

**MICHAEL W. SHERRY, B.A., LL.B., LL.M.**  
*Barrister & Solicitor*

August 7, 2009

**FAX COVER MEMO**

- TO:
- (1) Registrar  
Canadian Human Rights Tribunal  
FAX: 1-613-995-3484
  - (2) Daniel Poulin  
Canadian Human Rights Commission  
FAX: 1-613-996-9661
  - (3) Karen Cuddy  
Department of Justice, Resolutions Branch  
FAX: 1-613-996-1810
  - (4) Jill Dutka  
Wilson Christen LLP  
FAX: 416-360-1350

\* Total of 17 pages including this cover memo \*

In accordance with the Canadian Human Rights Tribunal Rules of Procedure, please find attached for service and filing a Notice of Motion and supporting Affidavit in relation to Tribunal Inquiry T1340 - 07008. The motion is for an order under Rule 8(4) adding the Chiefs of Ontario (COO) as a party complainant to the Inquiry.

Thanks.

*Confidentiality Note: The Information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named above. If you have received this facsimile in error, please immediately notify me by telephone and return the original message to me by mail at the address above. Thank you.*

**MICHAEL W. SHERRY, B.A., LL.B., LL.M.**  
*Barrister & Solicitor*

August 7, 2009

Registrar  
Canadian Human Rights Tribunal  
160 Elgin Street  
11<sup>th</sup> Floor, Suite 11A - 100  
Ottawa, Ontario  
K1A-1J4

BY FAX: 613-995-3484

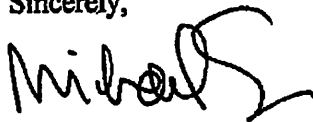
Dear Registrar:

RE: Canadian Human Rights Tribunal File No. T1340 - 07008

In accordance with the Canadian Human Rights Tribunal Rules of Procedure, please find attached for service and filing a Notice of Motion and supporting Affidavit in relation to the above-noted matter. The motion is for an order under Rule 8(4) adding the Chiefs of Ontario (COO) as a party Complainant to Inquiry T1340 - 07008.

Thanks for your attention to this matter.

Sincerely,



Michael Sherry  
Counsel

File No. T1340 - 07008

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

CANADIAN HUMAN RIGHTS TRIBUNAL

**BETWEEN:**

**FIRST NATIONS CHILD AND FAMILY  
CARING SOCIETY OF CANADA and  
ASSEMBLY OF FIRST NATIONS**

**Complainants**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**INDIAN AND NORTHERN AFFAIRS CANADA**

**Respondent**

NOTICE OF MOTION

The Chiefs of Ontario (COO) is making this motion to the Canadian Human Rights Tribunal.

The motion is made under Rule 3 of the Canadian Human Rights Tribunal Rules of Procedure.

The motion is for an order under Rule 8(4) adding COO as a party Complainant to Inquiry T1340-07008.

The grounds for the motion are:

1. Rule 8(4) of the Canadian Human Rights Tribunal provides that anyone who is not a party, and who wishes to be added to the inquiry as a party, may bring a motion under Rule 3 for an order to this effect.
2. Chiefs of Ontario (COO) is a secretariat controlled by the 133 First Nations of Ontario. Of this number, 127 are "Bands" recognized under the federal Indian Act, and 6 are "Near Bands", i.e. First Nation communities that are recognized by other First Nations and that are taking political, legal, and other steps to acquire Indian Act recognition.
3. COO is generally recognized by First Nations across Canada and by Canadian government agencies, including Indian and Northern Affairs Canada (INAC), as the leading regional voice for First Nations in Ontario.
4. There is an annual All Ontario Chiefs Conference (AOCC), as well as Special Chiefs Assemblies and Chiefs Forums. If there is a quorum present (60% of all First Nations), Assemblies have the authority to pass resolutions dealing with political and other topics of interest to First Nations. These resolutions are the primary form of directive for the activity of COO. Over the decades, there have been numerous resolutions passed dealing with the state of child and family services among First Nations in Ontario.
5. Partly based on resolutions passed at Chiefs Assemblies over the decades, COO has a long history of involvement in social service issues, most notably the state of child and family services among First Nations in Ontario.
6. COO recently completed a detailed study of the 1965 Indian Welfare Agreement between Ontario and Canada. This Agreement is a funding/service mechanism unique to

Ontario for key social service programs for First Nations, including child and family services. Above and beyond the most recent study, COO has expended significant human and financial resources over the years studying the impact of the 1965 Indian Welfare Agreement and the particular program area of child and family services.

