of the *Constitution Act, 1867*, the federal government has jurisdiction over "Indians, and Lands reserved for the Indians." As discussed above, most governmental services are provided to First Nations communities by the federal government whereas non-First Nations communities are served by the provinces. No other racial group is singled out or separately identified in the *Constitution Act, 1867* in this way.

> ***Constitution Act, 1867*, s. 91(24) [Respondents' Book of Authorities, Tab 7]**
>
> **Auditor General of Canada, Report on Programs for First Nations on Reserves at pg. 2 [Respondents' Record Vol. 1, Tab 2-A, pg. 114]**

61. Because of this, inter-jurisdictional differences in services are *discriminatory* only in the First Nations context. Jurisdictional divisions are generally not based on a prohibited ground of discrimination, except when it comes to First Nations people (because of their unique constitutional status). For example, differences in the treatment of federal government employees and provincial government employees are not *discriminatory* because the distinction between federal and provincial employees is not a prohibited ground of discrimination (such as race). Similarly, an Ontarian cannot allege discrimination vis-à-vis a Manitoban because the distinction between those groups is not a prohibited ground, as race is. The flood gates would not be opened to these sorts of claims.

> ***Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 188 [Respondents' Book of Authorities, Tab 16]**
>
> ***Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 31 [Respondents' Book of Authorities, Tab 22]**

62. Furthermore, the honour of the Crown is a legal principle that applies only to Aboriginal people, and supports federal/provincial comparisons in this context. The honour of the Crown is "a core precept that finds its application in concrete practices." The Crown must act honourably in all its dealings with Aboriginal people, which gives rise to various concrete duties depending on the circumstances. In this case, the Crown seeks to rely on jurisdictional divisions to justify the provision of inadequate and inferior services to Aboriginal people, contrary to the honour of the Crown.

> ***Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 16-18 [Respondents' Book of Authorities, Tab 17]**

63. Finally, there are unique and compelling factual circumstances that justify federal/provincial comparisons in appropriate First Nations services cases, namely the widespread disadvantage, stereotyping, and discrimination suffered by First Nations people both now and historically.

> **Assessment Report (July 13, 2007) at para. 50 [Application Record Vol. 1, Tab 2, pg. 39]**
>
> **Recommendations and Explanation Re Coroner's Inquest into Deaths in Kashechewan Police Station Fire [Respondents' Record Tab 1-D, pg. 55]**
>
> ***R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 58-69**

64. Two-service-provider and inter-jurisdictional comparisons can and would be restricted to First Nations cases involving government services. This case does not raise "flood gates" concerns.

Federal/Provincial Comparisons are Consistent with the Constitutional Division of Powers

65. Allowing federal/provincial comparisons under the *Act* in appropriate First Nations cases would not offend the constitutional division of powers, despite the concerns expressed by the Applicants and in *Caring Society v. Canada.*

> ***Caring Society v. Canada*, 2011 CHRT 4 at para. 130 [Applicant's Record Vol. II, Tab 9]**
> **Applicant's Factum at para. 51 [Application Record Vol. 1, Tab 3]**

66. The federal government's jurisdiction over "Indians, and Lands reserved for the Indians" is not threatened simply because the *Act* requires that First Nations services be equal in quality to services provided by the provinces to non-First Nations people. The federal government can continue to fulfill its responsibilities under section 91(24) of the *Constitution Act, 1867*, but must do so in a way that is consistent with the *Act*.

> ***Constitution Act, 1867*, s. 91(24) [Respondents' Book of Authorities, Tab 7]**

67. For example, the federal *Indian Act*, R.S.C., 1985, c. I-5 would not be struck down as discriminatory simply because it applies only to registered Indians. That is because not all differential treatment is *discriminatory*. Under section 5 of the *Act*, differential treatment must affect a group *adversely* to constitute discrimination. Furthermore, differential treatment is expressly protected under the *Act* where there is *bona fide* justification (e.g. where necessary to protect Aboriginal rights/culture) or for special programs aimed at ameliorating disadvantage suffered by an enumerated group. The *Indian Act* and other similar statutes are not discriminatory simply because they treat First Nations people differently.

> ***Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 188 [Respondents' Book of Authorities, Tab 16]**
>
> ***Canadian Human Rights Act*, R.S.C., 1985, c. H-6 at paras. 5, 15(1) (g), 16 [Respondents' Book of Authorities, Tab 4]**

68. Equality of government services for First Nations people is consistent with the constitutional division of powers and with the federal government's jurisdiction in relation to First Nations people.

