Mississaugas of the New Credit First Nation

Submissions Responding to Section 40/41 Report

Commission File: 20091016

Date: June 7, 2010

Background and introduction

The respondent (the federal government of Canada, represented by the Department of Indian Affairs and Northern Development, "INAC") has refused to fully fund the education of two special needs First Nations children who reside on the Mississaugas of the New Credit First Nation reserve in southern Ontario. These two special needs children have been denied access to education – a benefit and right enjoyed by non-First Nations children in neighbouring towns and cities. Although the Mississaugas of the New Credit First Nation has been paying for the childrens' education, it does not have the funding or revenues to continue to do so, or to fund the education of other special needs children on the reserve who will require education shortly. Ultimately, this complaint is about equality of educational services for First Nations children in Canada.

The respondent has asked the Commission to refuse to deal with this complaint based on section 41 of the *Canadian Human Rights Act* (the "*Act*"). The respondent claims first, that it does not provide a service, and second, that there is no comparator group for a claim of differential treatment. It argues that the claim should be dismissed because of these two alleged deficiencies. However, in the *Section 40/41 Report* (dated May 10, 2010), Investigator Deirdre Hilary concludes that the respondent does in fact provide a service, that the complained of practice could reasonably be considered discriminatory, and that there are reasonable grounds for believing that the respondent is carrying out a practice that discriminates in the provision of services and that is linked to a prohibited ground. On that basis, the section 41 objection is not valid. Our submissions respond to and support Ms. Hilary's *Section 40/41 Report*.

Summary of these submissions

The respondent argues that it does not provide a "service" and therefore cannot be discriminating "in the provision of … services" as those words are used in section 5 of the *Act*. In support of this argument, the respondent claims that it simply provides funding for First Nations education. This argument is both legally and factually flawed. In this case, the respondent's own actions (including its refusal to provide adequate funding) constituted a denial of services and therefore was discrimination "in the provision of … services". Furthermore, the respondent is more than a passive funder. It is engaged in the provision of education and schooling services (including special education) to First Nations children living on reserves by deciding how much funding is available, providing oversight, directly controlling certain aspects of First Nations education, setting the parameters and requirements of the First Nations education program, and ultimately controlling the level and quality of services and access to the program. Therefore, by not

providing for the educational requirements of these two special needs children, the respondent is discriminating in the provision of services.

The respondent also argues that there is no "comparator group." In particular, the respondent argues that the comparator group of "non-First Nations children in Ontario" is not appropriate because the respondent does not provide educational services to "non-First Nations children in Ontario." Ultimately, the respondents position would mean 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 position shocking. At a legal level, we think this position is also contrary to the wording and intent of the *Canadian Human Rights Act* as it would permit substantive inequality and discrimination.

The "service" issue and "comparator" issue will now be examined in more detail.

"Service" issue: The respondent is engaged in the provision of the relevant "services" for the purposes of section 5 of the *Act*

The respondent argues that it does not provide a "service" as defined in the *Act* and therefore has not discriminated "in the provision of services" or committed a "discriminatory practice." However, education and schooling services (including special education) are clearly "services" for the purposes of the *Act* and those services are customarily available to the public. Therefore the issue is whether the respondent 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
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> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
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> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

In her report, Ms. Hilary concluded that:

> There are several basis for concluding that through a number of its activities, <u>INAC provides a service which benefit First Nations</u>. 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".[1]

We support that conclusion and add the following remarks.

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[1] *Section 40/41 Report*, May 10, 2010, para. 11.

The respondent's own actions are the cause of the discriminatory provision of services

The respondent's actions are discrimination *in the provision of services* (as those words are used in section 5 of the *Canadian Human Rights Act*) in part because the respondent's own actions and decisions constituted a denial of services in this case. The substantive inequality and discrimination in this case arises from the respondent's refusal to provide funding for these two special needs children and from the gaps in the federal program for First Nations education. This was not a case where, for example, a teacher or school official discriminated against a First Nations child due to their prejudiced or bigoted beliefs. Here the source of the discrimination is the respondent's own actions and decisions – not the discriminatory actions of a certain teacher or school employee. In these circumstances it is the respondent itself that is discriminating in the provision of services.

The respondent is engaged in the provision of the relevant services

The respondent is more than a passive funder in regards to First Nations education (including special education).

