

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA,
ASSEMBLY OF FIRST NATIONS,
CHIEFS OF ONTARIO, and
AMNESTY INTERNATIONAL

Respondents

AFFIDAVIT OF IRWIN ELMAN

Motion for Leave to Intervene, brought by the Provincial Advocate for Children & Youth

I, IRWIN ELMAN, Provincial Advocate for Children and Youth, resident of the City of Toronto, in the Province of Ontario, AFFIRM:

1. I am the Provincial Advocate for Children and Youth ("Provincial Advocate") in Ontario and as such I have knowledge of the matters deposed to in this affidavit.

2. I make this affidavit in support of the Provincial Advocate For Children and Youth's motion for leave to intervene in this appeal. I am seeking leave to intervene in this appeal to fulfil my mandate to partner with children and youth, particularly children in the child welfare system and First Nations children, and bring their voices forward. As the Provincial Advocate, I wish to bring to the appeal my experience and expertise working with these young people, and a fresh perspective centered on the rights and best interests of the children and youth affected.

The Provincial Advocate for Children and Youth

3. The Provincial Advocate is an independent officer of the Ontario legislature, governed by the *Provincial Advocate for Children and Youth Act, 2007*, SO 2007 c 9 ("the Act"). On June 11, 2008 I was appointed as the first Provincial Advocate under s. 3(1) of the Act, and I took office on July 14, 2008. I have remained the Provincial Advocate since that time. Before the establishment of the Office of the Provincial Advocate, there was a predecessor advocacy office that operated from within the Ontario Ministry of Children and Youth Services. The Provincial Advocate has a mandate as set out in the Act, and as detailed further in my affidavit.
4. The Office of the Provincial Advocate for Children and Youth (the "Advocate's Office") supports my work and assists me in carrying out my mandate. Under my direction, the Advocate's Office provides an independent voice for children and youth by partnering with those young people to bring issues forward that are of concern to them.

5. The Provincial Advocate's mandate, as set out in the Act, is to promote the rights and interests of children and youth in Ontario. First Nations children have a special place in this mandate, as indicated in s. 1 of the Act:

The purpose of this Act is to provide for the Provincial Advocate for Children and Youth as an independent officer of the Legislature to,

- (a) provide an independent voice for children and youth, **including First Nations children and youth** and children with special needs, by partnering with them to bring issues forward;
- (b) encourage communication and understanding between children and families and those who provide them with services; and
- (c) educate children, youth and their caregivers regarding the rights of children and youth.

6. The Provincial Advocate serves children and youth in Ontario in provincial care, and at the margins of provincial care, namely in the child welfare system, youth justice facilities, and residential centres for children with special needs.
7. A large part of the Provincial Advocate's work revolves around young people in the child welfare system (also known as "children in care"). The Provincial Advocate's functions, as outlined in s. 15 of the Act, specifically include providing advocacy for children and youth who are seeking or receiving approved services under the *Child and Family Services Act*, RSO 1990, c C.11, and promoting the rights of children in care. These children in care include First Nations children who may be resident on- or off-reserve.

8. As directed by s. 2(3) of the Act, the Provincial Advocate is guided by the principles expressed in the United Nations *Convention on the Rights of the Child*,¹ and by the principle that the office should be an exemplar for meaningful participation of children and youth throughout all aspects of its advocacy services. I believe the young people that the Advocate's Office works with have a wisdom born of their lived experience, often in difficult circumstances. The Provincial Advocate's task, as I see it, is to be an ally to these children, amplify their voices, and do our best to ensure those voices are heard and valued.
9. The Provincial Advocate engages in advocacy in three ways: individual rights advocacy, systemic advocacy, and community development.
10. Individual rights advocacy involves working in partnership with children and youth who contact us, and those who contact us on a child's behalf. Every young person in child welfare care in Ontario must be provided with our contact information upon admission to any placement and on a quarterly basis. Posters with our contact information must be visible in all child welfare residences, as well as youth justice facilities and children's mental health or special needs residences.

