Mississaugas of the New Credit First Nation

Submissions on Jurisdiction

Commission File: 20091016

Date: February 5, 2010

The federal government (represented in this case by the Department of Indian Affairs and Northern Development and referred to in these submissions as "Canada") is asking the Commission to refuse to deal with this complaint under section 41 of the *Canadian Human Rights Act* (the "*Act*"). We provide these submissions in response to that request. Because Canada has not provided us with the details regarding its challenge we have had to infer or presume what Canada's challenge entails based on the similar cases involving the First Nations Child and Family Caring Society and Mushkegowuk Council.

Summary

We presume or infer that the crux of Canada's first main argument is that Canada does not provide a "service" as defined in the *Act* and therefore cannot be discriminating "in the provision of services." As discussed below, this argument is factually and legally flawed because Canada is in fact engaged in the provision of education and schooling services (including special education) to First Nations children living on reserves in Canada. For example, Canada determines the funding available for (and has *de facto* control over) the education and schooling (including special education) of First Nations children living on reserves. Furthermore, Canada's own actions (including its refusal to provide adequate funding) constituted a denial of services.

We presume or infer that the crux of Canada's second main argument is that Canada does not provide schooling to non-First Nations people in Ontario, and therefore it is not appropriate to compare the "federal" services provided to our children with the "provincial" services provided to non-First Nations children in Ontario (i.e. non-First Nations children in Ontario are an inappropriate "comparison group"). Canada's position implies that our children are not entitled to the same level and quality of services as children in neighbouring Ontario communities. At a common sense and human level we find this shocking. As discussed below, Canada's argument is flawed for many reasons, the most important being that Canada's interpretation of the *Canadian Human Rights Act* would lead to patent injustice and inequality contrary to the wording and purposes of the *Act*.

Canada's challenge must also fail because the issues it raises are not truly "jurisdictional" issues for the purposes of section 41 of the Act and also because Canada cannot show that it is "plain and obvious" that there is no prima facie discrimination.

Background of the case

Canada has refused to provide the funding required to send two special needs children to school. The two boys are members of the Mississaugas of the New Credit First Nation (the "First

Nation"), which has been supplying funding for the boys to go to school but cannot continue to do so because it does not have enough funding or revenues to accommodate their educational and schooling needs.

In our opinion, Canada has discriminated against these two special needs children on the ground of "race" in relation to "education and schooling services (including special education)" when compared to "non-First Nations children with special needs living in Ontario, other Canadian provinces, and/or the three Canadian territories."

We believe that Canada has also discriminated against these two special needs children on the ground of "disability" in relation to "education and schooling services" when compared to "children living on the reserve without special needs", or in the alternative, when compared to children living elsewhere in Canada and Ontario without special needs.

Canada has constitutional legislative jurisdiction in relation to the Complaint

Canada has constitutional jurisdiction in relation to education and schooling for First Nations people living on reserves. At a minimum, this jurisdiction is concurrent or overlapping with the province's jurisdiction. This federal jurisdiction comes from sources including section 91 (24) of *The Constitution Act, 1867*,[1] which recognises the federal government's jurisdiction in relation to "Indians, and Lands reserved for the Indians."

However, we presume that Canada's jurisdictional challenge in this case is not based on this constitutional "division of powers" between federal and provincial areas of jurisdiction. That is, Canada appears not to be arguing that it does not have constitutional jurisdiction over education and schooling for First Nations people living on reserves. Indeed, Canada's jurisdictional challenge seems to be based on the wording of a statute, the *Canadian Human Rights Act*, not the *Constitution*. Nevertheless, it is worth pointing out that Canada has constitutional jurisdiction in relation to education and schooling for First Nations people living on reserves.

The Commission has statutory jurisdiction over the alleged discrimination

We presume that Canada's main argument is that the *Canadian Human Rights Act* does not grant the Commission the jurisdiction to deal with the Complaint. This is different than the "division of powers" jurisdiction discussed above. "Division of powers" is about the *federal government's* jurisdiction under the *The Constitution Act, 1867*, whereas Canada's "statutory jurisdiction" argument is about the *Commission's* jurisdiction under the *Act*.

