Department of Justice Canada
Ministère de la Justice Canada

Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Bureau régional de l'Ontario
la tour Exchange
130 rue King ouest
Pièce 3400, CP 36
Toronto (Ontario)
M5X 1K6

Tel: 416-973-0392
Fax: (416) 952-4518
Email: Sean.Gaudet@justice.gc.ca

Our File: / Notre dossier: 2-589339

Your File: / Votre dossier:

February 10, 2009

BY FAX

Mr. John Chamberlin
Manager, Investigations
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario
K1A 1E1

Dear Mr. Chamberlin:

Re: LOUTTIT, Joseph, Grand Chief of Mushkegowuk - Human Rights Complaint Tribunal File No.: 2007 0826 and 2007 0993

We are counsel for the federal respondents to the above-referenced human rights complaint - the Departments of Indian and Northern Affairs Canada (INAC) and Public Safety and Emergency Preparedness Canada (PS) (together these departments are referred to as the "federal respondents"). This letter is written in response to your letter of December 17, 2008, and sets out the federal respondents' position in relation to the complaint.

The federal respondents submit that the Canadian Human Rights Commission (the "Commission") should refuse to deal with this complaint in accordance with sections 41(1)(c) and (d) of the *Canadian Human Rights Act* (the *Act*). For reasons developed below, the complaint is beyond the jurisdiction of the Commission and is trivial, frivolous and vexatious.

The complaint

As you know, the complainants have named as respondents Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the province of Ontario. They have also filed an identically worded complaint against the same two respondents with the Ontario Human Rights Commission.

The thrust of the complaints filed with both commissions is that the complainants allege they are receiving "lower quality police services and facilities in and around the Mushkegowuk communities compared to services customarily available to the public." Since the Governments of Canada and Ontario are responsible for "overseeing and funding these services and facilities", it is alleged that their "practices" amount to

discrimination in the provision of services and facilities on the basis of the complainants' ancestry, ethnic origin, and race.

Although the complainants do not cite any provision of the *Act* in their complaint, the Commission has characterized the complaint as engaging section 5 of the *Act*. A plain reading of this provision makes it clear that this provision does not apply to the facts as asserted in the complaint.

Section 5 of the Act provides that:

> 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

The complaint is cast in very general terms. The complainants assert that the federal and provincial governments have "fundamental obligations" to provide policing services and facilities to the Mushkegowuk First Nations in a manner that results in services and facilities that are customarily available to other communities and members of the general public in Ontario[1]. They assert that the "respondents' actions" have resulted in the Mushkegowuk First Nations receiving much lower quality policing than non-Aboriginal Canadians[2].

The complainants provide no details in their complaint as to the obligations of or actions taken by the federal respondents. In order to understand and respond to the complaint, we requested additional information respecting these and other aspects of the complaint by letter dated July 29, 2008. In his letter dated September 11, 2008, complainants' counsel indicated that these questions were premature and should only be answered in the course of an investigation.

These questions are not premature; rather, they are central to the issue as to whether this Commission has jurisdiction over the complaint.

The federal respondents submit that the Commission lacks jurisdiction over this complaint for two reasons:

1) The federal respondents do not provide a service within the meaning of section 5 of the *Act*; and,

2) There is no proper comparison to found a case of discrimination in this case.

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[1] Complaint, paragraphs 17 and 22
[2] Complaint, paragraph 25

The First Nations Policing Policy, First Nations Policing Program, and the Nishnawbe–Aski Police Service Agreement

The First Nations Policing Policy was introduced by the federal government in June 1991 to provide First Nations across Canada with access to police services that are professional, effective, culturally appropriate and accountable to the communities they serve. The Policy, administered by PS operates on the principle of partnership. Under the Policy, the federal government, provincial and territorial governments and First Nations work together to negotiate tripartite agreements for police services that meet the particular needs of each community. The Federal Government provides the funding for First Nations policing under the auspices of PS's First Nations Policing Program (FNPP), which is not mandated by statute but is rather an exercise of the federal spending power.

The federal Government's role in the provision of police services and facilities in respect of the Mushkegowuk First Nations is limited to the provision of contribution funding to the Police Board established under the tripartite Nishnawbe–Aski Police Service Agreement ("NAPS Agreement") negotiated under the FNPP. The purpose of the NAPS Agreement is to provide for the continuation of effective policing in the Nishnawbe–Aski area by the Nishnawbe–Aski Police Service. The NAPS Agreement, which has a specific term and is the subject of negotiations every couple of years, provides for the establishment of a Police Services Board (the Board). The Board in turn governs the Nishawabe-Aski Police Force (NAPS), which has primary police responsibility in the Nishawabe-Aski area.

The parties to the NAPS Agreement are the Nishnawbe–Aski Nation and the provincial and federal Governments. Under the NAPS Agreement, the First Nations are responsible for managing their own police service through the Board. For their part, Canada and Ontario agree to make financial contributions in accordance with a formula whereby Canada pays 52% and Ontario 48% of the costs for each fiscal year.

1. The federal respondents do not provide a service customarily available to the general public within the meaning of section 5 of the *Act*

As described above, the federal respondents do not provide police services or facilities to the complainants or to the Mushkegowuk First Nations. While PS provides funding for the Nishnawbe–Aski Police Service, this does not amount to the provision of a service or facility within the meaning of section 5 of the *Act*.