¹ United Nations, *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

11. When young people call the Advocate's Office, the job of the Provincial Advocate is to listen to them, learn from them, and partner with them to bring their issues forward. In doing so, the Provincial Advocate has learned immensely from the first-hand lived experiences of thousands of children and youth in care. Their real world experiences cannot substitute for any amount of abstract research. I am grateful, as the Provincial Advocate, to have benefitted from the knowledge and insights that young people have shared with me and with our Office.
12. The Advocate's Office receives in excess of 4,000 calls each year. Our office staff includes a team of eleven (11) Individual Rights Advocates who answer these calls and work with each young person with compassion and respect. In 2010-2011, 80% of our individual cases dealt with child welfare matters.
13. As systemic advocates, the Provincial Advocate and further staff at the Advocate's Office partner with young people to identify key themes and issues of special importance. The Provincial Advocate engages in systemic reviews and initiatives that take a wide variety of forms, which will be further detailed in this affidavit.
14. Finally, the Provincial Advocate and another staff team at the Advocate's Office participate in community development, by supporting young people themselves to develop their voices and their own advocacy skills and confidence, and working with diverse groups of young people province-wide to support their own advocacy efforts and their participation in discussions that affect their circumstances.
15. A number of our systemic advocacy and community development initiatives in the child welfare, First Nations, and children's rights contexts are detailed below.

The Case Under Appeal

16. This appeal primarily deals with the meaning of discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6. In particular, the issue of significance to the Provincial Advocate is the interpretation of the meaning of a "discriminatory practice" under the *Canadian Human Rights Act*, in a case where First Nations children receive child welfare services from the federal government, and other Canadian children receive the same service from their provincial or territorial jurisdictions.
17. This appeal will determine whether the underlying complaint of discrimination on federal child welfare funding for First Nations children is within or outside the jurisdiction of the Canadian Human Rights Tribunal. The appeal will determine whether First Nations children have a right to make complaints to the Canadian Human Rights Tribunal when they receive public services that are unequal to those that other Canadians receive.
18. This appeal also has precedential importance for First Nations children and families on reserve beyond the child welfare context, since many of the services they receive are provided in a similar manner to child welfare. Due to the unique legal position of First Nations persons on reserve, many of their services are funded and structured by the federal government, while other Canadians receive the same services from their provincial governments.

19. More broadly, the issues on this appeal are about the values we hold as Canadians, especially on matters of equity and quality of life. If, as the appellant suggests, we are to interpret the *Canadian Human Rights Act* in a manner that would allow the services provided by the federal government to First Nations children and families on reserve to be dramatically inferior to those off reserve, and yet not take this to be discrimination, I have grave concerns about the message that sends to First Nations, and to children and youth of all backgrounds.

The Provincial Advocate's Stake in the Issues

20. I believe these to be issues of the greatest public interest and importance. This appeal has a significant, real-life impact on thousands of First Nations children and youth in child welfare care or in the margins of that care. It impacts the resources and supports available to meet their needs and build the foundation for their future. It is an issue of importance not only to First Nations children and youth, but to all Canadians.
21. The matters at issue in this appeal are directly within the mandate of the Provincial Advocate under the Act:
- (a) This appeal deals with the treatment of children and youth in care in the child welfare context; such children and youth are our main constituents.
 - (b) Within that group, this appeal deals specifically with First Nations children; our office has a special mandate to assist First Nations children, whether in or out of care.
 - (c) This appeal deals with the human rights of children; our office has a mandate to promote understanding and respect for children's rights.

22. Providing advocacy on the issues engaged by this appeal is also directly within the legislated functions of the Provincial Advocate, as detailed in section 15 of the Act.
23. The Provincial Advocate works closely with the children and youth directly affected by this appeal, and with a clear and substantial stake in its outcome. The Provincial Advocate is mandated by legislation to advocate on behalf of these children and youth, and provide an independent voice attentive solely to their rights and interests.
24. In addition, the Provincial Advocate has demonstrated significant interest in the issues in this appeal through engagement with numerous initiatives on issues of child welfare, First Nations children, and children's rights. The Provincial Advocate's interest in this case specifically is demonstrated by close monitoring of this proceeding starting from the Tribunal level. These activities are detailed further below.

The Provincial Advocate's Special Knowledge and Expertise

25. The Provincial Advocate has special knowledge and expertise to bring to bear on this case in the areas of children and youth involved with the child welfare system ("in care"), First Nations children and youth, and children's rights generally.

Systemic Advocacy Regarding Children and Youth in Care

26. By working individually with the children and youth in care who call the Advocate's Office, and by working with young people on a number of systemic and community initiatives, the Provincial Advocate has developed considerable knowledge about the experiences of young people in care and of their perspectives on issues that affect them. The effectiveness of the Provincial Advocate's work is informed by the wisdom that young people share with me and the Advocate's Office on a daily basis.
27. In addition to casework involving individual children, the Provincial Advocate has undertaken a number of initiatives on the subject of child welfare and children and youth in care. These initiatives include:
- (a) The Provincial Advocate regularly conducts reviews of residential facilities and of Children's Aid Societies and makes recommendations to improve such facilities and services. Interviews with young people are a key part of each review.
 - (b) The Provincial Advocate works on matters relating to deaths of children in the child welfare system, such as by advocating for young people in Coroner's inquest proceedings and in the preparation of Paediatric Death Reports.

