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BY EMAIL

Deirdre Hilary
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Canadian Human Rights Commission
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Email: deirdre.hilary@chrc-ccdp.gc.ca

Dear Ms. Hilary,

Re: ***MNCFN v. INAC***
First Nations Special Needs Education Human Rights Complaint
CHRC File No. 2009 1016

I am writing to provide further details regarding the human rights complaint relating to special needs education brought by the Mississaugas of the New Credit First Nation ("MNCFN"). In this letter I would like to address the following points:

(1) This case should be referred to the Tribunal despite the recent decision in *First Nations Child and Family Caring Society v. Attorney General of Canada*;

(2) On-reserve special education services are inferior when compared to off-reserve, provincial services;

(3) The inferior and inadequate special education services provided to First Nations children perpetuate disadvantage and exclusion and have other significant detrimental effects; and

(4) The MNCFN special education funding allocation is demonstrably insufficient.

Background – Summary of the Case

This complaint alleges discrimination in the provision of special education services, primarily on the basis of race. The complaint includes a claim of discrimination against two specific children, the Miller twins, as well as a broader, systemic claim of discrimination against First Nations people generally. The respondent discriminated against the Miller twins (who are members of the MNCFN) by refusing to pay for the special education supports they need, and which any non-First Nations child living off-reserve would receive. The systemic discrimination arises from the serious flaws in the respondent's Special Education Program, from insufficient funding, and from other policies and decisions, which together result in service levels that are far below those enjoyed by non-First Nations people.

MNCFN also alleges discrimination on the basis of disability as an alternative claim.

THE *FIRST NATIONS CHILD AND FAMILY CARING SOCIETY* CASE

This case should be referred to the Tribunal despite the recent decision in *First Nations Child and Family Caring Society v. Attorney General of Canada* (the "*Caring Society Case*").

The *Caring Society Case* and the MNCFN's complaint both involve a comparison of federal on-reserve services (provided to First Nations people) and provincial off-reserve services (provided to non-First Nations people). In both cases, the federal government argues that this kind of federal/provincial comparison cannot form the basis of a claim under the *Canadian Human Rights Act* ("*Act*"). The Tribunal accepted the federal government's arguments in the *Caring Society Case*, and held that a claim of discrimination under the *Act* cannot be based on a comparison of two service providers. Chairperson Chotalia wrote that:

> The Act does not allow a comparison to be made between <u>two different</u> service providers with <u>two different</u> service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared.
>
> Let us look at how the Act works. As an example, the Act allows an Aboriginal person who receives lesser service from a government to file a complaint if a non-Aboriginal person receives better service from the <u>same government</u>. However, the Act does not allow an Aboriginal person, or any other person, to claim differential treatment if another person receives better service from a <u>different government</u>.[1]

We submit that (1) the decision in the *Caring Society Case* is incorrect, and, regardless, (2) that the present case can be readily distinguished from the *Caring Society Case*.

The decision in the Caring Society Case is incorrect

The decision in the *Caring Society Case* is incorrect in part because it does not account for the special and unique situation faced by First Nations people in Canada. It may be that discrimination cannot be made out by comparing the services provided by two "service providers" in the typical human resources case not involving First Nations persons. However, the words and purpose of the *Act* mandate an exception to the typical analysis in cases involving government services provided to First Nations people. That is because the federal government generally provides services on reserve (mainly to First Nations people) whereas the provincial governments provide most off-reserve services (mainly to non-First

[1] *First Nations Child and Family Caring Society v. Attorney General of Canada*, 2011 CHRT 4 at paras. 12-13 (emphasis in original).

Nations people).[2] Therefore, if First Nations people are not entitled to compare two service providers, they are not entitled to the same government services as non-First Nations people. In other words, according to the decision in the *Caring Society Case,* First Nations people are not entitled to equality of government services under the *Act*. This is clearly contrary to the purposes of the *Act*.

