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August 24, 2009

FAX COVER MEMO

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TOTAL: * 9 pages including this cover memo *

In accordance with the Canadian Human Rights Tribunal Rules of Procedure and the Direction of the Tribunal from August 13, 2009, please find attached for service and filing a Reply from Chiefs of Ontario (COO), relating to the COO motion for party Complainant status under Rule 8(4).

Thanks.

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Nicole Bacon
Registry Officer
Registrar
Canadian Human Rights Tribunal
160 Elgin Street
11th Floor, Suite 11A – 100
Ottawa, Ontario
K1A-1J4

BY FAX: 613-995-3484

Dear Ms. Bacon:

RE: Canadian Human Rights Tribunal File No. T1340 – 07008
AFN et al. and Attorney General of Canada

In accordance with the Canadian Human Rights Tribunal Rules of Procedure and the Direction of the Tribunal from August 13, 2009, please find attached for service and filing a Reply relating to the Chiefs of Ontario (COO) motion for party Complainant status under Rule 8(4).

Thanks for your attention to this matter.

Sincerely,

Michael Sherry
Counsel

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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 -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

REPLY

Pursuant to the Direction of the Canadian Human Rights Tribunal on August 13, 2009, this Reply is in support of the Motion made by the Chiefs of Ontario (COO) seeking party Complainant status in the subject Inquiry.

1 The current hearing schedule goes from September 14, 2009 to late February, 2010. As the original Complainants, the First Nations Child and Family Caring Society of

Canada (the "Caring Society") and the Assembly of First Nations ("AFN"), will be presenting evidence first, there will be sufficient time for COO to be integrated in a reasonable fashion into the proceedings. As acknowledged in the Response of the Attorney General of Canada ("Canada") on August 19, the parties have already foreseen that a number of weeks may be added to the schedule. This possible extension past February could more than accommodate any limited amount of extra time required by the addition of COO, as well as other contingencies.

2 Some new work will be required by the addition of COO as a party. Given the six month schedule, and the already foreseen option of an extension, it should be possible for Canada to adjust to the new workload. While the financial and personnel resources of Canada are not unlimited in the true sense of that word, they are vast compared with those available to all other parties and potential parties, including COO. COO has no specific program resources for the Inquiry and has been, and will be, obliged to identify internal cost savings and contributions in kind in order to participate to the best of its ability. It is more than ready and willing to do so at this stage given the importance of the Inquiry.

3 All the existing parties in the Inquiry, even Canada, are effectively "corporate" or umbrella organizations with strong representational, public policy, and others interests in First Nation child welfare services. COO is no different in that regard. COO acts on behalf of all First Nations in Ontario and is seeking to represent them in the Inquiry. With or without COO, the Inquiry does not include any First Nation or non First Nation child welfare agencies directly involved in service delivery.

4 Canada acknowledges in its Response of August 19, 2009, that it has consistently understood that the 1965 Welfare Agreement would be part of the evidence and the argument at the Inquiry. This is confirmed by correspondence dated July 31, 2009, attached to the Response of Canada. The Department of Indian and Northern Affairs Canada ("INAC") would have numerous officials in Toronto, Ottawa, and elsewhere,

intimately familiar with the history and ongoing operation of the 1965 Welfare Agreement. As emphasized in the COO Motion material in support of party status, the principal focus of COO participation will be the impact of the 1965 Welfare Agreement, which is unique to Ontario. Therefore, Canada should already be prepared and ready for any kind of material that COO will bring forward, if COO becomes a party.

5 The AFN and the Caring Society would have brought forward some evidence and argument on the 1965 Agreement, even without COO. However, COO is in the best position to deal with the 1965 Agreement issue. Participation by COO will lighten the load for the Caring Society and the AFN, which, unlike Canada, have restricted resources. Participation by COO will strengthen the overall process by enriching the evidence and argument base in relation to a unique part of the First Nation child welfare program network in the most populated First Nation jurisdiction in Canada.

6 Canada acknowledges in its Response that the existing Complainants have conduct of the "prosecution" of the Complaint. The existing Complainants could call evidence on the 1965 Welfare Agreement without COO as a party. However, as indicated in the Response of the Caring Society and the AFN on August 19, 2009, they firmly support the option of COO participating and assuming responsibility for the presentation of the 1965 Welfare Agreement issue. Since the existing Complainants have carriage of the prosecution, as acknowledged by Canada, their support for COO should be given considerable weight.