- (c) The Provincial Advocate has made submissions to the Ontario Legislature and to Standing Committees regarding children's rights and interests concerning a range of legislation, and have involved youth in care in making those submissions.²
- (d) The Provincial Advocate has prepared a number of published reports regarding the matter of youth in care and at the margins of care.³
- (e) The Provincial Advocate has facilitated youth-organized community development events for and by youth in care.

² Including amendments to the *Child and Family Services Act*, and a social housing bill called Bill 140 "An Act to enact the *Housing Services Act, 2010*, repeal the *Social Reform Act 2000* and make complementary and other amendments to other Acts".

³ Our reports on children and youth in care include:

- Youth Leaving Care Hearings Team, *My Real Life Book: Report from the Youth Leaving Care Hearings* (Provincial Advocate for Children and Youth, 2012); this report was produced based on two days of youth-led hearings in the Ontario Legislature organized by youth with the support of the Advocate's Office – a first in Canadian history.
- Provincial Advocate for Children and Youth, *25 is the New 21: The Costs and Benefits of Providing Extended Care & Maintenance to Ontario Youth in Care Until Age 25* (Provincial Advocate for Children and Youth, 2012); this report analyzed research about the costs and benefits of supporting youth in care or exiting care up to age 25.
- Provincial Advocate for Children and Youth, *Resources. Connection. Voice. What Youth in Provincial Care Need to Survive and Thrive* (Provincial Advocate for Children and Youth, 2011); this report provides accessible information about what the Advocate's Office has learned regarding the essential supports children in care need to succeed.

Advocacy for First Nations Children and Youth

28. As noted above, the Provincial Advocate has a specific mandate for First Nations children and youth. While all the Provincial Advocate's work in child welfare includes First Nations children and First Nations child welfare issues, the Provincial Advocate has also engaged in a number of initiatives that focus directly and specifically on the examination of systemic issues that directly impact the lives and experiences of First Nations children and youth. The Provincial Advocate's knowledge and expertise on First Nations children and youth stems from initiatives such as:

- (a) The Provincial Advocate is working with the Chiefs of Ontario, the Ontario Association of First Nation Child and Family Service Agencies, and respected scholars to advance a study on gaps in services and resources for First Nations children and youth in northern communities, particularly in the child welfare sector.
- (b) The Provincial Advocate participated in the Office of the Chief Coroner of Ontario's Death Review of the Youth Suicides at the Pikangikum First Nation, a remote First Nation in Northern Ontario. The Provincial Advocate's portion of the review involved meeting directly with First Nations young people, as the Chief Coroner's report indicated, "utilizing [our] office's expertise to represent the views and concerns of the living First Nations children and youth".⁴

⁴ The Provincial Advocate's report is Part H of the Chief Coroner's report, Office of the Chief Coroner, *The Office of the Chief Coroner's Death Review of the Youth Suicides at the Pikangikum First Nation, 2006-2008* (Office of the Chief Coroner, 2011).

- (c) The Provincial Advocate participated in the Independent Review of the inclusion of First Nations persons on jury rolls carried out by The Hon. Frank Iacobucci.⁵
- (d) On an ongoing basis the Provincial Advocate engages in outreach with provincial government bodies and other groups to discuss the barriers faced by First Nations youth, particularly in terms of access to appropriate resources and supports.
- (e) The Provincial Advocate has worked with a range of groups, including First Nations children and youth, the Canadian Council of Provincial Child and Youth Advocates, and First Nations organizations to produce a number of reports on the resources, supports, services and issues relating to First Nations children and youth.⁶

⁵ This review was established by Ontario Order-in-Council 1388/2011.

⁶ These reports include:

- Canadian Council of Provincial Child and Youth Advocates, *Aboriginal Children and Youth in Canada: Canada Must Do Better* (Canadian Council of Child and Youth Advocates, 2010)
- Regional Multicultural Youth Council, *Reserved and Lost (Traumatization of Aboriginal Children and Youth On and Off Reserves)* (Regional Multicultural Youth Council and the Multicultural Association of Northwestern Ontario, 2010)
- Various Meetings, Focus Groups, Presentations, Reference Information, and Recommendations for the Reggie Bushie Inquest (2009-2011)
- Shannen's Dream Campaign, *Our Dreams Matter Too: First Nations children's rights, lives and education / An alternate report from the Shannen's Dream Campaign to the United Nations Committee on the Rights of the Child on the occasion of Canada's 3rd and 4th periodic reviews* (Provincial Advocate for Children and Youth & First Nations Child and Family Caring Society, 2011)