The *Caring Society Case* proposes an interpretation of the *Act* that leads to an absurd result – that First Nations are not entitled to a benefit under law provided to other races or ethnic groups. Again, according to the decision in the *Caring Society Case*, First Nations people are not entitled to equality of government services under the *Act* because that would require a comparison of two service providers. Because of the unique circumstances of First Nations people (i.e. receiving services from the federal government which non-First Nations people receive from the provincial government), they are the only race or ethnic group excluded from the protections of the *Act* in this way. In a sense, the decision in the *Caring Society Case* discriminates against First Nations people by denying them the protection against discrimination in the provision of government services that is provided to other racial, ethnic, or national groups under the *Code*.

The Tribunal in the *Caring Society Case* justifies its decision based on a "flood gates" or a "slippery slope" argument.[3] Chairperson Chotalia held that, "To accept an interpretation that one service provider may be compared to another … is to open the flood gates to a barrage of new types of complaints."[4] On the contrary, it is possible to compare federal and provincial services in the First Nations context without opening the flood gates to "two service provider" comparisons in other contexts. As discussed above, the federal/provincial comparison for First Nations people is required because of the unique circumstances of First Nations people. This specific context is easily distinguished from other cases. The Tribunal erred by failing to recognise the special and unique situation faced by First Nations people in Canada. That special and unique situation justifies a comparison of federal and provincial services, and justifies an exception to the typical analysis involving only one service provider.

Furthermore, the decision in the *Caring Society Case* is overly formalistic, and fails to give the *Act* the purposive interpretation mandated by law. In a recently decided discrimination case under the *Charter*, *Withler v. Canada*, the Supreme Court of Canada held that courts must avoid an overly formalistic discrimination analysis, and should instead focus on the overall context and on whether substantive equality exists. The Court held that:

> The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator

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[2] Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons*, Chapter 4 Programs for First Nations on Reserves, online: http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201106_04_e.pdf, at pg 2, 5, 7.
[3] *FNCFCS, supra* note 1 at para. 129.
[4] *Ibid.* at para. 129.

> group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?[5]

The Court specifically disapproved of an overly formalistic "mirror comparator group analysis," writing that:

> finding a mirror group may be impossible, as the essence of an individual or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison.[6]

The Tribunal's decision in the *FNCFCS* case disregards the above guidance from the Supreme Court of Canada, and instead engages in an overly technical and non-purposive analysis of the words of the *Act*.[7] The Tribunal would have come to a different result if it had taken the correct approach to interpreting the *Act*, had focused on the differences in the services provided to First Nations people and other Canadians, and if it had recognized the special and unique situation of First Nations people in this context.

The decision in the Caring Society Case can be clearly distinguished

The decision in the *Caring Society Case* can be clearly distinguished from the present case because MNCFN makes an alternative "disability" claim that does not require a federal/provincial comparison. Again, MNCFN alleges discrimination on the basis of disability. This alternative claim is based on a comparison between the education services received by disabled and non-disabled children on reserve. By failing to pay for the Miller twins' special needs supports, the federal respondents failed to provide the accommodations the children needed to benefit from the education services provided to other, non-disabled children. As no federal/provincial comparison is required, the *Caring Society Case* does not apply to this alternative claim.

To summarize, this complaint should proceed to a Tribunal hearing despite the recent decision in the *Caring Society Case* because (1) the decision in the *Caring Society Case* is incorrect, and (2) the MNCFN case can be clearly distinguished. A Tribunal inquiry into these issues is warranted.

COMPARING ON AND OFF-RESERVE SPECIAL EDUCATION SERVICES

Various reports and other evidence clearly show that on-reserve special education services for First Nations people are inferior when compared to off-reserve, provincial services for non-First Nations people.

The original 2002 National Program Guidelines for INAC's Special Education Program (enclosed) state that "*The objective of the program is to provide eligible students with*

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[5] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.
[6] *Ibid.* at para. 59.
[7] *FNCFCS, supra* note 1 at paras. 102-131.

education programs and services of a standard comparable to that of other Canadians...."[8] That objective is reiterated in the 2011 version of those guidelines.[9] That objective has not been met.