7. COO is authorized by Chiefs Assembly resolution to participate in the Canadian Human Rights Tribunal proceedings initiated by the First Nations Child and Family Caring Society of Canada (FNCFCSC) and the Assembly of First Nations (AFN).
8. The original AFN resolution (53/2006) that authorized the initial application to the Human Rights Commission specifically mentioned that the state of First Nation child and family services in Ontario, as impacted by the 1965 Welfare Agreement, should be included in the Human Rights complaint.
9. Ontario has the largest status Indian population of any Province or Territory in Canada. A significant portion of the federal INAC funding for child and family services is allocated in relation to Ontario First Nations, via the 1965 Welfare Agreement. To be comprehensive and inclusive, any Canadian Human Rights Act inquiry into the state of First Nation child and family services in Canada should include the situation of Ontario First Nations and the 1965 Welfare Agreement. COO is best placed to ensure that evidence and argument relevant to the 1965 Welfare Agreement and the INAC child and family services program in Ontario are put before the Canadian Human Rights Tribunal.
10. The original Human Rights complaint filed by the FNCFCSC and the AFN is focussed on INAC Directive 20-1, which is a national funding and service vehicle for First Nation child and family service programming outside of Ontario. As noted, federal funding and service for First Nation and child and family services in Ontario are connected to the 1965 Welfare Agreement. However, the under-funding and under-servicing issues identified in the original

complaint in relation to Directive 20-1, in alleged violation of the Canadian Human Rights Act, are broadly similar to the issues experienced by First Nations in Ontario. All of the funding and service in question, including Ontario, are connected with the INAC national First Nations Child and Family Services Protection Program.

11. In a 2008 report, the federal Auditor General noted the failure to specify the modern array of child protection and prevention/supportive services in the 1965 Welfare Agreement, in line with evolving legislative standards and First Nation needs, possibly contributing to under-funding and the under-availability of services. As in the case of Directive 20-1 outside of Ontario, the interpretation of the 1965 Welfare Agreement may favour maintenance funding for taking children into care and keeping them in care, over funding for prevention or supportive services.

12. The 2008 report of the Auditor General on the INAC First Nations Child and Family Services Program focussed on Ontario, BC, Alberta, Manitoba, and Quebec. Overall, the report indicated that the INAC child welfare funding was inequitable, and there was no assurance that the services were culturally appropriate or comparable with provincial standards.

13. In the period between 1995 and 2001, Ontario had the highest increase in the number of INAC funded children in care, compared with other regions in Canada. The First Nation population in Ontario is under-serviced by provincially mandated First Nation child and family service agencies.

14. There has been no money for capital costs under the 1965 Welfare Agreement since 1975. This had led to serious inequities in terms of capital and infrastructure for First Nation children and family services in Ontario. Federal funding for First Nation child and family services pursuant to the 1965 Welfare Agreement fails to account for the lack of surrounding services available to First Nation communities, particularly in the North.

15. Annual and longer term general funding agreements for First Nation governments, which are drafted by INAC, routinely require the achievement of provincial program standards as a legal minimum for First Nation program delivery.

16. INAC has raised at least two significant jurisdictional issues in the direct and indirect context of the subject Inquiry, i.e. whether it is appropriate to compare the INAC First Nation child and family service model with provincial standards, and whether the INAC funding/service model is even reviewable under the Canadian Human Rights Act, based on a distinction between funding and service delivery. The 1965 Welfare Agreement, which only applies in Ontario, is very relevant to the comparator group issue. The preamble to the 1965 Agreement states that the "needs in Indian Communities should be met according to standards applicable in other communities" and that "Canada and Ontario ... desire to make available to the Indians in the Province the full range of provincial welfare programs" (including child and family services). COO seeks an opportunity to express its views on these very important issues that may affect INAC and other federal programs above and beyond child and family services.

17. Participation by COO as a full party Complainant will ensure that the ultimate ruling of the Tribunal, whatever that happens to be, will apply to First Nations across Canada, including Ontario, the Province with the highest status Indian population - regardless of the differences between the two child and family service vehicles connected with INAC, i.e. Directive 20-1 and the 1965 Welfare Agreement. COO is best placed to explicate the unique features of the child and family service arrangement in Ontario, based on the 1965 Welfare Agreement, while working in tandem with the original Complainants on the general themes of alleged INAC under-servicing and under-funding. If COO is not made a party to the subject Inquiry, there will be uncertainty as to whether the ultimate Tribunal ruling applies in Ontario, creating the risk of later multiple and inconsistent proceedings.