- (f) The Provincial Advocate partnered with Nishnawbe Aski Nation, a First Nations political-territorial organization in Ontario, to help increase birth registration in First Nations communities. As a result of the partnership, Nishnawbe Aski Nation, the Ministry of Government Services, and the Ministry of Aboriginal Affairs created a campaign around this issue.
- (g) In May 2012, staff from the Advocate's Office and a First Nations family met with the Accessibility Directorate of Ontario to discuss the lack of accessibility standards for First Nations children and youth with disabilities who live on reserve. The meeting focused on the need for accessibility standards on reserve and specifically the need for coordination between the provincial and federal governments.
- (h) The Provincial Advocate has participated in individual and systemic advocacy efforts to support and enforce Jordan's Principle.⁷
- (i) In June 2012, the Provincial Advocate opened a second office in Thunder Bay to increase our accessibility to northern Ontario children and youth. Our Thunder Bay office now has four full-time adult staff and five youth staff working there.

⁷ *Jordan's Principle* is a motion passed by Parliament in 2007 stating that when jurisdictional disputes arise in relation to a Status Indian or Inuit child, the government department of first contact pays for the service to the child without disruption, and that department may (if required) then refer the matter to intergovernmental processes to pursue repayment by another government.

29. As part of our work to support First Nations children and youth, especially young people in care, the Provincial Advocate has closely followed the case now subject to this appeal. Representatives of the Advocate's Office attended each day of hearings at the Canadian Human Rights Tribunal as observers. The Provincial Advocate has followed each step in this case with great interest, and with concern regarding its potential positive or negative impact for First Nations children and youth.

Expertise in Children's Rights

30. The Provincial Advocate's knowledge and expertise in children's rights is carried forward throughout all of the activities undertaken by the Advocate's Office. The Advocate's Office integrates a children's rights focus throughout each aspect of its work – in casework, in legal proceedings, during systemic reviews, during meetings and presentations, in reports, etc.
31. Promoting awareness and implementation of children's rights is at the core of the Provincial Advocate's mandate. Section 1(c) of the Act provides that the Provincial Advocate shall "educate children, youth and their caregivers regarding the rights of children and youth". The Advocate's Office conducts workshops and training programs on children's rights for professionals, and has developed children's rights-focused curricula for colleges who train front-line workers. The Advocate's Office produces materials for young people to learn about their rights and access support.
32. Section 2(3)(a) of the Act provides that the Provincial Advocate shall be guided by the *Convention on the Rights of the Child*. I wish to highlight two parts of the *Convention* here.

33. Article 3 of the *Convention* reflects the principle of the best interest of the child, stating: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” In addition to its role in the *Convention*, the best interests principle is also used throughout domestic Canadian law. The Provincial Advocate has expertise on this principle, and I believe this principle has application in the context of this appeal as detailed further below.
34. Article 12 of the *Convention* speaks to children’s rights to be heard in all matters affecting them and that their views be given due weight. In particular, it states that children shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting them, “either directly, or through a representative or an appropriate body”. Young people affected by this appeal have informed the Provincial Advocate’s views on the issues at stake in this appeal, and the Provincial Advocate is uniquely positioned to bring those views forward.

Participation in Legal Proceedings

35. The Provincial Advocate has been granted standing as a party or as an intervener in a number of legal proceedings, including:

- (a) As intervener in an appeal at the Ontario Court of Appeal, in the matter of a young person who was found not criminally responsible by account of a mental disorder. The appeal successfully altered the young person's placement to further the individual's recovery.⁸
- (b) As a party at the inquest into the death of Reggie Bushie, a First Nations youth from a remote reserve who died while attending high school in Thunder Bay, including at the Ontario Divisional Court and Ontario Court of Appeal on a matter that arose about the integrity of the jury roll for the inquest.⁹
- (c) As a party at the inquest into the death of M.R., a 3-year-old child who was killed while in foster care.
- (d) As a party at the inquest into the death of Ashley Smith, a youth who died in custody in a case that involves youth justice and mental health matters, including in judicial review proceedings at the Ontario Divisional Court dealing with various evidentiary matters.¹⁰

⁸ See: *J.J. v Centre for Addiction and Mental Health*, 2009 ONCA 680 (CanLII).

