

**IN THE MATTER OF THE INQUIRY INTO PEDIATRIC FORENSIC  
PATHOLOGY IN ONTARIO**

**AND IN THE MATTER OF AN APPLICATION FOR  
STANDING AND FUNDING  
BY ABORIGINAL LEGAL SERVICES OF TORONTO  
AND NISHNAWBE-ASKI NATION**

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**WRITTEN SUBMISSIONS OF THE ALST-NAN COALITION**

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**PART I - OVERVIEW**

1. This is an application by Aboriginal Legal Services of Toronto and Nishnawbe Aski-Nation (hereinafter “ALST-NAN Coalition”), for an Order granting it standing at the Inquiry into Pediatric Forensic Pathology in Ontario (hereinafter “Inquiry”), and for an Order granting it funding should standing be granted. The application for standing and funding is made pursuant to section 5(1) of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, Rules 11, 14, 16, 19, and 20 of the Inquiry’s *Rules of Standing and Funding*, and section 14 of the Order-in-Council establishing the Inquiry.

**PART II - ISSUES**

2. Issue 1: Does the ALST-NAN Coalition meet the test for standing set out in section 11 of the Inquiry’s *Rules of Standing and Funding*?

3. Issue 2: Should the ALST-NAN Coalition be granted funding to participate in the Inquiry?

### **PART III - LAW AND ANALYSIS**

#### **Issue 1: The ALST-NAN Coalition meets the test for standing set out in section 11 of the Inquiry's *Rules of Standing and Funding***

4. Section 11 of the Inquiry's *Rules of Standing and Funding* establishes the test for standing at the Inquiry. Specifically, it provides that the discretion to grant standing is to be guided by four related considerations: "...Section 5 of the [Public Inquiries] Act, the Terms of Reference, the systemic nature of this Inquiry and the desirability of a fair and expeditious proceeding."

Reference: *Rules of Standing and Funding*, section 11

5. The ALST-NAN Coalition respectfully submits that all four non-exclusive considerations enumerated under section 11 strongly favour the granting of standing sought herein. The submissions that follow will analyze the law and facts pertaining to each of these four aspects to the test for standing.

**(a) Section 5 of the *Public Inquiries Act*: Substantial and Direct Interest**

6. Section 5(1) of the *Public Inquiries Act*, R.S.O. 1990, c. P.41, states as follows:

A commission shall accord to any person who satisfies it that the person has a substantial and direct interest in the subject-matter of its inquiry an opportunity during the inquiry to give evidence and to call and examine or to cross-examine witnesses personally or by counsel on evidence relevant to the person's interest.

Reference: *Public Inquiries Act* R.S.O. 1990 Ch. P.41, section 5(1)

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7. In *Re Ontario (Royal Commission on the Northern Environment)* the Divisional Court elaborated on the "substantial and direct interest" test pursuant to section 5(1) of the *Public Inquiries Act* as follows:

The persons entitled to full participation are only those who have a 'substantial and direct interest', not just anyone who has a mere academic interest which is neither substantial nor direct. It is not enough merely to be as interested as any other member of the public in this inquiry. (See *Re Inmates Committee of the Prison for Women, et al. and Meyer* 55 C.C.C. (2d) 308.)

There is very little guidance in the authorities as to the factors to be examined by the Court (or a Commissioner) in determining this question. It does seem as though the subject matter of the inquiry is of significance. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it... The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest... If a person has vital information to give or has made the charges that the Commission is inquiring into, then that person may be considered to have a substantial and direct interest, whereas others might not. (See *Re Public Inquiries Act and Shulman* [1967] 2 O.R. 375. It seems to us that the value of the potential interest that is being affected would have to be considered in arriving at its conclusion. Similarly, if one person is potentially affected, that might be viewed differently than if 100 or 1,000 or more persons may be affected. None of these specific items would be controlling; it is necessary to look at all of these factors as well as any others in the context of each inquiry. [emphasis added]

*Ontario (Royal Commission on the Northern Environment) (Re)*, [1983] O.J. No. 994 (Ont. Div. Ct.) (QL) at paras. 7, 8; see also *Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario (Regional Coroner)* (1989), 38 Admin. L.R. 141 (Ont. Div. Ct.) regarding the application of the “substantial and direct interest” test in the *Coroners Act* context.

8. In essence, the Court held that a party will have a substantial and direct interest in the subject matter of a public inquiry where it is “greatly affected” by potential recommendations and findings flowing from the inquiry, or where the party has “vital information to give” concerning the inquiry. The ALST-NAN coalition enjoys a “direct and substantial interest” in this Inquiry on either basis.

9. The clients, members and constituents of the ALST-NAN Coalition are “greatly affected” by all aspects of Ontario’s pediatric forensic pathology system. Aboriginal people are over-represented in the criminal justice system, over-represented as persons accused of committing homicide, and over-represented as victims of crime. Most importantly, the rate of infant and preschooler deaths within Aboriginal communities is 4 to 5 times higher than the Canadian rate. Similarly, Aboriginal infants are three times more likely to have Sudden Infant Death Syndrome than infants within the Provincial population. These grim statistics demonstrate that Aboriginal people are much more likely to encounter the pediatric forensic pathology system than Canadians generally.

