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Notre dossier:

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Votre dossier:

September 23, 2010

VIA FACSIMILE AND COURIER

Deidre Hilary
Canadian Human Rights Commission
344 Slater Street
Ottawa, Ontario
K1A 1E1

Dear Ms. Hilary:

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

I am writing with respect to your letter dated August 19, 2010, in which you requested our response to the allegations raised in the complaint filed by the Mississaugas of the New Credit First Nation ("MNCFN"). The following are the submissions of the Department of Indian and Northern Affairs Canada ("INAC") in response to the complaint.

We wish to reiterate our position expressed in previous correspondence that the complaint is beyond the jurisdiction of the Canadian Human Rights Commission ("Commission") pursuant to sections 41(c) and (d) of the *Canadian Human Rights Act* ("Act"). We elaborate more fully on these issues below.

Background to Complaint

The Chief and Counsel of the Mississaugas of the New Credit First Nation ("MNCFN") bring this complaint against Indian and Northern Affairs Canada ("INAC") alleging systemic discrimination on the basis of race and disability. Specifically, they allege that special needs children living on the reserve are discriminated against on the basis of race and disability as INAC does not provide sufficient funds for these children to receive special education off reserve through the municipal school board.

For the 2008-2009 fiscal year, INAC provided \$164,949¹ in funding to the MNCFN for high cost special education. In November 2008, the MNCFN requested additional

¹ INAC's records confirm that this amount was provided to the MNCFN for 2008-2009, not \$171,123 as set out in the complaint. INAC provided \$171,124 to the MNCFN for special education for the 2007-2008 fiscal year.

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funding from INAC in the amount of \$238,482. The breakdown of this request for additional funding was as follows:

- \$93,700 for a one time bus purchase;
- \$40,000 for one year of operation and maintenance of the bus;
- \$81,260 for special education needs;
- \$16,022 for tuition; and
- \$7,500 for specialized equipment.

Following discussions regarding the request, INAC responded by providing the MNCFN with the following additional funding:

- \$93,659 for the actual cost of a one time bus purchase;
- \$39,000 for bus operation and maintenance;
- \$16,400 for tuition; and
- \$5,000 for one time specialized equipment.

In total, INAC provided additional funding to the MNCFN in the amount of \$154,059. The MNCFN characterizes the amount of funding provided by INAC as constituting discrimination on the basis of race and disability.

INAC's Role in Funding Education

INAC provides funding to the MNCFN for a broad range of programs and services, including education, pursuant to a multi-year Funding Agreement. The Funding Agreement allows the Council to control the funds in question and requires only limited reporting to INAC as to how these funds are allocated for educational services. The MNCFN has the ability to shift the funds between programs and services as needed.

A copy of the current Funding Agreement is included at **Annex A**.

The MNCFN receives funding for general and special education programs and services. In terms of general education, INAC provides funding for elementary and secondary education of students living on reserve and reimbursement for students attending provincial schools off reserve. In the latter case, the MNCFN *negotiates its own tuition agreements* with the school board. INAC is not a party to these agreements.

With regard to special education, the funding amount that is granted to the MNCFN is calculated by a special education formula allocation that was proposed by the Ontario First Nation Special Education Working Group. This funding formula was agreed upon by an Ontario Chiefs resolution² in November 2008 and INAC. As noted above, for the 2008-2009 year, the special education allocation for the MNCFN was \$164,949. The

² An Ontario Chiefs resolution arises from an assembly of the Chiefs of all of the bands in Ontario who vote upon a particular matter. In this case, the Ontario Chiefs in Assembly resolved that the special education program (SEP) formula principles proposed by the First Nation Special Education Working Group be adopted.

MNCFN has the authority and responsibility to determine priorities in allocating these funds.

The allocation for special education is specified as a full and final amount to pay for both Band operated and provincial high cost special education. Since the special education formula for determining the allocation has been agreed upon by the First Nations and is final, there is no additional funding when the amount is exhausted. This explains why INAC was unable to provide the additional requested amount of \$81,260 for special education needs.

A copy of the 2008-2009 Special Education Funding Formula Allocation is included at Annex B.

The Funding Agreement provides for both block funding and targeted funding. Block funded services include the provision of kindergarten, elementary and secondary education. Targeted funding is intended for time limited and specific undertakings. One of the targeted programs is Band Operated Special Education which is expressly administered by the Council. Section 4.4 of the Funding Agreement specifies that the Council is responsible for the provision of block funded services and targeted programs. This section provides as follows:

4.4 Responsibility for and the Provision of Block Funded Services and Targeted Programs

- 4.4.1 The Council will provide the Block Funded Services and Targeted Programs in accordance with the terms and conditions of this Agreement including the Delivery Standards set out in the Schedules, applicable laws, and any written standards the Council may develop in accordance with subsection 4.4.2.
- 4.4.2 The Council may develop its own written standards for the delivery of Block Funded Services which standards will, at a minimum, meet the Delivery Standards set out in the Schedule 4 to this Agreement.
- 4.4.3 The Council will advise the Minister of any changes to the written standards that it develops in accordance with subsection 4.4.2 not later than thirty (30) days after approval by the Council.

