



Section 40/41 Report

Complaint Information

File Number(s): 20091016
Date of Complaint(s): September 28, 2009
Complainant: Mississaugas of the New Credit First Nation
Respondent(s): Indian and Northern Affairs Canada
Section(s) of the Act: 5
Ground(s): National or Ethnic Origin, Race and Disability

Issue(s) for decision under section 41(1)

The issue for the Commission to decide is whether it should refuse to deal with the complaint under section 41(1)(c) of the *Canadian Human Rights Act* (the Act).

The Commission may decide:

- a) to deal with the complaint under section 41(1) of the *Canadian Human Rights Act*, or
- b) not to deal with the complaint under section 41(1)(c) of the *Canadian Human Rights Act* because the facts as alleged in the complaint would not constitute a discriminatory practice.
- c) not to deal with the complaint under section 41(1)(c) of the *Canadian Human Rights Act* because it is not based on a prohibited ground of discrimination identified in section 3 of the Act.
- d) not to deal with the complaint under section 41(1)(d) of the *Canadian Human Rights Act* because the complaint is trivial, frivolous, vexatious or made in bad faith.

Signature


Deirdre Hilary

10 May 2010
Date

Summary of Complaint

1. The complainant, the Mississaugas of the New Credit First Nation, allege that special needs children from their community are being discriminated against on the basis of national or ethnic origin, race and disability. The complainant alleges that the refusal of Indian and Northern Affairs Canada (INAC) to provide funding and support to special needs children who have to leave the community for their educational needs constitutes denial of service.

Section 41 of the Canadian Human Rights Act

2. The issue for the Commission to decide is whether it should refuse to deal with the complaint under section 41(1)(c) of the Act.
3. Section 41(1) of the Act states:

“Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

- (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;
- (b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;
- (c) the complaint is beyond the jurisdiction of the Commission;
- (d) the complaint is trivial, frivolous, vexatious or made in bad faith; or
- (e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.”

Factors relevant to a decision under section 41(1)(c) - No Discriminatory Practice

4. The Commission’s mandate is limited to the discriminatory practices that are described in sections 5 to 14.1 of the Act. Complaints relating to practices that are not described in the Act are beyond the jurisdiction of the Commission.
5. The Act is very specific and, as such, does not extend to every situation where a person feels that he/she has been aggrieved. Although a complainant may feel that he/she has been subjected to unfair treatment, unless that treatment would constitute a discriminatory practice under the Act, the Commission does not have jurisdiction to address it.
6. With respect to this complaint, it is necessary to consider whether the allegations would constitute a discriminatory practice under section 5 of the Act, which states:
 5. It is a discriminatory practice in the provision of goods, services, 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.

7. In considering whether the allegations in the complaint would constitute the discriminatory practice(s) described in this section of the Act, the Commission considers the language of the section. The language of the Act is interpreted broadly to give effect to the quasi-constitutional rights that it protects.

Information from the parties

8. The parties were invited to provide their positions on the issues for decision. They were invited to address the factors that are relevant to the Commissioners' decision, including the factors listed above.
9. The respondent argues that the Commission should not deal with the complaint for the following reasons:
- (i) INAC does not provide a "service" as defined in section 5 the Act and therefore cannot be discriminating "in the provision of services." Canada is not engaged in the provision of education and schooling services (including special education) to First Nations children living on reserves in Canada. INAC's role is to provide funding to the Band so that the Band itself may provide services to its members and other on-reserve residents.
- (ii) Recent jurisprudence indicates that an entity which simply provides funding does not constitute a service provider for the purposes of human rights legislation. It is the role of the service provider to determine how to spend the funds they are allocated. Decisions such as *Bitoni v. British Columbia* (1999), 36 C.H.R.R. (B.C.H.R.T.) deal with the issue of whether government funders are service providers. In *Bitoni*, it was determined that the Ministry of Health was not a service provider when it provided funding for hospitals for internships but did not determine how the money was spent. Similarly, in *Martyn vs. Laidlaw Transit Ltd.* (2005), 55 C.H.R.R. D/2356, the Alberta Human Rights Tribunal determined that the Ministry of Transportation was not a transportation provider as its only role was to provide funding for municipal transportation projects. The Federal Court also decided in *McCormick v. Canada* (Minister of Health) [2005] F.C.J. No 936, Band administered nurses were considered to be within the control of the individual band, not Health Canada, as regards the hiring and paying of wages. The Court noted that the funding agreement with the bands was to facilitate First Nations in taking greater control over their communities.
- (iii) Section 5 of the Act was never intended to be a mechanism for service providers to augment federal government funding for the services they are providing, such as special education, which are designed to ameliorate disadvantage, since there are always competing claims for government funding.
10. The complainant is of the position that the Commission should deal with the complaint for the following reasons:
- (i) 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 special education) are "services" and that they are "customarily available to the public."
- (ii) Since Canada determines the amount of funding available for the education and schooling of on-reserve First Nations children, including special needs First Nations children so that they can receive comparable education and schooling services, it has control