Inter-Jurisdictional Comparisons Have Been Made in Supreme Court Discrimination Cases

69. In *R. v. Drybones*, a majority of the Supreme Court of Canada found discrimination when comparing a section of the federal *Indian Act* applying to Indians with the laws of the Northwest Territories applying to non-Indians. Discrimination was found on the grounds that:

> ... an Indian who is intoxicated in his own home "off a reserve" is guilty of an offence and subject to a minimum fine of not less than $10 or a term of imprisonment not exceeding 3 months or both, whereas all other citizens in the Territories may, if they see fit, become intoxicated otherwise than in a public place without committing any offence at all.

***R. v. Drybones*, [1970] S.C.R. 282 at para. 22 [Respondents' Book of Authorities, Tab 19]**

70. In *R. v. Drybones*, the Supreme Court relies on an inter-jurisdictional comparison in its discrimination analysis (between the federal law applying to First Nations people, and the provincial or territorial laws applying to other Canadians). This is akin to the discrimination analysis put forward by the Mushkegowuk First Nations, and is the very kind of analysis that Applicant alleges is clearly and obviously legally invalid.

> ***R. v. Drybones*, [1970] S.C.R. 282 [Respondents' Book of Authorities, Tab 19]**
>
> **See also *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paras. 185, 188-189 (where the Supreme Court of Canada considered whether certain money management provisions applying to First Nations people perpetuate prejudice vis-à-vis non-First Nations people) [Respondents' Book of Authorities, Tab 16]**

71. Although *R. v. Drybones* primarily concerned the laws of a territory (not a province) and discrimination under the *Bill of Rights* (not the *Act*, which did not yet exist), these differences are immaterial to the underlying principle that First Nation people can, in appropriate circumstances, rely on inter-jurisdictional comparisons when alleging discrimination. *R. v. Drybones* was recently relied on and cited approvingly by a unanimous decision of the Supreme Court of Canada in *Authorson v. Canada (Attorney General)*.

> ***Authorson v. Canada (Attorney General)*, 2003 SCC 39 at para. 32 [Respondents' Book of Authorities, Tab 9]**

72. In sum, the Applicant's assertion that First Nations complainants cannot rely on federal/provincial comparisons in human rights cases is legally incorrect. It was both reasonable and correct for the Commission to refer these questions to the Tribunal.

The* Act *Violates* Charter *s. 15 if it Forecloses Federal/Provincial Comparisons

73. The Mushkegowuk First Nations assert that First Nations complainants can rely on federal/provincial comparisons in appropriate human rights cases under the *Act* concerning government services. However, if the Tribunal or this Court finds otherwise, the Applicants assert that the *Act* violates the right to equality guaranteed under section 15 of the *Charter*. If the *Act* does not allow federal/provincial comparisons in appropriate cases, First Nations would be singled out as the only racial or ethnic group in Canada which is not entitled to equality in government services.

***Charter of Rights and Freedoms*, s. 15 [Respondents' Book of Authorities, Tab 4]**

74. In *Vriend v. Alberta* the Supreme Court of Canada found that Alberta's human rights act infringed section 15 of the *Charter* because it failed to protect gay and lesbian people from discrimination. The Supreme Court in *Vriend v. Alberta* found that the under-inclusiveness of the legislation resulted in discrimination between (1) homosexuals and other disadvantaged groups and (2) between homosexuals and heterosexuals. Similarly, in this case, the Attorney General's interpretation of the *Canadian Human Rights Act* would result in discrimination as between (1) First Nations people and other disadvantaged groups and (2) between First Nations people and non-First Nations people. The purported restriction on federal/provincial comparisons would disproportionately affect First Nations communities if, as is alleged, they are generally provided with inferior government services.

***Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 81, 82 [Respondents' Book of Authorities, Tab 21]**

Auditor General of Canada, Report on Programs for First Nations on Reserves at pg. 5 [Respondents' Record Vol. 1, Tab 2-A, pg. 117]

75. If the Applicant is correct in asserting that federal/provincial comparisons are invalid, then the federal government is allowed to provide First Nations communities with grossly inferior government services vis-à-vis neighbouring non-First Nations communities

without running afoul of the *Act*. First Nations people would thus be denied equal protection under the *Act* based on race, contrary to section 15 of the *Charter*.

76. To the extent that the *Act* is inconsistent with section 15 of the *Charter*, the Respondents seek the remedy that the Court read in words to bring the *Act* in line with the *Charter* (i.e. such that federal/provincial comparisons can be made under the *Act*.)

77. However, this *Charter* argument need only be addressed if this Application is not dismissed on the two grounds argued above (that the Application is premature and that federal/provincial comparisons are allowable in appropriate cases).