The government is presumably claiming that its actions are not reviewable under section 5 of the *Act* because 1) Canada does not provide the "service" in question and 2) Canada does not provide any services to the "comparison group," which would be children with special needs in Ontario. The following two sections address these two points.

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[1] *The Constitution Act, 1867,* (U.K.), 30 & 31 Victoria, c. 3.

“Service” issue: Canada is engaged in the provision of the relevant “services” for the purposes of section 5 of the *Act*

We presume or infer that Canada’s first argument is that Canada does not provide a “service” and therefore cannot be discriminating “in the provision of services”, as described in section 5 of the *Act*. For the purposes of section 5 of the *Act*, the services at issue are best described as “education and schooling services (including special education).” As discussed below, the issue is whether Canada is in fact engaged (or involved) in the provision of those services.

An interpretation of section 5 (excerpted below) requires an analysis of three phrases in the *Act*: 1) “in the provision of”, 2) “services and facilities”, and 3) “customarily available to the public.” Canada presumably does not dispute that “education and schooling services (including special education)” are “services” and that they are “customarily available to the public.” Therefore, the remaining issue is whether Canada is engaged (or involved) in the provision of those services, as those words are used in section 5 of the *Act*. Section 5 of the *Act* states that:

> 5. It is a discriminatory practice <u>in the provision of goods, services</u>, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

Our position is that Canada is in fact engaged and involved in the provision of “education and schooling services (including special needs education).” Our Complaint describes a number of ways that Canada is engaged and involved in the provision of these services:

1) Canada funds, and is responsible for, the education and schooling of First Nations children living on reserve;
2) Canada’s First Nations elementary/secondary education program pays for on-reserve schools, reimbursement to provinces for First Nations children attending off-reserve provincial schools, and support services such as transportation, counselling, accommodation, and financial assistance;
3) Canada determines the amount of funding available for the education and schooling of on-reserve First Nations children;
4) Canada determines the funding available to accommodate on-reserve special needs First Nations children so that they can receive comparable education and schooling services;
5) Canada has legal and *de facto* control over the level and quality of education and schooling services provided; and
6) Canada is one of the main architects of the education system for First Nations children living on First Nations land.

The below passages from INAC's website support the claims made in our Complaint and further detail how Canada is engaged and involved in the provision of these services:

> Indian and Northern Affairs Canada (INAC) has primary responsibility for education for First Nations on reserve…[2]
>
> For First Nations (Status Indians) the Indian Act sets out the powers of the Minister of Indian Affairs and Northern Development to arrange for their education. The Department's mandate and responsibilities stem from exercising its authority and fulfilling its obligations under various statutes, treaties, agreements and government policy.[3]
>
> The [Aboriginal Elementary/Secondary Education] program pays for:
>
> - instructional services in on-reserve schools, operated by the First Nation or by the federal government
> - the reimbursement to provinces for tuition costs of students who attend provincial schools off-reserve
> - support services such as transportation, counselling, accommodation and financial assistance[4]
>
> The Government of Canada is committed to ensuring that Aboriginal peoples enjoy the same education opportunities as other Canadians.[5]
>
> The [Special Education Program] gives [First Nations children] access to quality special education programs and services that are culturally sensitive and comparable to generally accepted provincial standards in that locality.[6]

The above quotes, and the statements in our Complaint (which at this stage should be taken as true, as discussed below), show that Canada is engaged and involved in the provision of education and schooling services.

Furthermore, Canada's actions are discrimination *in the provision of services* (as those words are used in section 5 of the *Canadian Human Rights Act*) because Canada's own actions and decisions are causally related to the denial of services in this case. This was not a case where, for example, a teacher or school official discriminated against a First Nations child due to their prejudice or bigoted beliefs. Here the source of the discrimination is Canada's own actions and decisions. In these circumstances Canada is discriminating in the provision of services.

Canada's "services" argument must fail because Canada is engaged and involved in the provision of the services at issue and because Canada's own actions and decisions constituted a denial of services on prohibited grounds.