over the level and quality of education and schooling services provided. Furthermore, Canada is one of the main architects of the education system for First Nations children living on First Nations land.

(iii) INAC's website outlines in detail how Canada is engaged and involved in the provision of these services under various statutes, treaties, agreements and government policy, including:

- 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;

(iv) The INAC website also states "The Government of Canada is committed to ensuring that Aboriginal peoples enjoy the same education opportunities as other Canadians", and "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."

Analysis

11. There are several basis for concluding that through a number of its activities, INAC provides a service which benefit First Nations. The complainant outlines a number of these activities, pursuant to s.5 of the CHRA, and many of these activities are "customarily available to the general public".

Factors relevant to a decision under section 41(1)(c) - No Prohibited Ground

12. Under the authority of the Act, the Commission investigates allegations of discrimination in employment and in the provision of services based on a number of prohibited grounds of discrimination. In order for the Commission to accept a formal complaint, the alleged discriminatory act(s) must be based on or linked to a prohibited ground of discrimination. The following prohibited grounds of discrimination are listed in section 3 of the Act: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.
13. The Act is very specific and, as such, does not extend to every situation where a person feels that he/she has been aggrieved. Although a complainant may feel that he/she has been subjected to unfair treatment, unless that treatment is related to a prohibited ground, it does not constitute discrimination under the Act.
14. A complaint that is not based on a prohibited ground of discrimination listed in the Act, or does not provide a clear link to a ground, is beyond the jurisdiction of the Commission. The prohibited grounds of discrimination are interpreted broadly in order to give effect to the quasi-constitutional rights protected by the Act.
15. In considering whether a complaint is based on or linked to one or more prohibited grounds of discrimination, the Commission does not consider whether or not discrimination was intended. Instead, the Commission considers the following factors:
 - (a) Could the practice or policy at issue in the complaint reasonably be considered discriminatory on its face?
 - (b) Could the practice or policy at issue in the complaint reasonably be considered to have an adverse effect?

Information from the parties

16. The parties were invited to provide their positions on the issues for decision. They were invited to address the factors that are relevant to the Commissioners' decision, including the factors listed above.
17. The respondent argues that the Commission should not deal with the complaint for the following reasons:

(i) INAC's role in funding education respects that education services are a provincial responsibility pursuant to the division of powers and section 93 of the Constitution Act of 1867. INAC's funding role is limited to providing funding to First Nation Band councils or First Nation education authorities to support the education needs of those living on reserves. INAC provides funding under specific agreements for funding education off reserve, if there is no school in the First Nation Community and students must attend provincial schools off-reserve.

(ii) There is nothing in the complaint that suggests a basis for alleging discrimination on the basis of national or ethnic origin or race. Special education in Ontario is provided to First Nations based on an allocation methodology agreed to by the Ontario Joint Working Group. INAC provides funding to First Nations to enable them to provide primary and secondary school education programs to individuals ordinarily resident on reserve and to no other group. There is no comparator group to claim differential treatment for the education of students who are ordinarily resident off reserve.