References: *Affidavit of Derek Chum*, paras.6, 33  
*Affidavit of Deputy Grand Chief Alvin Fiddler*, paras. 20, 21, 25

10. Further, the ALST-NAN Coalition has “vital information” and perspectives bearing on the subject matter of this Inquiry. Given the distinct and unique nature of Aboriginal people and communities, and their *sui generis* legal position, it is essential

that Aboriginal perspectives be properly represented at the Inquiry. For example, recommendations for the reform of Ontario's pediatric forensic pathology system must take into account the unique challenges of serving remote and Northern Aboriginal communities. The ALST-NAN Coalition is ideally positioned to represent this vital perspective.

References: Affidavit of Derek Chum, paras. 32-41  
Affidavit of Deputy Grand Chief Alvin Fiddler, paras. 18, 19, 25-29

**(b) The Terms of Reference**

11. The ALST-NAN Coalition respectfully submits that the herein application for standing is consistent with the Inquiry's Terms of Reference. In addition to the submissions above, the proposed grant of standing would serve to "enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings".

Reference: *Terms of Reference*, section 4

12. The ALST-NAN Coalition submits that there is a crisis in the Canadian criminal justice system with respect to how it serves Aboriginal people. It is not surprising that this crisis has seriously undermined Aboriginal peoples' confidence in the Canadian criminal justice.

References: Affidavit of Derek Chum, para.33

Affidavit of Deputy Grand Chief Alvin Fiddler, paras. 25, 27, 28

13. The pediatric forensic pathology system cannot be isolated from this broader crisis of confidence. It is respectfully submitted that a meaningful consideration of Aboriginal perspectives in the reform of this important aspect of the criminal justice system is a necessary step to the fostering of confidence within Aboriginal communities.

**(c) The Systemic Nature of this Inquiry**

14. It is submitted that the ALST-NAN Coalition has both the broad systemic mandate and the specific expertise on how the criminal justice system serves Aboriginal people to make a distinct and important contribution to the work of the Inquiry.

15. The ALST-NAN Coalition's mandate transcends the interests of any particular institution or individual, and extends beyond the criminal justice system. ALST's mandate is to protect the rights of Aboriginal people by addressing laws, policies and practices that have a potential impact on Aboriginal people. NAN is a political territorial organization representing the interests of 49 First Nation communities throughout Ontario. NAN encompasses a land mass of 210,000 square miles (2/3 of the province), and an approximate population of 45,000.

References: Affidavit of Derek Chum, para. 4, 5  
Affidavit of Deputy Grand Chief Alvin Fiddler, paras 4, 5, 6

16. Through their various programs, and as a result of their litigation, advocacy, law reform and community development initiatives, ALST and NAN have developed considerable expertise with respect to Aboriginal peoples and the justice system, including expertise with respect to the existence of systemic issues at all levels of the criminal justice system. ALST and NAN have broad experience in interacting with the key institutions subject to review by this Inquiry, including police, the Coroner's office, Crown Attorneys, the defence bar and Legal Aid Ontario.

References: Affidavit of Derek Chum, para. 7-29  
Affidavit of Deputy Grand Chief Alvin Fiddler, paras. 10-19

**(d) A Fair and Expeditious Proceeding**

17. It is submitted that the grant of standing sought by the ALST-NAN Coalition would further the goal of ensuring a fair and expeditious proceeding.

18. The ALST-NAN Coalition is a vehicle for the mediation of diverse interests within Aboriginal communities, and their efficient and focused representation at this proceeding. It brings together the perspectives of on-reserve and off-reserve, northern and southern, urban and rural, political/territorial and service provider within the Aboriginal community of Ontario. Every effort has been made to ensure that the Inquiry receives the benefit of these diverse and important Aboriginal perspectives, while furthering the Inquiry's interest in ensuring a timely and efficient process.

19. It is further submitted that the proposed grant of standing would enhance the fairness and the perception of fairness in these proceedings. As it pertains to NAN in particular, the grant of standing would be consistent with a “nation-to-nation” approach to Aboriginal-government relations. In addition, it is anticipated that several Provincial (and perhaps municipal) government institutions and interests will be fully represented at this Inquiry. It would be “somewhat ironic” to exclude First Nations government given that Aboriginal people will be disproportionately affected by potential recommendations.

References: *Range Representative on Administrative Segregation Kingston Penitentiary v. Ontario (Regional Coroner)*, *supra* at p.14 (Q.L.)

Affidavit of Deputy Grand Chief Alvin Fiddler, paras. 25, 27, 28

**Issue 2: The ALST-NAN Coalition should be granted funding to participate in the Inquiry**

20. The ALST-NAN Coalition respectfully seeks funding to retain counsel to represent it at the Inquiry. Neither ALST nor NAN would otherwise be able to participate in the Inquiry without such funding.

21. ALST has three lawyers on staff, one of whom is the Executive Director of the agency. It has 692 open case files that require the direct involvement of a lawyer. ALST is unable to divert one of its lawyers on a full-time basis from its core services to this Inquiry. NAN does not have in-house counsel, nor does it have sufficient financial resources to retain counsel.

References: Affidavit of Derek Chum, paras. 46, 47  
Affidavit of Deputy Grand Chief Alvin Fiddler, para. 30

#### PART IV – ORDER SOUGHT

22. The ALST-NAN Coalition respectfully seeks an Order granting it standing at the Inquiry, with full rights to participate in accordance with its interest pursuant to section 5(1) of the *Public Inquiries Act*. The ALST-NAN Coalition further seeks an Order granting it funding pursuant to section 14 of the Order-in-Council establishing the Inquiry.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16<sup>th</sup> DAY OF JULY, 2007.**



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