CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

APR 04 2011

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Decision of the Commission

Mushkegowuk First Nation v. Public Safety and Emergency Preparedness Canada (20070826) and Mushkegowuk First Nation v. Indian and Northern Affairs Canada (20070993)

Decisions rendered by the Canadian Human Rights Commission on March 23, 2011.

The Complaint, the Investigation Report and the parties' submissions in these complaints have been read and considered by the Commission. The Commission adopts the recommendation of the Report. In addition to the reasoning in the Report, the Commission provides these additional reasons with respect to the following three issues.

First, in their submissions dated January 27, 2001, the respondents allege breaches of procedural fairness because the investigator "... did not interview any representative of the federal respondents" and did not consider the 2009 Statistics Canada Report entitled "Police Resources in Canada". As pointed out by the complainants in their submissions dated February 16, 2011, a representative of the respondent declined to meet with the investigator but was interviewed through written questions. The respondent is correct in stating that the Investigation Report does not refer to the 2009 Report. However, it was open to the respondents to provide information and analysis from that Report in its submissions to the Commission following disclosure of the Investigation Report.

Second, the respondents assert that the Commission has no jurisdiction over the complaints following the decision of the Supreme Court of Canada in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union,* 2010 SCC 45. The Investigation Report was issued before the *NIL/TU,O* decision. It now appears that, based on an application of the functional test re-affirmed by the Supreme Court in NIL/TU,O, First Nations policing is provincially regulated.

Notwithstanding *NIL/TU,O*, the Commission continues to have jurisdiction over Indian and Northern Affairs and Public Safety and Emergency Preparedness Canada. The respondents are subject to the *Canadian Human Rights Act* (the *CHRA*), not provincial human rights legislation. It is recognized that the respondents dispute the application of human rights legislation to their role in the matters giving rise to these complaints. Specifically, the respondents asserts that their role is limited to funding and that funding is not a "service" within the meaning of section 5 of the *CHRA*. The Commission adopts the findings of the Investigation Report with respect to the funding issue. The complainants' submissions also address the issue, stating that the federal government is more than a "passive funder".

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Third, on the question of comparator group, in its recent decision in *First Nations Child and Family Caring Society et al. v. A.G. of Canada,* 2011 CHRT 4, the Canadian Human Rights Tribunal (the Tribunal) held that section 5(b) of the *CHRA* requires a comparison, that the choice of an appropriate comparator is "a pure question of law" (at para. 107), and that the comparison must be within the same service provider. The Tribunal went on to find that comparisons between two service providers are not permitted and, even if they were, "the *CHRA* does not allow INAC as a service provider to be compared to the provinces as service providers". (at paras. 4 and 128 to 131).

The Commission notes that while the *First Nations Child and Family Caring Society* decision supports the respondents' position in the within complaints that it is not possible to establish discrimination on the basis of comparisons with communities in which the OPP provide policing services, the Commission is not bound by the Tribunal's decision. As noted in the Investigation Report, the Federal Court rejected a requirement for a comparative analysis to prove discrimination in *Morris v. Canada (CAF)*. Moreover, while the question of whether section 5(b) requires comparisons may be a question of law, the question of whether or not a particular comparator is appropriate is a specialized inquiry. The choice of comparator is usually case-specific and fact-driven. This exercise lies squarely within the realm of specialized bodies such as the Commission and the Tribunal. For these reasons, the choice of an appropriate comparator is not a question of law. This view is supported by the recent decision of the Supreme Court of Canada regarding "mirror comparators": *Withler v. Canada (Attorney General)*, 2011 SCC 12.

The following factors speak to the reasonableness of the comparators in these complaints: the need to provide policing in isolated, impoverished First Nations communities that have no other comparators than the rest of Canada in which policing is provided by the provinces, the need to meet the unique policing needs of First Nations communities at a standard that is at least comparable to that enjoyed by other Canadians, the shared history of federal and provincial responsibility for First Nations communities, and the unique and current tripartite nature of First Nations policing. In particular, it is noted that the federal government itself appears to contemplate such a comparison because the tripartite agreement states: "it is intended that the police service in the Nishnawbe-Aski area ... will be.... at least equivalent in level and standard of service to that provided in non-Aboriginal communities in Canada with similar characteristics".: quoted at para. 9 of the CHRC Assessment Report, dated June 24, 2009.

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The Commission therefore decides, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:

- the evidence gathered appears to show that the respondent is a service provider within the meaning of section 5 of the *Canadian Human Rights Act*; and

- the evidence gathered suggests that individuals living in communities served by NAPS are disadvantaged as compared to other, non-First Nations communities.

David Langtry
Acting Chief Commissioner
Canadian Human Rights Commission