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Our File:
Notre dossier: 4-588311

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June 4, 2010

VIA E-MAIL

Mr. John Chamberlin
Manager, Investigations
Canadian Human Rights Commission
344 Slater Street
Ottawa, ON K1A 1E1

Dear Sir:

Re: Mississaugas of the New Credit First Nation v. INAC
Court File No.: CHRC 2009 1016

Please accept this letter as the submissions of the respondent, Department of Indian and Northern Affairs Canada (INAC), in response to the analysis contained in the "s.40/41 Report" dated May 10, 2010. The assessor's analysis, while listing the respondent's submissions, does not critically analyse or consider their import when concluding that the CHRC should deal with the complaint and therefore the respondent reiterates its position that pursuant to ss.41(1)(c) and (d) of the *Canadian Human Rights Act*, (the *Act*) the CHRC should refuse to deal with this complaint.

Summary of the Respondent's Position

For the reasons that follow it is the position of the respondent that this complaint is beyond the jurisdiction of the CHRC and/or falls within the scope of section 41(1)(d).

If the CHRC does decide to deal with the complaint, INAC submits that this is an appropriate case for the CHRC to request the consent of the alleged victims (or their guardians) under section 40(2) of the *Act*.

The Complaint

This complaint is brought by the Chief and Council of the Mississaugas of the New Credit First Nation. In 2008/2009, they received from INAC, funds in the amount of $171,123 to provide for high cost special education. The First Nation used $125,143 of these funds to hire a special education teacher and four teaching assistants to address the needs of 49 children in the elementary school on the reserve. The balance, $45,980, was targeted to address the needs of their students in the secondary school system off reserve. In September, 2009, they sought additional funding from INAC in the amount of $175, 432 (see p.1 CHRC complaint dated

Sept.25, 2009) to cover the costs related to the schooling of two special needs children who could not be accommodated in the on reserve elementary school. They received additional funding from INAC in the amount of $154,059.

The complainants allege that the additional funding provided by INAC does not entirely cover the costs of the special education needs of these children. The complainants have characterized the funding provided by INAC as constituting systemic discrimination on the basis of race and disability, contrary to section 5 of the *Act*.

As a preliminary matter, please note that INAC reserves the right to make additional submissions pursuant to s.41 of the *Act*, in the event the complaint is further clarified as to scope or otherwise. The submissions below only address the present allegations as they are articulated in the Summary of Complaint, dated September 25, 2009.

A. JURISDICTIONAL ARGUMENT

Pursuant to subsections 41(1)(c) and (d) of the *Act* the CHRC should refuse to deal with this complaint on the basis that the complaint is beyond the jurisdiction of the CHRC and/or otherwise falls within the scope of paragraph 41(1)(d):

1) INAC does not provide education services for children resident on reserve. INAC's role is limited to providing funding to the Band so that the Band itself may provide services to its members and other residents on reserve.

2) The allegations do not concern differential treatment on the grounds of national or ethic origin, race or disability under the *Act*. The complainants instead assert that federal funding for special education is not sufficient to pay the provincial fees for provision of high-cost special education off reserve for two individuals who live on the reserve. At the same time, the Council acknowledges that it has spent approximately 73% of its special education funding on a special education teacher and four education assistants for 49 students on reserve. This complaint is essentially about the cost imposed by the province for off reserve education onto on reserve students and the choices made by the Council in allocating their block of special-education funding. The complaint does not involve a ground of discrimination under the *Act*.

3) The real provider of education services in this case is the Council itself. The differential treatment here is in part caused by the choices made by the complainant Council in allocating the block of special education funding that it receives from the federal government. INAC submits that a complaint made by an entity which is in part responsible for the alleged differential treatment falls within the scope of section 41(1)(d).

1) Provision of funding does not constitute a service under s.5 of the *CHRA*

Section 5 of the *Act* provides that:

> 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.

In this case the complaint concerns the provision of funds by INAC to the Chief and Council of the Mississaugas of the New Credit First Nation to provide education on reserve. In this case the complainants decided to use $45,980 of the $171,123 in funds designated for Special Education to address the needs of students in the school system off reserve. How this money is allocated is determined by the recipient of the funds, the Council.

INAC submits that section 5 of the *CHRA* was never intended to be – and cannot be reasonably interpreted as providing – 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. There are always competing claims for government funding, and one of the unfortunate tasks of government – including the Council – is to allocate these scarce resources. Just as a school board presumably cannot successfully pursue a human rights complaint against a provincial government when funding for special education is thought to be insufficient, so too can the complainants here not avail themselves of section 5.

i) Jurisprudence – INAC funding is not a "Service customarily available to the public"

The assessor's conclusion at paragraph 11 at her report that INAC provides services customarily available to the public ignores, without explanation or justification, all of the recent jurisprudence which has determined that an entity which simply provides funding is not a service provider for the purpose of human rights legislation. Applying this case law to the facts of this complaint makes it clear that INAC is not a service provider as required under the *Act,* leaving the Commission without jurisdiction to deal with this complaint.