The disparity in service levels has been discussed in a number of reports and academic papers, including the enclosed materials authored by Dr. Paquette and Dr. Phillips (which were provided to you previously). Key passages from those materials are excerpted below (with underlining added for emphasis throughout):

> In 2008 First Nations students with special needs attending schools on reserves (i.e., First Nations) throughout Canada did not have available to them the level of special education services found in provincial school systems.[10]
>
> At no time has INAC provided adequate funding to provide a provincial/territorial level of special education services for First Nations schools.[11]
>
> As of 2004, INAC reported that it would be investing $101 million in special education for First Nations students nationally ... the amount being provided is reflective of service levels well below current provincial norms *when the very high incidence rates in First Nations student populations is taken into consideration*, and is well below any reasonable estimate of overall assessment and service need in First Nations communities.[12]
>
> Changes are needed to current funding levels if First Nations students are to have a chance to 'catch up' with mainstream Canadian students, and catch up in a way that respects and reinforces their identity as Aboriginal persons.[13]
>
> ...the entire spectrum of educationally relevant handicaps and exceptionalities needs to be funded adequately and appropriately, taking due account of dramatically higher incidence levels of such conditions in general, and especially of some of the most costly types of handicaps and exceptionalities in the First Nations population. Indeed, the lack until very recently of any funding of special education services for First Nations students studying in their home communities can only be described as

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[8] INAC, *Special Education, National Program Guidelines,* 2002 at 5.
[9] INAC, *Special Education Program, National Program Guidelines,* February 2010 at 2.
[10] Ron Phillips, "Special Education in First Nations Schools in Canada: Policies of Cost Containment" *Alberta Journal of Educational Research*, Vol. 56, No. 1, Spring 2010, 72-81, at 72.
[11] Phillips. *ibid.* at 77.
[12] Jerry Paquette and Gérald Falon, *First Nations Education Policy in Canada, Progress of Gridlock* (Toronto: University of Toronto Press, 2010) at 231; see also: Jerry Paquette and William J. Smith, "Equal Educational Opportunity for Native Students: Funding the Dream," *Canadian Journal of Native Education* (2001) vol. 25, no. 2, pg. 129 (stating, at pg. 138: "the federal government needs to invest more than a quarter of a billion dollars annually in special education services for on-reserve status-Indian students across Canada").
[13] Paquette, *ibid.* at 115.

scandalous, given the adoption and funding of mandatory special education services founded on the principle of an appropriate education at public expense for all children by every province in Canada during or before, the early 1980s.[14]

...the slightly more than $100 million per year being invested by INAC in First Nations special education remains, in our view, disproportionately small in comparison to needs... [15]

... nothing existed – or exists today in most First Nations – which could be compared to the guaranteed right to appropriate education at public expense in provincial education systems. This tragic status quo in special education continues to be a blight on First Nations education.[16]

...the Indian Act accords no rights to appropriate education to any First Nations students, much less to First Nations students with special needs.[17]

Other citizens of Canada who send their children with special needs to schools can turn to provincial education laws to ensure that their children receive special education programs and services. However, First Nations parents on reserves do not have this option.[18]

Diseconomy of scale factors, particularly small school and class sizes and dispersion over geographical space of schools (we assume a quasi- school board model) require funding that is adequate and appropriate. ... Teacher salaries and benefits need to be comparable to provincial remuneration levels.[19]

Despite many years and countless policies, commitments, proposals, studies, and reports, First Nations schools and students lack a comprehensive system of special education throughout Canada.[20]

The First Nations schools are expected to provide the provincial level of special education services but are not given provincial levels of special education funding.[21]

The above quotations support and illustrate the significant and systemic disparity between special education services on and off reserves.

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[14] Paquette, *ibid.* at 113.
[15] Paquette, *ibid.* at 114.
[16] Paquette, *ibid.* at 229-130.
[17] Paquette, *ibid.* at 228.
[18] Phillips, *supra* note 10 at 76
[19] Paquette, *supra* note 12 at 115.
[20] Phillips, *supra* note 10 at 77.
[21] Ron Phillips, 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.