In terms of delivery standards, the MNCFN must ensure that the educational programs and services are comparable to the programs and services in the province.

The Funding Agreement contains a clause which enables the MNCFN to access additional funding in exceptional circumstances. The Exceptional Circumstances Clause is set out in section 5.0 of the Funding Agreement and states as follows:

5.0 EXCEPTIONAL CIRCUMSTANCES

- 5.1 In the event that exceptional circumstances occur during the term of this Agreement, the Council may return to the Minister to seek changes to the level of funding or to obtain assistance.
- 5.2 Section 5.1 is intended to address exceptional circumstances (including but not limited to health, safety and socio-economic issues), which were not reasonably foreseeable at the time this Agreement was entered into and which have a significant impact on the Council's performance of the terms and conditions of this Agreement. In the event that the Minister agrees to change the level of funding, that change shall be made by way of an Amending Agreement.

The additional funding in the amount of \$154,059 that INAC provided to the MNCFN was granted through the exceptional circumstances clause of the Funding Agreement. Additional funding for high cost special education cannot be obtained through the exceptional circumstances clause of the Agreement as the special education budget is a fixed allocation.

The Commission has no jurisdiction over this complaint

INAC relies upon its submissions of February 5, 2010 and June 4, 2010 in support of its position that the Commission lacks jurisdiction in the present complaint. Specifically, INAC states that there are three principal reasons why the Commission has no jurisdiction in this case. First, the provision of funding does not constitute a service under section 5 of the Act. Second, the complaint is not based upon a prohibited ground of discrimination. Finally, the subject matter of this complaint falls within section 41(d) of the Act.

1. Funding is not a Service under Section 5

Section 5 of the Act 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.

Therefore, pursuant to this section, in order for the Commission to have jurisdiction over this matter, the complaint must relate to a "service provider". This complaint relates to funding that INAC provides to the MNCFN, not services. INAC has no control over the

provision of services as required by section 5 of the *Act*. INAC is not involved in the day to day operations of education nor does it dictate or control how the Council spends the funds that it receives. INAC is not responsible for the educational standards, nor does it employ teachers or otherwise provide educational services. The Council is responsible for the educational programs and services on reserve, while the province is responsible for the programs and services off reserve.

Further, the relevant case law establishes that a funder will not be found to be a service provider for the purposes of human rights legislation, unless its role extends beyond providing funds to include significant obligations specific to the provision of the services itself. In this regard, we rely upon the case law summarized in our submissions to the Commission dated February 5, 2010 and June 4, 2010.

2. No prohibited ground

It is INAC's position that the MNCFN has incorrectly characterized this complaint as being based upon the prohibited grounds of race and disability. Rather, the complaint alleges discrimination by comparing federal funding of special education on reserve against provincial tuition costs and provision of special education services off reserve. In essence, the complaint is really about the cost of provincial special education.

Any differential treatment in this case is based solely upon a comparison between special education that is funded by INAC on reserve with special education that is provided by the province off the reserve. The comparison does not result from differential treatment by the federal government (single actor) based on race and disability, but differential treatment as between the federal and provincial governments (two actors) based on their constitutional jurisdictions. Such a cross-jurisdictional comparison of two separate and distinct entities cannot amount to differential treatment based on any ground under the *Act*. In order to find discrimination, the Commission would have to find that the federal and provincial governments are a single entity. This is inconsistent with the division of powers in the *Constitution Act, 1867*. The federal government has no constitutional authority or control over the provision or cost of education services in the province.

3. The Complaint falls within Section 41(d) of the Act

The real service provider in this case is the Council of the MNCFN. It is the Council that determines how to allocate the money provided by INAC. Thus, in essence, the complaint is against the entity which is responsible for the alleged discriminatory treatment. This falls within the purview of section 41(d) of the *Act*.

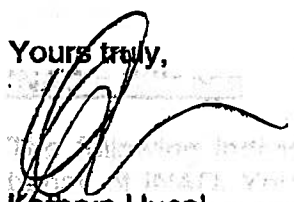
INAC's Witness

The following individuals can provide further information relating to the complaint on behalf of INAC. You may contact the undersigned to obtain contact information for the witnesses and to set up a meeting.

- 1. Ms. Kris Hill
Regional Manager, Education, INAC
- 2. One additional individual yet to be determined.

Please be advised that Victoria Yankou is also counsel on this matter and she can be contacted at 416-952-7105.

Yours truly,



**Kathryn Hucal
Senior Counsel
Regulatory Law Section**

per

Encl.