In ***Bitonti v. British Columbia (1999)****, 36 C.H.R.R. D/263 (B.C.C.H.R),* the British Columbia Human Rights Tribunal (BCHRT) dealt with the issue of whether the provincial Ministry of Health was a service provider for the purpose of the *British Columbia Human Rights Act.* While finding that the Ministry provided funding to hospitals for internships, the Council noted that because the Ministry had no role in the selection of interns or the content of their training there was no service relationship between the Ministry and the complainants. In fact the University of British Columbia controlled the resources related to faculty involved in post-graduate training, and its associate dean was responsible for the distribution of those funds to the various programs. This is similar to the role played by the Council in this case. Therefore the provision of funds did not result in the Ministry being characterized as a service provider within the meaning of the *Act.*

In ***Martyn v. Laidlaw Transit Ltd*** *(2005), 55 C.H.R.R. D/2356 (Alta H.R.P.),*the Alberta Human Rights Panel rejected a complaint alleging lack of availability of accessible taxis for the disabled. The Ministry of Transportation was one of the named respondents. The Panel found that the Ministry was not a 'service provider', as its only role was to provide funding for municipal transportation projects. The Ministry had no direct role in the provision of transportation services within municipalities. The establishment of priorities, initiatives of projects, and supervision over municipal public transportation systems and taxi services, was all within the sole responsibility of each municipality, and without any involvement by the Province.

In ***McCormick v. Canada (Minister of Health)*** *[2005] F.C.J. No. 936,* – an "employment" case but nonetheless analogous – the Federal Court dismissed an application for judicial review of a decision of the Canadian Human Rights Commission which dismissed a complaint brought against Health Canada. The complaint alleged Health Canada discriminated against certain Band-administered nurses in their employment contrary to section **11(1)** of the CHRA. The Commission dismissed the complaint, and the Federal Court upheld the Commission's decision. In dismissing the application, the Court expressed serious doubt that the nurses were employed by Health Canada. The Court noted that the purpose of the funding agreement with the Bands was to facilitate First Nations in taking greater control over their communities. The delivery of community health services, hiring of nurses, and payment of wages was within the control of the individual Band, not Health Canada.

Overall, the comments of Justice Noel, on behalf of the Federal Court of Appeal, in the recent case of ***Canada v. Watkin*** are instructive on this point:

> Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" ... and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one.[1]

ii) Federal vs. Provincial Funding for Education

At paragraph 19 of the report, the assessor concludes that the special needs children schooled off reserve are subject to discrimination because the respondent "does not support them in attending school off reserve'. Clearly the assessor is concluding because the federal government did not provide funding to cover the entire cost of provincially provided off reserve education, this could constitute discrimination. This conclusion again requires ignoring the jurisprudence that has stated funding does not constitute a service.

INAC does not provide a 'service' within the meaning of the CHRA. By virtue of section 93 of the *Constitution Act of 1867*,[2] its role with respect to the education of children of first nations is limited to the funding for educational programs and is only incidental to the education services provided for by the First Nation Band Councils and/or the province.

In her Report, the Assessor states that "INAC's role and responsibilities in funding education in the context of the allegations raised in the complaint are unclear."[3]

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[1] 2008 FCA 170

[2] *Constitution Act, 1867* (U.K.) 30 & 31 Vict. C.3, reprinted in RSC 1985, App II, no.5

[3] Para. 20 of the s.40/41 Report dated May 10, 2010; Should after reading these submissions, the Commission remains unclear and requires further information regarding INAC's role and responsibilities in funding education, we ask that the Commission provide INAC an opportunity to provide further information regarding same.

INAC Role in Funding

For over a century the federal government has provided funding for the elementary/secondary education of students living on reserve. The funding in question is provided to the Council for education pursuant to the federal spending power implicit in the *Constitution Act of 1867.*

Currently the federal role in education on reserves is limited to providing funding to First Nation Band councils or First Nation education authorities to support the educational needs of those living on reserves. First Nations are also able to use the provided funding for provincial tuition when students ordinarily resident on reserve attend provincial schools as in this case.

INAC funds band councils and First Nations education authorities for the education of children normally resident on reserve in Kindergarten to Grade 12 who attend schools on reserve or who attend provincial schools off reserve.