(iii) While differential treatment as between on reserve and off reserve members of First Nations may be significant under s. 15 of the Charter, residence does not engage the grounds of race or national or ethnic origin under human rights legislation.

18. The complainant maintains that the Commission should deal with the complaint for the following reasons:

(i) 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*, which recognises the federal government's jurisdiction in relation to "Indians, and Lands reserved for the Indians."

(ii) 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."

(iii) 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.

Analysis

19. The complainant alleges that First Nations children with special needs are discriminated against on the grounds of race and disability because the respondent does not support them in attending school off of their reserve. This practice or policy could reasonably be considered discriminatory on its face, and can reasonably be considered to have an adverse effect.

20. The federal government legislative authority over "Indians and Lands Reserved for Indians" pursuant to s.91(24) of the *Constitution Act* has never been exhaustively defined by the Courts. What is known through the case law is that persons with Indian status under the *Indian Act* living on reserve lands are not the only Aboriginal people subject to this federal jurisdiction (*Re Eskimos* [1939] S.C.R. 10). INAC's role and responsibilities in funding education in the context of the allegations raised in the complaint are unclear.
21. In *Leslie Hicks v. Attorney General of Canada* (2008 FC 1059), the Federal Court held that decisions under paragraph 41(1)(c) of the CHRA attract a higher level of judicial scrutiny. The Court said that at this early screening stage, the Commission should only decide not to deal with a complaint if it is "plain and obvious" that there is not a *prima facie* case of discrimination. This is the test that guides analysis and decision-making at this stage of the Commission process

Factors relevant to a decision under section 41(1)(d)

22. The Commission may refer to the following factors and other relevant factors in considering whether to deal or not deal with the complaint under section 41(1)(d) of the Act.
23. In considering whether the complaint is trivial within the meaning of section 41(1)(d):
 - a) What is the nature of the dispute between the parties? Is it a purely private dispute or are there public interest issues raised in the complaint? Are there allegations of systemic discrimination?
24. Does the complaint raise serious or relatively trifling issues? How serious was the adverse impact of the alleged discriminatory practice(s) on the complainant?
25. In considering whether the complaint is frivolous within the meaning of section 41(1)(d):
 - a) Does the complaint have merit or is it plain and obvious that the complainant cannot succeed?
 - b) Can the complaint lead to any practical result? Do the alleged acts or omissions in the complaint constitute discriminatory practices under the Act?
 - c) Are there remedies available under the Act for the alleged acts or omissions that are the subject of the complaint? Could the adjudication of the complaint advance the purposes of the Act?

Information from the parties

26. The parties were invited to provide their positions on the issues for decision. They were invited to address the factors that are relevant to the Commissioners' decision, including the factors listed above.
27. The respondent states that the real provider of education services in this case is the Council itself. Any differential treatment is in part caused by the choices made by the complainant Council in its allocation of special education funding.
28. The complainant states that it is not plain and obvious that there is no *prima facie* case of discrimination, and only investigation will determine the validity of the complainant's case. Further, the complainant argues that human rights legislation, and statutory provisions protecting the interests of Aboriginal peoples should be given a generous and liberal interpretation.

Analysis

29. The complaint raises public interest issues in that the allegations address the education of First Nations children with special needs. The complainant has established that it has reasonable grounds for believing that the respondent is carrying out a practice that discriminates in the provision of services and that this practice is linked to one or more of the 11 grounds of the *Act*. Whether or not a *prima facie* case exists cannot be determined at this stage.
30. The Commission can decide either:
- a) to deal with the complaint under section 41(1) of the *Canadian Human Rights Act*, or
 - b) not to deal with the complaint under section 41(1)(c) of the *Canadian Human Rights Act* because the facts as alleged in the complaint would not constitute a discriminatory practice.
 - c) not to deal with the complaint under section 41(1)(c) of the *Canadian Human Rights Act* because it is not based on a prohibited ground of discrimination identified in section 3 of the *Act*.
 - d) not to deal with the complaint under section 41(1)(d) of the *Canadian Human Rights Act* because the complaint is trivial, frivolous, vexatious or made in bad faith.