The following passages from the respondent's own website show some of the ways it is engaged and involved in the provision of the services in question:

> 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]

[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

> 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]

Our Complaint also describes a number of ways that the respondent 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 [which is more than simply providing the required funding];
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 above quotations from the respondent's website, the facts set out in our Complaint (which at this stage should be taken as true, as discussed below), and the causal connection between the respondent's actions/decisions and the substantive discrimination at issue, all show that the respondent is engaged and involved in the provision of education and schooling services (including special education) for the purpose of this Complaint.

The legal cases cited by the respondent do not support its position

The respondent claims that "recent jurisprudence indicates that an entity which simply provides funding does not constitute a service provider for the purposes of human rights legislation."[7] As discussed above, the respondent is far more than an "entity which simply provides funding."

Furthermore, the cases cited by the respondents do not in fact support its position. The cases are not applicable and should not be relied on because, generally speaking, they concern the meaning of "services" or are cases with facts that are fundamentally different than those found in this complaint.

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[6] INAC, Special Education Program, http://www.ainc-inac.gc.ca/edu/ep/sep-eng.asp
[7] *Section 40/41 Report*, May 10, 2010, para. 9 (ii).

The respondent first cites *Bitonti v. British Columbia (Ministry of Health)*.[8] In that case the complainants, who were foreign medical school graduates, alleged that they were the subjects of discrimination because they routinely had extreme difficulty in obtaining intern positions when compared to domestically trained students.[9] The federal Ministry of Health was named as one of the many respondents because it ultimately funded the internships.

Although the B.C. Tribunal held that the Ministry was not a service provider, the facts in *Bitonti* are fundamentally different than the facts in our Complaint. In *Bitonti* the problem was "not lack of funding, but *allocation of funding*."[10] In *Bitonti* the discrimination was the result of low-level managerial decisions (i.e. the use or allocation of funding) and was unrelated to the amount of funding given by the federal ministry. In our case the discrimination is the direct result of the respondent's refusal to provide sufficient funding and the gaps in its own education program.

Furthermore, in *Bitonti*, the relevant federal ministry was *not* involved in the allocation of funding – it did not select interns or stipulate how interns were to be chosen.[11] However, the respondent *is directly* involved in the allocation and approval of education funding for First Nations people, as described above.

In fact, the complaint against the Ministry of Health in *Bitonti* was so weak that the complainant did not explicitly identify the service at issue or even respond to the Ministry's submission that it did not provide a service.[12] It would be inappropriate to rely on a case with such different facts, particularly one in which the complainants did not actually argue their case.

The respondent also cites *Martyn v. Laidlaw Transit Ltd.*.[13] That case also concerns a different set of facts because the services at issue – taxis – are not publicly funded. The complainant alleged, among other things, that Alberta Transportation discriminated against her by failing to ensure an adequate number of accessible taxis in Edmonton.[14] The complaint against Alberta Transportation was dismissed because the provincial government did not fund taxi services and did not regulate the taxi industry.[15] It only funded public transit systems, not private systems like taxis.[16] Our Complaint is fundamentally different because it concerns publicly funded education services.

The last case cited by the respondent is *McCormick v. Canada (Minister of Health)*.[17] That case is not relevant because it is a pay equity case, not a "provision of services" case, and is therefore subject to different legal rules. The case concerned differential pay between female nurses working for Aboriginal Bands (who were ultimately paid by Health Canada) and male Public

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[8] *Bitonti v. British Columbia (Ministry of Health)* (1999), 36 C.H.R.R. D/263, 2000 C.L.L.C. 230-011 (B.C.H.R.T.) [*Bitonti*].
[9] *Ibid.* at paras. 1,2.
[10] *Ibid.* at para. 310 (italics in original).
[11] *Ibid.* at para. 314.
[12] *Ibid*. at para. 312.
[13] *Martyn v. Laidlaw Transit Ltd.*(2005), 55 C.H.R.R. D/235 (A.B.H.R.C.C.) [*Martyn*].
[14] *Ibid*. at para. 9.
[15] *Ibid*. at paras. 357, 359.
[16] *Ibid.* at 242.
[17] *McCormick v. Canada (Minister of Health)*, 2005 FC 754 [*McCormick*].