Where there is no school in the First Nation community the children attend a local provincial school. The First Nation enters into a tuition agreement with the local school board, outlining the services to be provided to the children.

INAC's funding for the elementary/secondary program pays for:

- instructional services in band operated schools;
- the reimbursement to provinces for tuition costs of students who attend provincial schools off reserve; and
- support services such as transportation, counselling, accommodation and financial assistance.

INAC's funding also supports education through a variety of other programs.

Special education in Ontario is provided to First Nations based on an allocation methodology agreed to by the Ontario Joint Working Group. An increase in demand for service resulted in a review of the regional allocation methodology. This review was done in consultation with First Nations. A revised formula and First Nations Special Education Guidelines were developed and approved by Chiefs Resolution in November 2006. The revised formula collapses both band-operated and provincial high cost funding into a one line item, giving the First Nations the opportunity to determine priorities and the ability to negotiate services with provincial boards of education within their approved level of funding. The allocations to First Nations, which are based on the approved methodology, are final and therefore First Nations must work within their allocations.

Allocated according to a formula, all funds under Special Education authorities are exhausted annually. For fiscal year 2008-2009, INAC provided $171,123 for special education to Mississaugas of the New Credit First Nation. Per the Exceptional Circumstances clause 5.0 of the funding agreement, INAC has provided an additional $154,059 in response to the Mississaugas of the New Credit First Nation's request to help alleviate funding pressure. The additional funding was approved under the capital, tuition and student transportation service authorities.

2) No prohibited ground

There is nothing in the complaint that suggests a basis for alleging discrimination on the basis of national or ethnic origin or race. 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. If the suggestion made by the complaint is that these individuals would have received funding from INAC if they were living off reserve, then there is no "comparator group' that could be used as a basis for claiming differential treatment because INAC does not provide funding for the education of students who are ordinarily resident off reserve. This aspect of the complaint could only be sustained if the federal and provincial governments are treated as a single actor, which would ignore the fact that the federal government has no constitutional authority or control over the provision or cost of educational services by the province.

Further, differential treatment as between on reserve and off reserve members of First Nations does not engage the grounds of race or national or ethnic origin, as there is no difference between the race or national or ethnic origin of an on reserve First Nations member and an off reserve First Nations member. While the Supreme Court of Canada has found "Aboriginality-residence" (in the sense of off reserve band member status) to be an analogous ground under section 15 of the *Charter*, it is not an enumerated ground under the *CHRA.*

These facts do not give rise to differential treatment based on any recognized ground under the *Act.*

3) Complaint by a service provider in relation to the provision of its own service falls within section 41(1)(d)

At paragraph 29 of her report the assessor concludes that 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*" (emphasis added). This conclusion ignores that the real provider of education services in this case is the Council itself. INAC merely provides the funding.

The complaint indicates that approximately 73% of the funding given by INAC has been allocated to a special education teacher and four education assistants at its on reserve school. Therefore, any differential treatment is in part caused by the choices made by the complainant Council in allocating the block of special education funding that it receives from the federal government. INAC submits that a complaint made by an entity which is in part responsible for the alleged differential treatment falls within the scope of section 41(1)(d) (see discussion in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, where the Court does not foreclose such a finding being made in similar circumstances and *Canada Safeway Ltd. v. Saskatchewan Human Rights Commission* (1997), 150 D.L.R. (4th) 207 (Sask. C.A.)).

B. SECTION 40(2)

If the CHRC does decide to deal with the complaint, INAC submits that this is an appropriate case for the CHRC to request the consent of the alleged victims (or their guardians) under

section 40(2) of the *Act*. The complaint has been filed by the Mississaugas of New Credit First Nation, which is not the victim of the alleged discriminatory practice. Instead, the victims are two unidentified (but nonetheless discrete and identifiable) individuals who allegedly are unable to obtain education services in part because of decision of the Council itself to allocate its special education funding from the federal government to other purposes. As in the *Canada Safeway Ltd.* case, above, it can be questioned whether the Council is the appropriate complainant in these circumstances in the absence of informed consent from the affected individuals.

C. CONCLUSION

In conclusion, INAC submits that the Commission does not have jurisdiction to consider the complaint. At essence this complaint is about the amount charged by the province for special education which given how the band has allocated its federal monies for education in 2008/2009, resulted in a shortfall of $81,260 for the provincial fees. INAC as the funding provider did not control how that funding was to be allocated or spent, that decision was that of the band and it is the province which provides the service in question. INAC does not provide a service under s.5 of the *Act*. The band has failed to demonstrate any distinction based on an enumerated ground of discrimination under the *Act*.

Yours truly,

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