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[2] INAC, *Education Programs*, http://www.ainc-inac.gc.ca/edu/ep/index-eng.asp
[3] INAC, *Background – Education*, http://www.ainc-inac.gc.ca/edu/ep/res-eng.asp
[4] INAC, *Elementary/Secondary Education*, http://www.ainc-inac.gc.ca/edu/ep/ese-eng.asp
[5] INAC, *Education*, http://www.ainc-inac.gc.ca/edu/index-eng.asp
[6] INAC, Special Education Program, http://www.ainc-inac.gc.ca/edu/ep/sep-eng.asp

"Comparison group" issue: our children are entitled to the same services as other children in Ontario

We presume or infer that Canada's second argument is that it does not provide schooling to non-First Nations people in Ontario and therefore we cannot compare the "federal" services provided to our children with the "provincial" services provided to non-First Nations children in Ontario (i.e. non-First Nations children in Ontario are an inappropriate "comparison group"). The logical and shocking implication of Canada's argument, in our view, is that our children are not entitled to the same level and quality of services as children in neighbouring Ontario communities. This argument is presumably based on the idea that a person discriminates when they treat two groups of people differently (one worse than the other). Canada seems to be arguing that Canada only provides services to one group – First Nations people on reserve – and therefore they can't be said to be discriminating. This might seem logical from an inhumane, legalistic, and uncaring point of view, but in terms of common sense, basic decency, and Canada's claim to be a civilized society, this is shocking.

We believe we have identified the correct comparison group and that Canada's position is flawed because its position 1) is contrary to the wording and purposes of the act, 2) it fails to recognize that the federal-provincial jurisdictional/operational divide corresponds with a prohibited ground, and 3) its position violates the legal principle of the honour of the Crown.

We also make two other alternative claims that are not affected by Canada's "comparison group" challenge because they don't involve a comparison with a provincially served group. The first such claim is of discrimination based on disability when compared to on-reserve non-special needs children. The second claim is of discrimination based on race when compared to other similarly disabled children living in the three Canadian territories.

Canada's position is contrary to the words and purpose of the Act

Canada's position is that, despite the prohibition against discrimination in the *Canadian Human Rights Act*, on-reserve First Nations people receiving federal services are not entitled to the same level or quality of services as non-native people elsewhere Ontario who receive provincial services. It would appear that a potential shocking corollary of this position is that the federal government could stop providing education and other services on reserve without running afoul of the *Act*. Canada's position implies that First Nations people, a historically neglected and disadvantaged group, have no right to receive the same basic governmental services as non-native people, even though this is so obviously unequal and discriminatory. This position is shocking in terms of common sense and basic decency and is contrary to the words and purposes of the *Canadian Human Rights Act*.

Canada's position does not accord with the wording of section 5 of the *Act*, which prohibits the denial of (or adverse differential treatment in relation to) a service customarily available to the general public on a prohibited ground. Very simply, the *Act* does not state that, to find that a discriminatory practice occurred, the discriminating party must provide the service to the comparison group *in each and every cas*e (see the following section regarding the specific case of discrimination against Aboriginal people in the provision of basic government services).

Furthermore, the *Act* focuses on the *effects* of the alleged act, not the intent of the parties, and in this case the *effect* is substantive discrimination and inequality.

Canada's actions regarding the two special needs children constitute a "discriminatory practice" under section 5 of the *Act*. Education and schooling services are provided to the entire Canadian public, and therefore the services at issue are "customarily available to the general public." Non-First Nations Canadians and Ontarians are entitled to education and schooling services (including special education). The two special needs children were denied this service by Canada. The *effect* of those actions is substantive discrimination and inequality. This is a discriminatory practice in the words of the *Act*.

Canada's position is also contrary to the purpose of the *Act* and to the well-established principle that human rights legislation should be given a liberal and purposive interpretation. An overall reading of the *Canadian Human Rights Act* shows that, at the most basic level, it is meant to promote equality and prevent discrimination. Canada's position would permit serious and widespread *substantive inequality and discrimination* contrary to the purposes of the *Act* because on-reserve First Nations people could receive inferior services when compared to non-First Nations people.