Service workers.[18] The case was dismissed on the ground that the employees did not work in the same establishment, a factor in pay equity cases that has no bearing on this complaint.[19]

In summary, the respondent's "service" argument must fail because 1) the respondent is in fact engaged in and involved in the provision of the services at issue, 2) its own actions and decisions constituted a denial of services on prohibited grounds, and 3) the cases cited do not actually support its position.

"Comparator group" issue

The respondent argues that there is no "comparator group."

In her report, Ms. Hilary did not accept this argument, and instead concluded as follows:

> 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]

We support this conclusion and add the following comments regarding the correct choice of comparator group.

Our children are entitled to the same services as other children in Ontario

The respondent argues that non-First Nations children in Ontario are not an appropriate comparator group because the respondent does not provide educational services to that group. This argument is rooted in Canada's federal/provincial division of powers, with the federal government having special responsibility for First Nations people. However, the respondent's position implies that our children are not entitled to the same level and quality of services as children in neighbouring Ontario communities. The respondent's basic position may seem strictly logical from a myopic, legalistic, inhumane, and uncaring point of view, but in terms of common sense, basic decency, and Canada's claim to be a fair society, it is shocking. The respondent's position is also flawed because 1) it is contrary to the wording and purposes of the Act, 2) it fails to recognize that the division between federal and provincial educational spheres falls on a prohibited ground (i.e. race), and 3) its position violates the legal principle of the honour of the Crown.

Words and purpose of the Act

The respondent'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 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

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[18] *Ibid*. at para. 6.
[19] *Ibid*. at para. 32.
[20] *Section 40/41 Report*, May 10, 2010, para. 19.

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*.

The respondent's legal position is also contrary to the purpose of the *Canadian Human Rights Act* and to the principle that the *Act*, as remedial legislation, should be liberally interpreted. The *Act* is meant to promote equality and prevent discrimination. As "remedial legislation," the *Act* should be given a liberal and purposive interpretation, the protected rights should receive a broad interpretation, and the exceptions and defences should be narrowly construed.[21] The respondent's position implies that First Nations people living on reserves, a historically neglected and disadvantaged group, have no right to receive the same basic governmental services as non-First Nations people in neighbouring non-reserve areas, simply because the federal government provides the services to one group and the provincial governments provide the services to another group. This position would mean that on-reserve First Nations people could receive inferior services when compared to non-First Nations people without running afoul of the *Canadian Human Rights Act*. The respondent's position would permit serious and widespread *substantive inequality and discrimination* and is therefore contrary to the purposes of the *Act* and to common sense and basic decency.

The division between federal and provincial educational spheres falls on a prohibited ground – Indian vs. non-Indian

Non-First Nations children living in Ontario are a valid comparator group even though the federal government does not provide services to them. This is in part because the division between the federal and provincial educational spheres (i.e. jurisdiction, administration, and management) falls on a prohibited ground in that the Federal Government funds and oversees the education of on-reserve First Nations children while Ontario funds and oversees the education of off-reserve non-First Nations children. The respondent therefore can use this jurisdictional/operational division as an excuse for providing substantively unequal services.

This is not a case, for example, where federal government employees are seeking the same wages as provincial government employees. In such an example the differential treatment is not based on a prohibited ground. Similarly, this is not a case where Manitobans are seeking the same quality of educational services as Ontarians – again, any differential treatment here would not be based on a prohibited ground. Instead, in our case, Ontario funds and oversees the education of off-reserve non-First Nations children. The Federal Government funds and oversees the education of on-reserve First Nations children. Unlike in the examples above, the jurisdictional/operational divide directly falls on a prohibited ground of discrimination, that is, race.

In fact, this jurisdictional/operational divide is an issue with the provision of many other 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

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[21] *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.

provide those services to non-First Nations people. First Nations people generally receive basic governmental services from a different body and based on a different regime *largely because of their race*.

As discussed above, if the respondent 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.

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

The respondent's position is contrary to the "honour of the Crown," a legal rule that states that the government must deal with Aboriginal peoples honourably and that statutes regarding Aboriginal people must be liberally interpreted.