7 If COO is granted status at the Inquiry, the focus will be on the presentation of evidence and argument in relation to First Nation child welfare services in Ontario and the 1965 Welfare Agreement. COO is uniquely positioned to assist with the Inquiry in this regard. Any COO submissions on any jurisdictional issues, including the two identified in the Motion and referred to in the Response of Canada (comparator and service delivery vs. funding), will be linked to the focus on the Ontario 1965 Welfare Agreement and, therefore, will be unique. COO undertakes

not to duplicate any submissions from existing Complainants, including those participating in parallel Federal Court proceedings.

8 While the position of COO is unique, based on the 1965 Welfare Agreement, there is a broad similarity in the approaches of COO and the existing Complainants. This means that the Complainants can cooperate, thereby strengthening the Inquiry process, whatever the final result. With respect, it would not be practical for COO to bring a separate and new complaint to the Human Rights Commission (the "Commission"), as suggested by Canada in its August 19 Response. It is a more efficient use of Tribunal and party resources to integrate COO into the present proceedings and have all relevant and related issues resolved at one time. Canada has anticipated on a consistent basis that the 1965 Welfare Agreement would be dealt with in the present proceedings. As the 1965 Welfare Agreement will be dealt with one way or the other in the present proceedings, a new and separate Commission complaint by COO might be contested by Canada as a form of double jeopardy.

9 COO agrees with Canada that the core issue of the Inquiry is whether the federal First Nation child welfare program, including the 1965 Welfare Agreement component, is discriminatory under the Canadian Human Rights Act (CHRA). Contrary to the suggestion in the Response by Canada, COO is not proposing a quasi Royal Commission into the state of First Nation child welfare services in Ontario or the rest of Canada. There is no need for that – the studies are in. The COO position, supported by unique material tied to the 1965 Welfare Agreement, is that the federal program package is discriminatory in a substantial and broad sense, causing great and foreseeable prejudice to the life chances of the most vulnerable members (children) of an already vulnerable racial group that is supposed to be protected by the CHRA. The federal defence appears to be based primarily on technicalities (i.e. the jurisdictional comparator and service vs. funding issues), presumably because the reality of systemic discrimination on the ground is so painfully obvious. Extrapolated to its logical conclusion, this defence would make most major INAC

programming immune from scrutiny under the CHRA, a result that seems wrong on its face and contrary to public policy, especially in the wake of the recent deletion of sec. 67 of the CHRA by Bill C-21 (June 18, 2008).

10 If COO is granted party status, Canada suggests in its Response that the start of the Inquiry should be adjourned to permit pre-hearing disclosure, particulars, witnesses, and other preliminary organizational matters. COO believes that the adjournment suggested by Canada is not necessary, given the fact that the existing Complainants will be starting first and the parties have already foreseen a possible extension of the Inquiry past February, 2010. However, if the Tribunal agrees with the suggestion from Canada, COO would work in the short adjournment to produce all of the material required. In any event, there may be other developments in the proceedings that may indicate that a short initial adjournment is justified.

11 COO agrees with all parts of the AFN and Caring Society Response of August 19, 2009, including the affidavit of Cindy Blackstock for the Caring Society, and gratefully acknowledges that support. Participation by COO will be a significant assist to the original Complainants, given their restricted resources, and participation should increase the likelihood that the full First Nation picture is presented to the Inquiry, which is in the interests of all concerned, including Canada. COO specifically agrees with the undertaking given by Ms. Blackstock in paragraph 12 of her affidavit of August 17, with regard to COO, AFN, and Caring Society counsel working together to avoid delay and inefficiency in the proceedings. In particular, COO will not duplicate evidence in chief or in cross examination. This efficiency also makes sense because of the limited resources available to COO.

12 While COO is seeking party Complainant status, COO would be agreeable to an order that limits its involvement based on the Motion and this Reply. These limitations would be similar to those that might apply to an "interested party" or intervener under Rule 8(1) of the Tribunal Rules of Procedure. In particular, appropriate limitations in the circumstances might be the following: (1) COO to

focus on the unique aspects of First Nation child welfare service and funding in Ontario linked to the 1965 Welfare Agreement; and, (2) no duplication of evidence in chief or cross-examination.

13 With good will and cooperation among counsel, COO believes that it can be integrated into the Tribunal proceedings in an orderly and reasonable manner. In this Reply, COO has made specific suggestions to help ensure this result.

14 COO is not seeking costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 24, 2009

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