⁹ See: *Nishnawbe Aski Nation v Eden*, 2009 CanLII 30144 (ON SCDC); *Nishnawbe Aski Nation v Eden*, 2009 CanLII 39780 (ON SCDC); *Pierre v McRae*, 2011 ONCA 187 (CanLII).

¹⁰ See: *Smith v Porter*, 2011 ONSC 2593 (CanLII), *Smith v Porter (Judicial Review)*; 2011 ONSC 2844 (CanLII); and *Smith v Porter*, 2011 ONSC 2744 (CanLII).

- (e) As a party at the inquest into the death of Diane Anderson and her children, including in a judicial review proceeding at the Ontario Divisional Court dealing with evidence and the scope of the inquest.¹¹ Ms. Anderson and two of her five children died in a fire while the local Children's Aid Society had an open file in respect of one of the children.
- (f) As a party at the inquest into the death of G.A., a young person who died while in custody pursuant to the *Youth Criminal Justice Act*.
36. The Provincial Advocate has also participated indirectly in various legal proceedings as a "support person" for a young person at his or her request, particularly at tribunals such as the Child and Family Services Review Board, the Custody Review Board, and others.

The Fresh Perspective the Provincial Advocate Would Bring

37. The submissions of the Provincial Advocate as intervener in this appeal will be grounded in a child- and youth-focused approach, and will centre on the rights and best interests of the children and youth affected. I believe this is a fresh and helpful perspective through which to view the issues in this appeal.
38. The Provincial Advocate does not intend to comment on the procedural fairness issues raised on this appeal. Our submissions will focus on the issue of how to interpret and define a "discriminatory practice" within the meaning of s. 5 of the *Canadian Human Rights Act*.

¹¹ See: *Ontario (Provincial Advocate for Children and Youth) v. Ontario (Toronto Regional Coroner)*, 2011 ONSC 3354.

39. In particular, if granted leave to intervene, the Provincial Advocate's submissions will be:
- (a) The "best interests of the child" is a well-established legal principle with widespread expression in Canadian law. Not only is it a right within the *Convention on the Rights of the Child*, but it is also found within many different kinds of legislation across all Canadian jurisdictions, including child welfare law, criminal law, family law, and immigration law, and others.
 - (b) The need to be alive and attentive to children's best interests is applicable not only in the context where a court is making a decision about an individual child. It is used by courts, and should continue to be used, in many other contexts including in statutory interpretation, in the interpretation and application of common law doctrines, and in the interpretation of the constitution.
 - (c) In this circumstance, the interpretation of the *Canadian Human Rights Act* stands to dramatically impact many vulnerable children and youth, specifically those children who are First Nations children (more specifically, "Indians" within the meaning of the *Indian Act*, R.S.C. 1985 c. 1-5) resident on reserve. The Provincial Advocate's submissions will urge this Court to be alive and attentive to the best interests of those children, and the Provincial Advocate will bring this children's rights jurisprudence to bear on the issues before the Court.

- (d) Applying that perspective, the Provincial Advocate will highlight how the interpretation of the *Canadian Human Rights Act* advanced by the appellant Canada has enormously negative consequences for First Nations children and youth, and is inconsistent with the best interests of the child. As interpreted by the Attorney General of Canada, the rights and interests of these children and youth would be systematically impaired, along racial lines, and they would be denied recourse in human rights law for unequal and inferior treatment.
- (e) The Provincial Advocate's position will be that the appeal should be denied.
40. By focusing on the law pertaining to children's rights and best interests, the Provincial Advocate wishes to turn the Court's attention to the well-established jurisprudence on the use of the principle of the best interests of the child, and of the consequences of the court's decision for the children and youth directly affected. I believe this perspective will shed new light on the issues that have already been laid out by the appellant on this appeal. I believe it is a different and valuable perspective, that will usefully assist the Court in its determination of the legal issues in this proceeding.

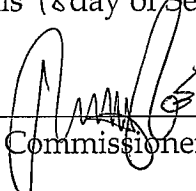
Various Matters

41. The Provincial Advocate will rely on the current record, and does not seek to introduce any additional evidence.
42. The Provincial Advocate is committed to causing no delay in the hearing of this appeal.

- 43. The Provincial Advocate seeks no costs in this motion or in the proposed intervention, and asks that no costs be awarded against it.

- 44. The Provincial Advocate therefore respectfully requests that it be granted leave to intervene in this appeal, with the right to file a Memorandum of Fact and Law and present oral argument.

OR AFFIRMED before me at the City of Toronto, in the Province of Ontario, this 18 day of September, 2012.



A Commissioner, etc.

CSOC 5870EV



IRWIN ELMAN