The Supreme Court of Canada has held that human rights legislation, as remedial legislation, should be given a liberal and purposive interpretation.[7] Protected rights should receive a broad interpretation, while exceptions and defences should be narrowly construed.[8] Based on a liberal and purposive interpretation of the *Act* (and on common sense and basic decency), Canada should not be allowed use the legal distinction between the federal and provincial governments as an excuse to deny basic government services to First Nations people such as these two special needs children.

The federal-provincial jurisdictional/operational divide corresponds with a prohibited ground

In most cases of discrimination in the provision of services, a person or government directly provides services to one group (the "comparison group") and denies the services to another group. We submit that it is not necessary for the government to provide the services to the "comparison group" in cases of discrimination in the provision of basic governmental services to First Nations people (e.g. education, healthcare, policing, etc.). This is because, generally speaking, under the *Constitution* the federal government provides basic governmental services to First Nations people on reserves while the provincial governments provide those services to non-First Nations people living off reserves. First Nations people generally receive basic governmental services from a different body and based on a different regime *solely because of their race*. Therefore the jurisdictional/operational divide directly corresponds with a prohibited ground of discrimination.

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[7] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at paras. 27 - 32.

[8] *Ibid.*

In our Complaint the jurisdictional/operational divide directly corresponds with a prohibited ground of discrimination (namely race) because the federal government is responsible for First Nations education on reserve and the provincial government is responsible the education of non-First Nations people in the rest of Ontario. It would be different, for example, to argue that the province of Ontario must provide the same level of services as the province of Manitoba. In that example the differentiation is not on a prohibited ground.

As discussed above, if Canada were able to rely on this jurisdictional/operational divide as a defence, almost none of the services provided to First Nations people on reserves (including education and schooling services) would need to be equivalent to those provided to non-First Nations people elsewhere in Canada. Again, this outcome would be contrary to the words and purpose of the *Act* and to common sense and human decency.

Canada's position is contrary to the legal principle of the "honour of the Crown

Canada's position is contrary to the "honour of the Crown" because 1) that principle requires that the *Act* be construed liberally and in favour of the First Nations parties and 2) Canada's position is dishonourable.

The legal principle of the "honour of the Crown" requires that statutory provisions protecting the interests of Aboriginal peoples be given a generous and liberal interpretation.[9] As discussed above, Canada's position gives an overly narrow interpretation of the meaning of "discrimination" and section 5 of the *Act* when it comes to discrimination against First Nations people in the provision of basic government services.

The honour of the Crown is at stake in all of the government's dealings with Aboriginal peoples. The Supreme Court of Canada has specifically held that it "is not a mere incantation, but rather a core precept that finds its application in concrete practices."[10] Canada must deal honourably with Aboriginal peoples, which requires honestly and fairness. Canada's position in this case is highly dishonourable, dishonest, and unfair. To rely on the distinction between provinces and the federal government as an excuse to deny basic services to Aboriginal children is an affront to the honour of the Crown and the common sense of decency held by most Canadians.

Alternative claims not affected by Canada's "comparison group" challenge

The First Nation makes two other alternative claims that are not affected by Canada's "comparison group" challenge because they don't involve a comparison with a provincially-served group.

The first claim is of discrimination based on disability when compared to on-reserve non-special needs children. The two special needs children were denied education and schooling services that are customarily provided to non-special needs children on reserve. INAC, not the province, has primary responsibility for the education of First Nations children on reserve, therefore the "comparison group" challenge does not apply.

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[9] *R.. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 24; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106.
[10] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 2 S.C.R. 511, at para 16.

The second claim is of discrimination based on race when compared to other similarly disabled children living in the three Canadian territories. As stated in our Complaint, as part of Canada's constitutional federal jurisdiction and responsibility, Canada is engaged in the provision of education and schooling services (including special education) in the three Canadian territories. For example,

1. Canada has the ultimate constitutional jurisdiction over all matters in the territories;
2. Canada provides between 70 and 100 percent of the funding for social programs in the territories, including funding for education and schooling services (including special education); and
3. Canada has *de facto* control over the level and quality of education and schooling services (including special education) provided in the territories.