18. In summary, COO has a direct interest in the matter and has a unique contribution to make, based in part on the 1965 Welfare Agreement. Participation by COO should not alter the

schedule set down by the Canadian Human Rights Tribunal. Participation by COO should ensure that the ultimate decision of the Tribunal will be national and comprehensive in scope.

19. The Canadian Human Rights Tribunal has set down a hearing schedule of up to 42 days in Ottawa starting on September 14, 2009, and ending on or about February 19, 2010. COO and its counsel can accommodate this schedule and are not requesting any adjustment, adjournment or other form of delay.

20. It is believed that the AFN and FNCFCSC are consenting to the addition of COO as a party Complainant to the subject Inquiry.

The following documentary evidence will be used in support of the motion:

The Affidavit of Lori Jacobs, Executive Director of COO, dated August 7, 2009.

August 7, 2009

Michael Sherry  
Counsel to Chiefs of Ontario  
1203 Mississauga Road North  
Mississauga, Ontario  
L5H-2J1  
Fax: (905) 278-8522



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**TO: Registrar**  
**Canadian Human Rights Tribunal**  
**160 Elgin Street**  
**11<sup>th</sup> Floor, Suite 11A - 100**  
**Ottawa, Ontario**  
**K1A-1J4**  
**Fax: (613) 995-3484**

**AND TO: Daniel Poulin**  
**Canadian Human Rights Commission**  
**Canada Place**  
**344 Slater Street, 8<sup>th</sup> Floor**  
**Ottawa, Ontario**  
**K1A-1E1**  
**Fax: (613) 996-9661**

**AND TO: Karen Cuddy**  
**Counsel to the Attorney General of Canada**  
**Department of Justice, Resolution Branch**  
**Indian Residential Schools/Foster Care/Day Schools**  
**Legal Services (5<sup>th</sup> Floor)**  
**Floor 01, room 033**  
**90 Sparks Street**  
**Ottawa, Ontario**  
**K1A-0H4**  
**Fax: (613) 996-1810**

**AND TO: Jill Dutka**  
**Wilson Christen LLP**  
**137 Church Street**  
**Toronto, Ontario**  
**M5B-1Y5**  
**Fax: (416) 360-1350**

**Counsel for the Complainants**

File No. T1340 - 07008

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

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY  
CARING SOCIETY OF CANADA and  
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Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

INDIAN AND NORTHERN AFFAIRS CANADA

Respondent

AFFIDAVIT OF LORI JACOBS

I, Lori Jacobs, of Smith Township, Ontario, the Executive Director of the Chiefs of Ontario,

AFFIRM:

1. This Affidavit is given in support of the Chiefs of Ontario (COO) motion under Rule 8(4) of the Canadian Human Rights Tribunal Rules of Procedure to be added as a party Complainant to Inquiry T1340-07008.

2. I am the Executive Director of COO and have held this position since 2005.

3. COO is a secretariat controlled by the 133 First Nations of Ontario. Of this number, 127 are "Bands" recognized under the federal Indian Act, and 6 are "Near Bands", i.e. First Nation communities that are recognized by other First Nations and that are taking political, legal and other steps to acquire Indian Act recognition. COO maintains an office on the Fort William First Indian Reserve Thunder Bay, Ontario.

4. In relation to corporate and other business matters, COO acts through the Indian Associations Co-ordinating Committee of Ontario Inc., which is a federally incorporated not-for-profit or without share corporation. It has been in continuous operation since 1982.

5. COO is generally recognized by First Nations across Canada and by Canadian government agencies, including Indian and Northern Affairs Canada (INAC), as the leading regional voice for First Nations in Ontario.

6. The Executive body of COO is the Political Confederacy (PC). The PC is composed of the Ontario Regional Chief (ORC), the leaders of the four sub-regional First Nation organizations in Ontario (Association of Iroquois and Allied Indians, Grand Council Treaty 3, Nishnawbe Aski Nation, and the Union of Ontario Indians), and one representative from the Independent First Nations, Six Nations of the Grand River and Akwesasne. The PC meets approximately once a month to guide the affairs of COO and to take other political steps on behalf of Ontario First Nations. From time to time, the PC passes motions or resolutions to record its decision making.

