Mississaugas of the New Credit First Nation

Submissions Responding to INAC's Letter Dated September 23, 2010

Commission File: 20091016

Date: October 21, 2010

Background and introduction

The respondent (the federal government of Canada, represented by the Department of Indian Affairs and Northern Development, "INAC") refuses 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 are being denied access to education – a benefit and right enjoyed by non-First Nations children in neighbouring towns and cities – effectively because they are First Nation.

The respondent provided its submissions responding to the complaint by letter dated September 23, 2010. In that letter, INAC describes its submissions as follows:

> 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.

We have already responded to INAC's submission that the complaint is beyond the jurisdiction of the Commission. Therefore, we ask that you please refer to our previous submissions, including our submissions dated June 7, 2010 and February 5, 2010, for our response to the issues raised in INAC's September 23, 2010 letter. However, we would like to provide some additional comments in this letter.

We have enclosed two additional documents (discussed below) in support of our claim. However, we would like an opportunity to provide further supporting documentation to you before you write your report.

"Passing the buck" – faulting the First Nation

INAC states that the First Nation, not the federal government, is "responsible for the alleged discriminatory treatment." This theme is repeated throughout INAC's submissions. INAC states that the First Nation:

- "has the ability to shift the funds between programs and services as needed";
- "negotiates its own tuition agreements with the school board";
- "must ensure that the educational programs and services are comparable to the programs and services in the province";
- "is responsible for the programs and services on reserve";
- "determines how to allocate the money provided by INAC"; and

- "is responsible for the alleged discriminatory treatment."

It is clear from these statements that INAC is trying to fault the First Nation for the discriminatory treatment of its own special needs children. This is an extremely dishonourable and offensive position for the federal government to take. It is also factually and legally incorrect.

INAC, through its own flawed and under-funded special education program, is the cause of the discrimination at issue. First, the terms and conditions of its special education program do not ensure that First Nations children living on reserve will receive appropriate special education services – as do neighbouring non-First Nations children. Second, INAC's overall fixed allocation of funds for special education is insufficient. It is no excuse to say that the funds are distributed by an approved formula when the overall allocation of funds falls short of what is needed for adequate services or for the same services that non-First Nations children receive.

Third party sources have confirmed that INAC's special education program for First Nations people is flawed and underfunded. The President of the Ontario Public School Boards' Association states in a letter to INAC (enclosed) that:[1]

- The per pupil amount approach to funding for special education adopted by INAC does not reflect the incidence of high needs or the costs of particular supports, including educational assistants, that some students need. (emphasis added)
- We respectfully request that the matter of education funding for First Nations students with special needs be re-opened and that funding be restructured to recognize the real costs of providing First Nations students with the support to which they are entitled. Your Department's mandate includes ensuring that First Nations receive services comparable to those available to other Canadian residents. Equitable treatment for students with special needs is one of these services. (emphasis added)

Dr. Ron Phillips states in a recently published peer reviewed article (enclosed) that:

- The First Nation schools are expected to provide the provincial level of special education services but are not given provincial levels of special education funding.[2]
- The federal government of Canada is constitutionally responsible for the education, including special education, of First Nations students residing on reserves.[3]

The federal government's special education program (and its overall fixed funding allocation) fails to ensure that First Nations children receive adequate special needs education equal to what non-First Nations children receive.

Despite this, INAC somehow expects First Nations across Canada to provide adequate special needs education services. How can INAC expect First Nations to provide equal and adequate special needs education under the federal government's flawed and underfunded program?

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[1] Letter from Rick Johnson, President of the Ontario Public School Boards' Association to The Honorable Jim Prentice, Minister for Indian and Northern Affairs Canada, dated November 27, 2006.
[2] Phillips, Ron, *Forgotten and Ignored: Special Education in First Nations Schools in Canada*, Canadian Journal of Educational Administration and Policy, Issue #106, June 7, 2010 at 21 (also see page 5).
[3] *Ibid.* at 1.

Contrast this with the situation of non-Aboriginal children in Ontario. Those children are legally entitled to appropriate special education programs under the provincial *Education Act*. Section 8(3) of that *Act* states that:

> The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario.

Non-Aboriginal children in Ontario are guaranteed appropriate special education programs. First Nations children on reserve are not, largely because of the flaws and lack of funding in INAC's special education program. This is discrimination.

The respondent is engaged in the provision of the "services" in question

INAC argues that it is not a "service provider" for the purposes of section 5 of the *Act*. This argument has been addressed by our previous submissions, including our submissions dated June 7, 2010 and February 5, 2010, and in the *Section 40/41 Report* dated May 10, 2010. In those documents we explain, among other things, that:

- INAC's own actions (including its refusal to provide adequate funding) constituted a denial of services and therefore constituted discrimination "in the provision of services;" and
- INAC's role in First Nations education is much more than that of a passive funder.

Please refer to those documents for our complete submissions on this topic.

Prohibited ground

INAC argues that the differential treatment is not based upon a prohibited ground because the differential treatment is "between the federal and provincial governments (two actors) based on their constitutional jurisdiction." In other words, INAC argues that the differential treatment is based on jurisdiction, not race or disability.

On the contrary, the differential treatment is, on its face, based on race, whether or not it also crosses jurisdictional boundaries. The federal government's flawed and underfunded special education program applies only to First Nations children.

The differential treatment could also be considered to be "adverse effect" discrimination, whether or not it crosses jurisdictional boundaries. The problems with the federal government's program disproportionately affect First Nations children vis-à-vis non-First Nations children.

To a certain extent, this "no prohibited ground" argument is simply a reformulation of INAC's argument that there is no proper "comparator group." The "comparator group" argument is that we cannot compare the "federal" services provided to our children with the "provincial" services provided to non-First Nations children in Ontario. Both arguments rest on the assertion that a human rights complaint cannot rely on a cross-jurisdictional comparison between groups. This "comparator group" argument has been addressed by our previous submissions, including our submissions dated June 7, 2010 and February 5, 2010, and in the *Section 40/41 Report* dated

May 10, 2010. In those documents we point out (among other things) that INAC's position (if accepted) would lead to the absurd and offensive conclusion that our First Nations children are not entitled to the same quality of services as children in neighbouring non-First Nations communities. Please refer to those documents for our submissions on that topic.

Conclusion

INAC still has not refuted our allegation that these two special needs children suffered unequal and unfair treatment when compared with non-First Nations special needs children in Ontario. Instead, INAC denies responsibility for this alleged substantive inequality and discrimination, argues that it does not provide the relevant services, and claims that a cross-jurisdictional comparison is invalid. However, INAC in fact caused the substantive discrimination and inequality through its own discriminatory actions. As we said before, INAC'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. That is why we ask that this complaint be referred to the Tribunal for a full inquiry.