

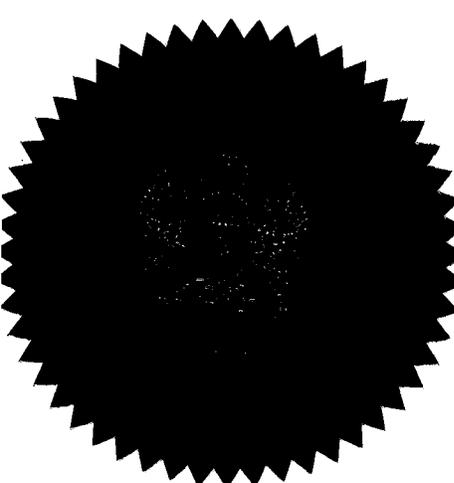
FEDERAL COURT

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Applicant

- and -



**ATTORNEY GENERAL OF CANADA,
ASSEMBLY OF FIRST NATIONS,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa.

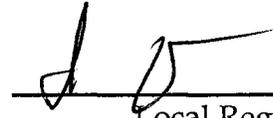
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 13, 2011

Issued by:


Local Registrar

Address of local office: 90 Elgin Street
Ottawa ON K1P 5B8

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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW by the First Nations Child and Family Caring Society (the "Caring Society") in respect of the decision of the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal"), made March 14, 2011 (the "Decision"), whereby the Chairperson dismissed the Caring Society's human rights complaint to the Tribunal filed February 26, 2007 (the "Complaint").

The Complaint alleges that the Government of Canada discriminates in providing child welfare services to First Nations children living on reserve by providing inequitable funding to on-reserve child welfare agencies. This discrimination has resulted – and will continue to result while this application and the Complaint remain outstanding – in lesser services being available to on-reserve First Nations children compared to those offered to off-reserve children, and ultimately in a proportionately higher number of on-reserve First Nations children entering the child welfare system than children living off reserve. The Complaint alleges that this discrimination is contrary to the *Canadian Human Rights Act*.

The Tribunal unfairly and incorrectly dismissed the Complaint on the sole basis that the discriminatory funding provided by the federal government for child welfare services for on-reserve children could not legally be compared to funding provided to off-reserve children, since off-reserve funding is provided by provincial or territorial governments. The Tribunal incorrectly read into the *Canadian Human Rights Act* a requirement that there be a "comparator group" receiving the same services from the same provider (the federal government) before a finding of discrimination could be made. The Tribunal thereby effectively precluded First Nations people – who receive more services from the federal government than other Canadians because of their *sui generis* constitutional status – from raising human rights complaints in respect of such services regardless of the discriminatory way in which they may be provided.

THE APPLICANT MAKES APPLICATION FOR:

- (a) an Order setting aside the Decision and remitting the matter back to a differently constituted Tribunal with the direction that the Tribunal proceed to hear the Complaint on its merits;
- (b) an Order setting an expedited hearing date for the hearing of the within application for judicial review;
- (c) its costs of the within application; and
- (d) such further and other relief as to this Honourable Court seems just.

THE GROUNDS FOR THE APPLICATION ARE:

- (a) the Caring Society is a non-profit organization committed to research, policy development, professional development and advocacy, on behalf of First Nations agencies that serve the well-being of Aboriginal children, youth and families in Canada;
- (b) on February 27, 2007, the Caring Society and the Assembly of First Nations ("AFN") filed a joint complaint 2006/1060 (the Complaint) against Indian and Northern Affairs Canada ("INAC") with the Canadian Human Rights Commission (the "Commission");
- (c) the Complaint asserts that INAC's child and family services program results in inequitable child welfare services for Registered Indian children on reserve compared to those services received by children living off reserve, in a discriminatory manner contrary to section 5 of the *Canadian Human Rights Act* (the "Act");
- (d) the Complaint also alleges that jurisdictional disputes between and within governments regarding First Nations children in need of government

services adversely impact those children and are discriminatory, again contrary to section 5 of the Act;

- (e) INAC has admitted that the funding provided to on-reserve child welfare agencies is not equal to provincial funding of off-reserve child welfare agencies;
- (f) by letter dated May 6, 2008, the Respondent, the Attorney General of Canada, requested that the Commission decline to deal with the Complaint pursuant to section 41(1)(c) and 41(1)(d) of the Act, on the basis that the Complaint was beyond the jurisdiction of the Commission;
- (g) on September 30, 2008, the Commission decided to deal with the Complaint and referred the Complaint to the Tribunal for an inquiry. The then chairperson of the Tribunal, Mr. J. Grant Sinclair, Q.C., was assigned to the matter;
- (h) on November 13, 2008, the Attorney General of Canada brought an application for judicial review with this Honourable Court, seeking to quash the Commission's decision and dismiss the Complaint;
- (i) on February 12, 2009, the Applicant and AFN brought a motion to strike the Attorney General's application for judicial review or, in the alternative, stay the Attorney General's application until disposition of the Complaint before the Tribunal;
- (j) on November 24, 2009, Prothonotary Aronovitch of this Honourable Court stayed the Attorney General's application for judicial review until disposition of the Complaint before the Tribunal, but refused to strike the application;