7. The ORC is normally elected every three years at an All Ontario Chiefs Conference (AOCC), the annual gathering of Chiefs. The current ORC, Angus Toulouse, was re-elected at the AOCC of July 8, 2009, at the Batchewana First Nation, near Sault Ste Marie, Ontario. As noted above, the ORC is a member of the executive body known as the PC. Working in conjunction with the PC, the ORC has a general duty to carry out the political wishes of the Ontario First Nations in Assembly.

8. In addition to the annual Chiefs Assembly (the AOCC), there are usually one or two Special Chiefs Assemblies each year, some times focussing on particular topics, such as health and social services. There are also Chiefs Forums from time to time. If there is a quorum present (60% of all First Nations), Assemblies have the authority to pass resolutions dealing with political and other topics of interest to First Nations. These resolutions are the primary form of directive for the activity of COO, the PC, and the ORC. For example, over the decades there have been numerous resolutions passed dealing with the state of child and family services among First Nations in Ontario.

9. Further and more detailed information on COO is available at the Chiefs of Ontario web site: [coo.org](http://www.coo.org). This includes a complete directory of all the First Nations affiliated with COO. <http://www.coo.org>

10. Partly based on resolutions passed at Chiefs Assemblies over the decades, COO has a long history of involvement in social service issues, most notably the state of child and family services among First Nations. The full-time COO Social Services Director facilitates a Chiefs Committee on Social Services and Social Services Committee composed of the Social Services Directors from the different sub-regional organizations and the Independent First Nations. The Grand Chief of the Association of Iroquois and Allied Indians is the PC portfolio holder for social services and, in that capacity, works closely with the COO Social Services Director and the Committee.

11. COO recently completed a detailed study of the 1965 Indian Welfare Agreement between Ontario and Canada. This Agreement is a funding/service mechanism unique to Ontario for key social service programs, including child and family services. This study is privileged and confidential at this time. Above and beyond the most recent study, COO has expended significant human and financial resources over the years studying the impact of the 1965 Welfare Agreement and the particular program area of child and family services. This is an indication of the priority COO attaches to First Nation social services, most notably the state

of child and family services.

12. COO is authorized by Chiefs Assembly resolution to participate in the Canadian Human Rights Tribunal proceedings initiated by the First Nations Child and Family Caring Society of Canada (FNCFCSC) and the Assembly of First Nations (AFN).

13. The original AFN resolution (53/2006) that authorized the initial application to the Human Rights Commission specifically mentioned that the state of First Nation child and family services in Ontario, as impacted by the 1965 Agreement, should be included in the Human Rights complaint.

14. Ontario has the largest status Indian population of any Province or Territory in Canada. A significant portion of federal INAC funding for child and family services is allocated in relation to Ontario First Nations, via the 1965 Indian Welfare Agreement. To be comprehensive and inclusive, any Canadian Human Rights Act inquiry into the state of First Nation child and family services in Canada should include the situation of Ontario First Nations and the 1965 Welfare Agreement. COO is best placed to ensure that evidence and argument relevant to the 1965 Welfare Agreement and the INAC child and family services program in Ontario are put before the Canadian Human Rights Tribunal.

15. The original Human Rights complaint filed by the FNCFCSC and the AFN is focussed on Indian Affairs Canada (INAC) Directive 20-1, which is a national funding and service vehicle for First Nation child and family service programming outside of Ontario. As noted, federal funding for First Nation child and family services in Ontario is flowed through the 1965 Indian Welfare Agreement. However, the under-funding and under-servicing issues identified in the original complaint in relation to Directive to 20-1, in alleged violation of the Canadian Human Rights Act, are broadly similar to the issues experienced by First Nations in Ontario. All of the funding and service in question, including Ontario, are connected with the INAC national First Nations Child and Family Services Protection Program.

16. In a 2008 report, the federal Auditor General noted the failure to specify the modern array of child protection and prevention/supportive services in the 1965 Welfare Agreement, in line with evolving legislative standards and First Nation needs, possibly contributing to under-funding and the under-availability of services. As in the case of Directive 20-1 outside of Ontario, the interpretation of the 1965 Welfare Agreement may favour maintenance funding for taking children into care and keeping them in care, over funding for prevention or supportive services. Care options often involve taking children away from their extended families and home communities.