First, as discussed above, the respondent's position gives an overly narrow interpretation of section 5 of the *Act*. This is contrary to the principle that statutory provisions protecting the interests of Aboriginal peoples be given a generous and liberal interpretation.[22]

Second, the respondent's position is simply dishonourable, dishonest and unfair. 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."[23] To rely on the distinction between provinces and the federal government as an excuse to deny basic services to First Nations children with special needs – services which their non-First Nations neighbours receive – is an affront to the honour of the Crown and the sense of decency held by most Canadians.

Multiple appropriate comparator groups

There are many valid comparator groups in this claim, including the following examples:

- The two special needs children have been directly discriminated against on the basis of "*race*" when compared to non-First Nations children with special needs living in Ontario, other Canadian provinces, and/or the three Canadian territories;
- Alternatively, the practice of treating on-reserve and off-reserve children differently is adverse effect discrimination on the basis of "*race*" as it is mainly First Nations children who are negatively impacted; and
- The two special needs children have been directly discriminated against on the basis of "*disability*" when compared to children living on the reserve without special needs and when compared to children living elsewhere in Canada and Ontario without special needs.

[22] *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.
[23] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 2 S.C.R. 511, at para 16.

In *McIvor v. Canada*, the British Columbia Court of Appeal held that there can be multiple appropriate comparator groups.[24] It also held that it is only necessary to show that at least one of those groups received better treatment.[25] That case was about equality under the *Canadian Charter of Rights and Freedoms*, but the same logic, discussed in the following excerpted paragraph, applies to discrimination under human rights legislation:

> The right to equality is not a right to be treated as well as one particular comparator group. Rather, it is, *prima facie*, a right to be treated as well as the members of all appropriate comparator groups. It is, therefore, no defence to a s. 15 claim that some particular comparator group is treated no better than the group to which the claimant belongs. On the other hand, all that the claimant need show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs.[26]

In our case, there are multiple appropriate comparator groups. However, our primary allegation is that the respondent 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. As outlined above, the respondent's challenge to that comparator group is legally flawed and dishonourable. Furthermore, the respondent has not even addressed all of the other potential comparator groups identified in the Complaint.

For the above reasons, the respondent's "comparator group" challenge must fail.

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.[27] In other words, the grounds for dismissal must be so clear and unambiguous at first sight that further investigation is not required.[28] At this early stage the Commission should not dismiss a complaint where disagreements exist on factual or legal issues that require further investigation.

Our allegations should be taken as true

At this early stage the Commission should assume that the allegations we have made are true for the purposes of the section 41 challenge.[29] This is because the preliminary screening takes place before the following steps are taken: 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

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[24] *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2009 BCCA 153, leave to appeal ref'd [2009] S.C.C.A. No. 234, at para. 76 ["McIvor"]; see also *Plesner v. British Columbia (Hydro and Power Authority)*, 2009 BCCA 188 at para. 119-121.
[25] *McIvor, ibid.* at para. 76.
[26] *McIvor, ibid.* at para. 76.
[27] *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.
[28] *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").
[29] *Hicks v. Canada*, *supra* note 27 at para. 6.

statements, and before a tribunal hearing and decision. It would be unfair and inefficient to require the complainant to prove the facts he or she alleges at this early stage.

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

The respondent's "service" and "comparator 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 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 as a complaint that is far out of time. Instead, the respondent essentially argues that it did not discriminate. 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.

The Commission has twice rejected the same "service" and "comparator" challenges from the federal government

Finally, the federal government raised very similar "service" and "comparator group" challenges in the federal human rights cases involving the Mushkegowuk First Nations (regarding the discriminatory provision of policing services to First Nations people) and the First Nations Child and Family Caring Society (regarding the discriminatory provision of child welfare services to First Nations people).[30] The investigator and Commission rejected the federal government's "service" and "comparator group" challenges in both of those cases.[31] They should be rejected again here.

Conclusion

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

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[30] Decision of the Commission in *FNCFCS et al. v. INAC* (20061060) dated October 14, 2008; Assessment report in *FNCFCS et al. v. INAC* (20061060) dated June 26, 2008; Decisions of the Commission in *Mushkegowuk First Nations et al. v. INAC et al.* (20070826, 20070993) dated September 23, 2009; Assessment report in *Mushkegowuk First Nations et al. v. INAC et al.* (20070826, 20070993) dated June 24, 2009.

[31] *Ibid.*