Some of the significant differences between the special education services provided on and off reserves, as discussed in various reports and academic papers (enclosed), are summarized in the table below.[22]

Some Differences Between Special Education Services On and Off Reserves	
Special Education On Reserves	***Ontario's Special Education System***
There is **no legal right** to free and appropriate special education in the *Indian Act*	All children have a **legal right to free education** and appropriate special education under provincial laws
Funding insufficient to meet provincial standards	**Greater funding** to meet student needs
There are **no specialized legal procedures** or rights for First Nations parents to ensure their children get appropriate services	**Parents can use provincial laws** to ensure their children get appropriate services (e.g. parents can appeal decisions made about their children)
Some children **may not get services** unless the family or First Nation can pay	Children are **guaranteed** special education services
Specialists (e.g. speech therapists) often **unavailable** or very expensive	**Specialists** (e.g. speech therapists) **available** from school board
Little or no funding for high-level curriculum creation and policy setting	**Provincial ministry provides high-level curriculum creation and policy setting**
Small education departments have **small budgets that cannot absorb costs of certain students with high needs**	Large school boards have **large budgets that can afford high cost services, benefit from economies of scale, and can balance out high cost cases**

The Miller twins are an example of the systemic discrimination described above. Very simply, the federal government refused to pay for the special education supports required by the Miller twins. If the Miller twins were non-First Nations and living off-reserve, they would receive those special education services in a provincial system without payment. In fact, non-First Nations children have a *legal right* to receive those special education services.

The federal government refused to provide funding in this case in part because it says it is not obligated to provide special education services under the *Indian Act*. Compare this to the situation faced by non-First Nations children. Children living off-reserve in Ontario have a

[22] See: Harvey McCue Consulting, First Nations 2nd & 3rd Level Education Services, A Discussion Paper of The Joint Working Group, April 2006 at 34 to 39 (attached); Phillips, *supra* note 10; Paquette, *supra* note 12; Phillips, *supra* note 21.

legal right to attend school. Furthermore, the Ontario Minister of Education has a corresponding *legal duty* to ensure that appropriate special education programs and services are made available to all exceptional children in Ontario. The key sections of the Ontario *Education Act*[23] are excerpted below:

> s. 8. (3) 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, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
>
> (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
>
> (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.
>
> s. 32. (1) A person has the right, without payment of a fee, to attend a school in a school section, separate school zone or secondary school district, as the case may be, in which the person is qualified to be a resident pupil.

First Nations people, including the Miller twins, do not have these legal rights.

The disparity between the special education services for First Nations and non-First Nations children is clear, both in the specific case of the Miller twins, and on a broader, systemic level.

THE MNCFN SPECIAL EDUCATION ALLOCATION IS INSUFFICIENT

INAC has justified its refusal to pay for the Miller twins' education by saying that it already provides yearly special education funding to MCNFN, and that the twins' education should be paid for using those funds. However, MNCFN's existing special education funding allocation is insufficient to pay for the Miller twins' education.

The Miller twins attend an off-reserve provincial school because of their high special needs. The provincial school charges over $80,000 per year to provide the required special education services (see table 1 below, and the enclosed supporting letter from the provincial school board). Since 2008, MNCFN's special education allocation has equalled between $160,000 and $190,000 (see table 1 below, and the enclosed supporting spreadsheet). Thus, the cost of these two high needs children would take up roughly *half* of the MNCFN's

[23] *Education Act*, R.S.O. 1990, c. E.2

overall special education budget. However, this money is required to provide services to the other children with special needs in the community.

Before the Miller twins' entered the school system, MNCFN was already spending all of the special education funds provided to it by INAC. However, MNCFN received no budget increase when these two children entered the system, even though the cost of the special education supports for just these two children equals approximately half of the overall existing budget. In these circumstances, it was, and is, impossible to pay for the special education supports of these children within the existing allocation provided by INAC.