- (k) the Attorney General on the one hand and the Caring Society and the AFN on the other appealed the decision of Prothonotary Aronovitch. On March 30, 2010, both appeals were denied;
- (l) in the interim, on November 2, 2009, Ms. Shirish P. Chotalia, Q.C. was appointed as the new Chairperson of the Tribunal. By November 6, 2009, the new Chairperson appointed herself to handle the Complaint (in place of Mr. Sinclair, who had previously been seized thereof) and unilaterally vacated hearing dates that had been scheduled for the Complaint, without any response to the Caring Society's request for a decision as to whether Mr. Sinclair remained seized;
- (m) on December 21, 2009, having been expressly invited by the new Chairperson to do so, the Attorney General brought a motion before the Tribunal to dismiss the Complaint, on the basis that INAC was not providing a "service" (the "Service Issue") and that no appropriate comparator existed for the purposes of section 5(b) of the Act (the "Comparator Issue");
- (n) in addition to the Applicant, the AFN and the Commission, the Chiefs of Ontario and Amnesty International Canada responded to the motion as interested parties;
- (o) on June 2 and 3, 2010, the Tribunal heard the Attorney General's motion to dismiss. Following the hearing, the parties filed further written submissions regarding recent Supreme Court jurisprudence as well as international declarations;
- (p) on February 28, 2011, with a decision from the Tribunal still outstanding, the Caring Society filed an application for judicial review with this

Honourable Court, seeking an order of mandamus to require the Tribunal to set dates for a hearing into the merits of the Complaint;

- (q) two weeks later, on March 14, 2011, the Chairperson delivered the Decision;
- (r) in the Decision, the Chairperson dismissed the Complaint on the basis of the Comparator Issue, concluding that:
 - i. the Tribunal can dismiss a complaint without a *viva voce* hearing where the moving party has demonstrated that the material facts are clear and not in dispute and/or where the issues raised involve questions of pure law;
 - ii. the Service Issue could not be decided on the evidence filed;
 - iii. the Act requires that a "comparison" be made for there to be a finding of discrimination, and therefore requires the existence of a "comparator group" receiving the same service from the same service provider; and
 - iv. since no "comparator group" receiving the same service from the same service provider existed for the purposes of the Complaint, there could be no finding of discrimination;
- (s) in rendering the Decision, but without advising the parties of her intention to do so, the Chairperson relied not only on the materials filed by the parties on the Attorney General's motion, but also on other material filed in connection with the merits of Complaint, including but not limited to expert reports filed by the Attorney General nearly two months after oral argument on the motion. The Caring Society had objected to the admission of these reports into evidence on the merits and not had the opportunity to cross-examine on them;

- (t) in making the Decision, the Chairperson erred in law and/or exceeded her jurisdiction by:
 - i. incorrectly and unreasonably dismissing the Complaint on a preliminary basis absent a finding of abuse of process or breach of natural justice;
 - ii. breaching the duty of fairness and the principles of natural justice by failing to confine her reasoning to the motion material filed or, in the alternative, not advising the parties that she would be relying on materials filed in relation to the merits of the Complaint and giving the parties the opportunity to cross-examine and make submissions thereon;
 - iii. incorrectly and unreasonably concluding that a “comparator group” is required for there to be a finding of discrimination under section 5(b) of the Act; and
 - iv. incorrectly and unreasonably concluding that the “comparator group” must be one receiving the same service from the same service provider, thereby failing to adequately or appropriately recognize the unique constitutional position of First Nations peoples in Canada;
- (u) it is just and appropriate that the hearing of this application for judicial review be expedited;
- (v) Rules 3, 55 and Part 5 of the *Federal Courts Rules*;
- (w) sections 18.1 and 18.4 of the *Federal Courts Act*;
- (x) the further and other grounds set out in the affidavit and memorandum to be filed in support of this application; and
- (y) such further and other grounds as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) the affidavits to be filed in support of the within application, and the exhibits thereto; and
- (b) such further and other material as counsel may advise and this Honourable Court may permit.

THE APPLICANT REQUESTS pursuant to Rule 317 of the *Federal Courts Rules*, that the Canadian Human Rights Tribunal send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Human Rights Tribunal to the Applicant and to the Registry:

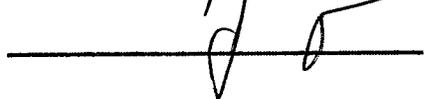
1. communications between the Chairperson and former chairperson Sinclair in respect of the Complaint;
2. communications between the Chairperson and the mediation member, Matthew Garfield, in respect of the Complaint and the mediation thereof; and
3. communications between the Tribunal and the Respondent, the Attorney General of Canada regarding the KPMG Expert Report filed by the Attorney General of Canada.

April 13, 2011

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 13

day of April A.D. 20 11

Dated this 13 day of April 20 11



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