The Complaint Does not Rest Solely on a Federal/Provincial Comparison

78. In any event, this complaint does not rest solely on a federal/provincial comparison. The Mushkegowuk First Nations also allege discrimination in comparison to the policing provided to *non-First Nations* communities by the *federal* government through the Royal Canadian Mounted Police ("RCMP"). This comparison is not vulnerable to the Applicant's arguments regarding federal/provincial comparisons or comparisons of two different service providers. Similarly, the findings in *Caring Society v. Canada* do not apply to the RCMP comparison in this case.

> **Submissions to the Commission re Jurisdiction at paras. 55-61 (March 6, 2009) [Respondents' Record Tab 1-A, pg 23-24]**
>
> **Letter to the Commission (Jan. 28, 2011), pg. 5-7 [Respondents' Record Tab 1-H, pgs. 87-89]**

79. The Commission's investigation and decision was not restricted to a comparison with OPP communities. It also found that it was reasonable to believe that discrimination existed vis-à-vis other non-First Nations communities more generally, including RCMP-policed communities.

> **Assessment Report (July 13, 2007) at para. 27 [Application Record Vol. 1, Tab 2, pg. 35]**
>
> **Investigation Report (Dec. 23, 2010) [Application Record Vol. 1, Tab 2, pg. 17]**

80. This is another, independent reason why this Application should be dismissed.

Conclusion

81. This Application should be dismissed because:

a. The Application is premature;

b. The Commission's referral decision was reasonable;

c. The Applicant's narrow and technical interpretation of the *Act* is incorrect as First Nations complainants may rely on federal/provincial comparisons in appropriate human rights cases; and

d. The complaint should be referred whether or not federal/provincial comparisons are legally valid due to the alternative comparison with RCMP-policed communities.

82. Each of the above grounds is independently sufficient to merit a dismissal.

PART IV – ORDER SOUGHT

83. The Respondents request:

a. That this Application be dismissed;

b. Their costs on a solicitor-client basis; and

c. Any further relief that this Honourable Court deems just.

All of which is respectfully submitted this 17th day of October, 2011

Murray Klippenstein

Kent Elson

KLIPPENSTEINS, BARRISTERS & SOLICITORS
Lawyers for the Respondents

PART V – LIST OF AUTHORITIES

Statutes

1. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
2. *Interpretation Act*, R.S.C. 1985, C. I-21, s. 12
3. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*including* the *Canadian Charter of Rights and Freedoms* and *Constitution Act, 1982, s.* 52)
4. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, *reprinted* in R.S.C. 1985, App. II, No. 5

Texts and Jurisprudence

5. Donald Brown and *John* Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2011)
6. *Authorson v. Canada (Attorney General)*, 2003 SCC 39
7. *Attorney General of Canada v. Cumming*, [1980] 2 F.C. 122 (T.D.)
8. *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.)
9. *Canada (Attorney General) v. Public Service Alliance of Canada*, 2011 FCA 257
10. *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.)
11. *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555
12. *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756
13. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9
14. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
15. *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536
16. *R. v. Drybones*, [1970] S.C.R. 282
17. *R. v. Gladue*, [1999] 1 S.C.R. 688
18. *R. v. Van der Peet*, [1996] 2 S.C.R. 507
19. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
20. *Withler v. Canada (Attorney General)*, 2011 SCC 12
21. *Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (C.A.) ("*Zündel 1*")
22. *Zündel v. Canada (Attorney General)*, [1999] 4 F.C. 289 (T.D.) ("*Zündel 2*")
23. *Zündel v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 394 (F.C.A.) ("*Zundel 2*")

APPENDIX A – PROVISIONS OF STATUTES CITED

Canadian Charter of Rights and Freedoms

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Canadian Human Rights Act

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Denial of good, service, facility or accommodation

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

   (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

   (b) to differentiate adversely in relation to any individual,

   on a prohibited ground of discrimination.

Exceptions

15. (1) It is not a discriminatory practice if...

   (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

Special programs

16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Report

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

Constitution Act, 1867

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, — …

24. Indians, and Lands reserved for the Indians.

Interpretation Act

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

APPENDIX B – EXCERPTS RE UNEQUAL POLICING SERVICES

The following excerpts are taken from various reports provided to the Commission in support of the assertion that policing in the Mushkegowuk communities is inferior to the policing in non-First Nations communities. These quotes are reproduced from a letter to the Commission dated January 28, 2011, found at Exhibit "H" of the Affidavit of Mikaila Greene [Respondents'' Record, Tab 1-H]. Emphasis is added throughout.