Therefore Canada's "comparison group" challenge does not apply to this claim.

These two claims are made in the alternative. Our primary allegation is that Canada discriminated against the two special needs First Nations children on the ground of race when compared to non-First Nations special needs children elsewhere in Ontario.

The Government must prove that it is "plain and obvious" that there is no *prima facie* discrimination

The Commission should only refuse to deal with the complaint at this preliminary screening stage if it "plain and obvious" that there is no prima facie case of discrimination.[11] In other words, the grounds for dismissal must be so clear and unambiguous at first sight that further investigation is not required.[12] At this early stage the Commission should not dismiss the complaint where disagreements exist on factual or legal issues that require further investigation. Instead, the Commission should only dismiss where the grounds under section 41(1) are abundantly clear, for example, where the complaint is filed far out of time without any justification.

Our allegations should be taken as true because no investigation has taken place yet

At this early stage the Commission should assume that the allegations we have made are true.[13] This is because the preliminary screening takes place before an investigation, the respondent's response to the allegations, the investigator's assessment of whether an inquiry is warranted, the Commission's decision, the parties' Statements of Particulars, the disclosure of documents and witness statements, and before a tribunal hearing and decision. It would be very unfair and inefficient to require the complainant to prove the facts he or she alleges at this very early stage.

[11] *Hicks v. Canada*, 2008 FC 1059, 334 F.T.R. 260 at para. 22; *Canada Post Corp. v. Barrette*, [2000] 4 F.C. 145, 254 N.R. 38 (Fed. C.A.) at para. 23.
[12] *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 (S.C.C.) at para. 35, 36 (re "plain and obvious").
[13] *Hicks v. Canada*, *supra* note 11 at para. 6.

The "service" and "comparison group" challenges are not truly jurisdictional

Canada's "service" and "comparison group" challenges are not truly jurisdictional and should not be the basis of a Commission decision to refuse to deal with this Complaint under section 41 of the *Act*. As discussed above, these two challenges centre on the definition of "discrimination" and the proper interpretation of section 5 of the *Act*. These are issues of mixed fact and law because they involve applying the facts of the case to the wording of the *Act*.

Section 41 is meant to deal with obvious cases, such a complaint that is far out of time. It frustrates the purpose of the *Act* to allow the government to litigate these issues at this early stage, thus delaying justice and sapping the complainant's resources.

Furthermore, as discussed above, Canada has not denied that it has legislative jurisdiction in relation to the education services required by the two special needs children (i.e. they do not make a division of powers challenge).

Canada essentially argues that it did not discriminate under section 5 of the *Act*. This is not an issue that is properly the subject of a section 41 jurisdictional challenge.

Alternative statutory redress

We have been advised that Canada alleges that the Commission should not deal with this Complaint because there is an alternative statutory redress available to us. However, we have not been told what statutory redress Canada is referring to and we know of no other reasonable statutory redress that is available. We believe we have exhausted all options available to us. We met with INAC officials, explained the situation to them, appealed in writing through the "exceptional circumstance" clause of our funding agreement, and asked in writing for further clarification as to why our request was not granted. Throughout this process no one from INAC ever made us aware of another means of redress.

We did not want to lay a Human Rights Complaint because we know it is a very long process. We did not have another choice. Neither the First Nation nor the parents can afford the education costs of these two children, which amounts to more than most families would make in a year. We simply want these children to go to school.

Conclusion

Canada has not refuted our allegation that these two special needs children suffered unequal and unfair treatment when compared to other non-native special needs children in Ontario. Instead, Canada denies responsibility for this alleged substantive inequality and discrimination by saying it doesn't provide the services and that Ontario children are not a proper comparison group. We deny that position. We say that Canada actually caused the substantive discrimination and inequality through its own discriminatory actions. Canada's position, if accepted, would make on-reserve First Nations people second-class citizens not entitled to the quality of basic government services provided to other Canadians. Therefore we ask that the Commission decide to deal with this important Complaint.