17. The 2008 report of the Auditor General on the INAC First Nations Child and Family Services Program focussed on Ontario, BC, Alberta, Manitoba, and Quebec. Overall, the report indicated that the INAC child welfare funding was inequitable, and there was no assurance that the services were culturally appropriate or comparable with provincial standards.

18. According to a study by Brad McKenzie (Block Funding Child Maintenance in First Nations Child and Family Services: 2002), in the period between 1995 and 2001, Ontario had the highest increase in the number of INAC funded children in care, compared with all other regions in Canada.

19. Based on previous studies and reports, I believe that the First Nation population in Ontario is under-serviced by provincially mandated First Nation child and family service agencies.

20. There has been no money for capital costs under the 1965 Welfare Agreement since 1975. This has led to serious inequities in terms of capital and infrastructure for First Nation children and family services in Ontario.

21. Federal funding for First Nation child and family services pursuant to the 1965 Welfare Agreement fails to account for the lack of surrounding services available to First Nation

communities, particularly in the North.

22. According to the Ontario Ministry of Children and Youth Services (MCYS) Transformation Plan of 2005, First Nation children in care remain over represented, compared with the general provincial population.

23. Annual and longer term general funding agreements for First Nation governments, which are drafted by INAC, routinely require the achievement of provincial program standards as a minimum for First Nation program delivery. Failure to meet provincial standards in a particular program area may amount to a breach of the overall funding agreement and may result in financial and administrative penalties, up to and including third party administration and termination of the overall funding agreement.

24. I am advised by counsel for COO, Michael Sherry, that INAC has raised at least two significant jurisdictional issues in the direct and indirect context of the subject Inquiry, i.e. whether it is appropriate to compare the INAC First Nation child and family service model with provincial standards, and whether the INAC funding/service model is even reviewable under the Canadian Human Rights Act, based on a distinction between funding and service delivery. The 1965 Welfare Agreement, which only applies in Ontario, is very relevant to the comparator group issue. The preamble to the 1965 Agreement states that the "needs in Indian Communities should be met according to standards applicable in other communities" and that "Canada and Ontario ... desire to make available to the Indians in the Province the full range of provincial welfare programs" (including child and family services). COO would like an opportunity to express its views on these very important issues that may affect INAC and other federal programs above and beyond child and family services.

25. COO believes that it should be represented in the subject Inquiry as a full party Complainant. This will ensure that the ultimate ruling of the Tribunal will apply to First Nations across Canada, including Ontario, the Province with the highest status Indian population –

regardless of the differences between the two child and family service vehicles connected with INAC, i.e. Directive 20-1 and the 1965 Welfare Agreement. COO is best placed to explicate the unique features of the child and family service arrangement in Ontario, based on the 1965 Welfare Agreement, while working in tandem with the original Complainants on the general themes of alleged INAC under-servicing and under-funding. If COO is not made a party to the subject Inquiry, there will be uncertainty as to whether the ultimate Tribunal ruling applies in Ontario, creating the risk of later multiple and inconsistent proceedings.

26. I am advised by counsel for COO, Michael Sherry, that the Canadian Human Rights Tribunal has set down the following schedule for the hearing in Ottawa: week of September 14, 2009; week of October 13, 2009; November 9-10, 2009; week of November 16, 2009 (tentative); week of November 23, 2009; weeks of January 18 and 25, 2010; and, weeks of February 8 and 15. COO and its counsel can accommodate this schedule and are not requesting any adjustment, adjournment or other form of delay. COO and its counsel will work with other counsel to make arrangements within the existing schedule.

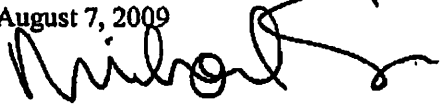
27. In summary, COO has a direct interest in the matter and has a unique contribution to make, based in part on the 1965 Indian Welfare Agreement. Participation by COO should not alter the schedule set down by the Canadian Human Rights Tribunal. Participation by COO should ensure that the ultimate decision of the Tribunal will be national and comprehensive in scope.

28. I believe that the AFN and FNCFCSC will be consenting to the addition of COO as a party complainant to the subject Inquiry.



29. I make this Affidavit in support of the COO motion for party complainant status in the subject Inquiry and for no improper purpose.

Affirmed before me at the City of )  
Toronto in the County of York, on )  
August 7, 2009 )



A Commissioner for Taking Affidavits, etc.

  
Lori Jacobs