

September 19, 2011

BY EMAIL

Deirdre Hilary

Investigator

Canadian Human Rights Commission

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Dear Ms. Hilary,

Re: *MNCFN v. INAC*

First Nations Special Needs Education Human Rights Complaint

CHRC File No. 2009 1016

I am writing to advise the Commission and the Respondent that the Complainant may raise a constitutional issue in these proceedings, as discussed below.

Constitutional Issue: Equal Protection from Discrimination for First Nations People

The Complainant's position is that the *Canadian Human Rights Act* (the "*Act*") prohibits the federal government from providing services to First Nations people that are inferior to the services provided to non-First Nations people under provincial jurisdiction. In the alternative, if it is found that the words of the *Act* do not allow First Nations complainants to rely on this kind of federal/provincial comparison, the Complainant intends to question the constitutional validity of the *Act*, including section 5 of that *Act*, based on the *Charter* right to equality.

The Complainant alleges that the special education services provided to First Nations communities are inferior to the special education services provided to non-First Nations communities in Ontario and Canada. The comparatively inferior services stem from problems such as a lack of funding, serious flaws in the federal First Nations Special Education Program, and negligent, harmful, and counterproductive management of the program by government officials.

A wide range of federal services for First Nations communities are inferior to provincial services for non-First Nations communities. The Auditor General of Canada's 2011 Report on Programs for First Nations on Reserves (enclosed) stated that:

Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, **we have seen a lack**

of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. (emphasis added)

This complaint raises the issue of whether federal services for First Nations communities must be at least equal in quality to provincial services for non-First Nations communities.

The constitutional question will be raised as a secondary and alternative argument. In the main, the Complainant submits that the *Act* allows First Nations people to claim discrimination in circumstances where federal services for First Nations communities are inferior to provincial services for non-First Nations communities.

In the alternative, if the *Act* is found not to protect First Nations people against discrimination in these circumstances, the Complainant argues that the *Act* is under-inclusive and violates the right to equality of First Nations people guaranteed by s. 15(1) of the *Charter*.

This under-inclusion creates a distinction based on a personal characteristic – race or national or ethnic origin – and denies First Nations people the equal protection or benefit of the *Act*, compared with non-First Nations people and compared with other disadvantaged groups protected under the *Act*.

If the *Act* does not allow for federal/provincial comparisons in the First Nations context, First Nations communities, which are historically disadvantaged, could be provided with far inferior government services (compared to non-First Nations communities) without legal recourse under the *Act*. First Nations people would be effectively singled out as the only racial, national or ethnic group denied the right to equality in the provision of government services. This denial of equality in basic and essential services would exacerbate the disadvantage experienced by First Nations children, including the Miller twins, and would violate section 15(1) of the *Charter*.

To the extent that the *Act* is inconsistent with s. 15(1) of the *Charter*, the Complainant seeks a remedy under s. 52(1) of the *Constitution Act, 1982*, including that the Tribunal read in words to bring the *Act* in line with the *Charter*.

The Equality Issue Should be Addressed by the Tribunal

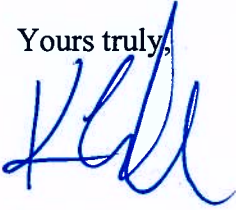
This constitutional issue should be addressed in a Tribunal hearing. This is yet another reason why a Tribunal inquiry is warranted and necessary.

However, we are not asking that the Commission address the merits of this constitutional issue at this point. We raise this constitutional issue at this point to: (1) give ample prior

notice of the Complainant's position and (2) because the need to address this issue is yet another reason why a Tribunal inquiry is required.

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

Yours truly,



Kent Elson

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