Table 1 – Overall Special Education Funding vs. Costs for the Miller Twins			
	2008-2009	2009-2010	2010-2011
Special Education Costs for the Miller Twins	$116,983.13[24]	$ 81,342.03	$ 84,160.00
Special Education Allocation from INAC	$ 164,949.00	$ 171,902.00	$ 166,990.00

The problem is compounded by the fact that the MNCFN overall special education allocation is relatively small. The MNCFN budget and overall enrolment is much smaller than that of a provincial school board. Therefore, unlike in the case of a provincial school board, the MNCFN special education budget is unable to "absorb" large costs, such as the special education costs for the Miller twins.

The MNCFN special education funding allocation from INAC is clearly inadequate; INAC cannot justify its refusal to provide funds for the Miller twins based on this existing, insufficient yearly funding allocation.

DETRIMENTAL EFFECTS OF SUBSTANDARD SPECIAL EDUCATION SERVICES

The lack of equal and adequate special education services for First Nations people has self-evident, long-term detrimental effects, including the perpetuation of exclusion, disadvantage and stereotyping.

Adequate special education programs and services are an absolute necessity for disabled children. The lack of special education can affect every aspect of a disabled child's future life, wellbeing, and happiness. Without a proper education, a child with special needs may find it impossible to properly integrate and function in society as an adult, which can lead to isolation and depression. Furthermore, special education is a vehicle to level the playing field, and to help those with the greatest needs. Without proper programs or services, the gap between children will widen as time goes on. Special education is not just about future jobs and a career – it is central to a child's overall development, and his or her ability to function and flourish in society.

[24] In 2008-2009 the Miller twins attended school for 124.5 billable days out of the regular 194 days, and therefore the special education fees equalled approximately $75,074.23 for the portion of the school year they attended.

More generally, education is one of the most important and powerful tools to fight inequality, poverty, and social exclusion. Good public education, that is provided free of charge, is essential for social mobility, and to close the gap between the advantaged and disadvantaged. A recent report of the Auditor General found that the education gap between First Nations living on reserves and the general Canadian population has actually *widened* in recent years.[25] Changes to the federal government's programs are clearly needed if First Nations children are to be given a chance to catch up.[26]

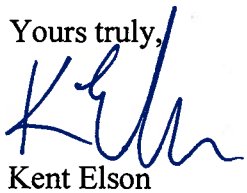
Inferior special education services deny First Nations children the opportunity to catch up, reach their full potential, and lead a full and happy life. MNCFN hopes this complaint will go some way to remedying these and other detrimental effects of INAC's flawed special education program.

Conclusion

The documents and reports referred to above are enclosed with this letter. We invite the respondent, if it wishes, to respond to any of the above, and to the enclosed materials. In the interest of efficiency and fairness, we ask that any response be copied to us.

Please do not hesitate to contact me if you wish to discuss any of the above.

Yours truly,



Kent Elson

Cc: Kathryn Hucal & Victoria Yankou, Department of Justice Canada
khucal@justice.gc.ca, vyankou@justice.gc.ca

Enclosed Documents:

Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons, Chapter 4 Programs for First Nations on Reserves*, 2011

Harvey McCue Consulting, *First Nations 2nd & 3rd Level Education Services, A Discussion Paper of The Joint Working Group*, April 2006.

INAC, *Special Education Program, National Program Guidelines*, February 2010.

INAC, *Special Education, National Program Guidelines*, 2002.

Grand Erie District School Board, *Letter outlining the costs associated with the two children attending J.L. Mitchener Public School from the MNCFN,* May 18, 2011

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[25] Auditor General of Canada, *supra* note 2 at 8.
[26] Paquette, *supra* note 12 at 115.

Paquette, Jerry and Falon, Gérald, *First Nations Education Policy in Canada, Progress of Gridlock* (Toronto: University of Toronto Press, 2010).

Paquette, Jerry and Smith, William J., "Equal Educational Opportunity for Native Students: Funding the Dream," *Canadian Journal of Native Education* vol. 25, no. 2, 2001, 129.

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.

Phillips, Ron, "Special Education in First Nations Schools in Canada: Policies of Cost Containment" *Alberta Journal of Educational Research*, Vol. 56, No. 1, Spring 2010, 72.