> "...many of the First Nations police services demonstrably **have the poorest quality policing facilities in Canada.**"[1]
>
> *Federal Government Assessment of First Nations Police Detachments (2003)*

> **"Proper Policing facilities have been a huge issue for NAPS**, and **their horrible state has been documented** by PWGSC during their on site inspections.
>
> ...
>
> It is well-documented and general knowledge that many of the buildings **meet no industry standards** and suffer from **serious health and safety problems**, such as the lack of fire protection, no running water, inadequate cells for prisoners etc."[2]
>
> *Winona Embuldeniya, Public Safety Canada (2004)*

> "**NAPS detachments generally fall a long way short of acceptable facility and operational standards for the RCMP and OPP in remote locations.** The detachments are poorly equipped, basic facilities (cells, toilets. etc.) are missing or inadequate, and **the buildings are riddled with building code violations.**
>
> ...
>
> Typically, the buildings are **functionally inadequate, poorly equipped, not properly built-out for police purposes, and in an advanced state of disrepair.**
>
> ...
>
> most of the existing facilities **should probably be replaced** with new facilities **immediately** or in the very near future
>
> ...
>
> Only 7 of the 26 inspected detachments have some form of **officer accommodation**.... Most of this residential space **is in very poor condition and recommended for demolition.**
>
> ...
>
> In comparison with the standard for remote RCMP detachments, **none of the NAPS detachments meet the recommended space requirements**. On average, the NAPS detachments are less than half the size of the recommended RCMP standard "
>
> ...

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[1] Public Works and Government Services Canada, Renewal of First Nations Policing Facilities, February 2003 (at ATIP pg. 000635).

[2] APD (Winona Embuldeniya), Minor Capital Funding Amendment to the Nishnawbe-Aski Nation Police Service Agreement, Negotiation Mandate Document, December 31, 2004

10 of the 16 **fly-in locations** "are in poor or very poor condition and are considered to be **beyond repair**"[3]

Federal Government Assessment of NAPS Detachments (2001)

[*Regarding various police stations in Mushkegowuk First Nations communities*]:
"It is believed that the exterior walls are **not insulated** …

The ceiling and the upper walls in the bathroom are **covered with mildew** due to the fact that the detachment is not supplied with fresh air, though exhaust fan is installed in the rooms, the ventilation is basically non-existent. The smell in the detachment, at times, was hard for the officers to tolerate. **Lack of ventilation in a crowded room is a major deficiency which could lead to serious health problems caused by moulds, airborne diseases, etc**. …

The police station is in such a poor condition that a new accommodation should be provided **without delay**.

…

The foundation has shifted due to freeze & thaw cycles, as a result, the floor surface is uneven and the flooring has cracked at various locations…. Some of the window panes are broken and the frames are damaged. …

The existing landings and steps at the main entrance of the police station is in **extremely poor and unsafe condition.** …

…with the problems of **shifting foundation, poor building exterior, inadequate detention facilities and the lacking of fire separation**, the police station is considered to be in very poor condition and **recommended for demolition and re-build.**

…

Based upon **the lack of cells, minimal office space,** security and privacy issues and occupational requirements of the NAPS officer's it is **recommended to relocate this police station to a new facility**."[4]

Federal Government Assessment of NAPS Detachments (2001)

"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 associated 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

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[3] PWGSC, *Building Condition Report and Needs Analysis for N.A.P.S. Detachments*, 2001 (prepared for the Solicitor General Canada, now Public Safety Canada)

[4] Public Works and Government Services Canada, Nishnawbe-Aski Police Service Building Condition Reports, August 3, 2001(Note: Although some of these police stations have now been replaced, these facilities were in use during the time period covered by this complaint.)

services, certainly in Ontario and Quebec, are here to stay and have replaced OPP policing, not just enhanced it."[5]

Professor Don Clairmont (2006)

"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."[6]

The Honourable Sidney B. Linden, Report of the Ipperwash Inquiry (2007)

"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."[7]

The Honourable Sidney B. Linden, Report of the Ipperwash Inquiry (2007)

"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."**[8]

The Honourable Sidney B. Linden, Report of the Ipperwash Inquiry (2007)

"There is no reason why residents of First Nations in Ontario should have lower-quality policing than non-Aboriginal Ontarians do."[9]

The Honourable Sidney B. Linden, Report of the Ipperwash Inquiry (2007)

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[5] Prof. Don Clairmont, Aboriginal Policing in Canada (September 2006)
[6] The Honorable Sidney B. Linden, Report of the Ipperwash Inquiry
[7] The Honorable Sidney B. Linden, Report of the Ipperwash Inquiry
[8] The Honorable Sidney B. Linden, Report of the Ipperwash Inquiry, Complainants' Record, Tab 3, pg. 265
[9] The Honorable Sidney B. Linden, Complainants' Record, Tab 3, pg. 249