In this regard, articles 3.1 and 3.2 of the NAPS Agreement make it clear that the police services and facilities are provided by the Board, not the federal Government:

> 3.1 The Police Service Board shall be independent and autonomous.
>
> 3.2 The Police Service Board shall be responsible for governing NAPS and for providing and implementing through the Chief of Police, planning, direction and policy for NAPS.

It is the Board - not the federal government - that is responsible for ensuring NAPS officers have the necessary training and for recommending individuals for appointment

to NAPS. The Board is also responsible for establishing standards of performance, grievance procedures for matters of discipline and dismissal and public oversight.

In this case PS and the province of Ontario provide funding to the Police Board pursuant to the NAPS Agreement. It is the Police Service Board which provides the police services to the communities it serves. Neither PS nor INAC provide the police services, as alleged in the complaint.

In *Watkin v. Canada*, 2008 FCA 170, the Federal Court of Appeal expressly rejected the position adopted by the Canadian Human Rights Tribunal in previous cases that all government actions in the performance of statutory functions constitute "services" within the meaning of section 5 of the *Act*:

> [33] Regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (Gould, supra, per Iacobucci J., para. 16, per La Forest J., para. 60), and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are "services", government actions do not come within the ambit of section 5. As in the present case, the enforcement actions which form the object of the complaint are not "services" under any of the meanings that can be given to this word, the Commission is without jurisdiction to hear the complaint.

PS, along with the Government of Ontario, is merely a source of funding for the operations of the Nishnawbe–Aski Police Service. It provides no "service" to the general public.

A number of cases have addressed the issue raised in this case, i.e. whether a "funder" is a service provider within the meaning of human rights legislation.

In *Bitonti v. British Columbia* (1999), 36 C.H.R.R. D/263 (B.C.C.H.R.), the British Columbia Human Rights Tribunal rejected the portion of a complaint brought against the provincial Ministry of Health alleging that it was liable for discrimination suffered by foreign-trained doctors in the granting of internships by hospitals funded by the Ministry. The Ministry of Health provided the funding for post-graduate training, but had no involvement in the selection of interns. The Council found that there was no apparent service relationship between the complainants and the Ministry and therefore that the Ministry was not a "service provider" within the meaning of the *Act*. Nor did the Council find that there was any obligation on the Ministry to undertake a special program to ameliorate the situation of the complainants.

In *Martyn v. Laidlaw Transit Ltd.* 2005), 55 C.H.R.R. D/235 (Alta.H.R.P.), an Alberta Human Rights Panel rejected a complaint alleging lack of availability of accessible taxis for the disabled. The complaint named the Alberta Ministry of Transportation. The Panel found that the Ministry was not a "service provider", as its only role was to provide funding for municipal transportation projects. It did not establish priorities or transportation initiatives, nor did it have any supervisory role with respect to transportation systems or taxi services.

In *McCormick v. Canada* [2005] F.C.J. No. 936, the Federal Court dismissed an application for judicial review of a decision of the Canadian Human Rights Commission to dismiss a complaint brought against Health Canada alleging that nurses working with 19 First Nations Bands had suffered discriminated in their employment contrary to section 11(1) of the *Act*. The Commission had dismissed the complaint. The Federal Court upheld the Commission's decision. In doing so, the Court expressed serious doubt that the nurses were employed by Health Canada. Health Canada's role was to provide funding to the Bands to facilitate their taking greater control over their communities. The Bands, not Health Canada, exercised control over the delivery of community health service, hired the nurses and paid the wages.

This case is akin to the three cases referred to above. PS is a funder, and not the exclusive one at that, and does not provide the service that is complained of here. It has assumed no obligations in respect of the delivery of police services to the complainants and asserts no regulatory or supervisory role in the provision of the policing services. PS has no legal or *de facto* authority to direct or control the manner in which the policing services are to be carried out. It does not hire or pay the police officers who work for the Board. Rather, the officers are recommended by Board and are hired by the Commissioner of the Ontario Provincial Police in accordance with article 3.4 of the NAPS Agreement and section 54 of the Ontario *Police Services Act*, R.S.O., c. P.15, as amended.

2. There is no proper comparison to found a case of discrimination in this case

The complainants seek to establish discrimination by comparing the level of funding provided by PS in respect of the Nishnawbe–Aski Police Service, with the funding of police services and facilities in other non-Aboriginal communities in Ontario. However, the federal Government is not responsible for the provision of police services or facilities in Ontario; this is a matter of provincial jurisdiction (which is presumably why the complainants have named Ontario as a respondent to the complaint). The complainants are asking the Commission to engage in a cross-jurisdictional comparison of policing throughout Ontario. This is not how section 5 of the *Act* works. It does not authorize an analysis of alleged differential treatment by different entities.

In order find discrimination in this case the Commission would need to find that the federal and provincial governments are a single entity. This is inconsistent with the division of powers established in the *Constitution Act, 1867*. The complainants' cavalier approach to the distinction between the two levels of government (e.g. by naming both the federal and provincial governments in the same complaint, and by failing to distinguish between them in their allegations of discriminatory "practices") does not justify any further examination of this complaint. Each level of government is legally and practically distinct; they cannot be treated as one entity, no matter how unique the circumstances, as recognized by the Supreme Court of Canada in *R. v. S. (S.)*, [1990] 2 S.C.R. 254.

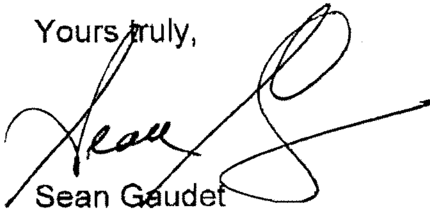
3. The complaint is trivial, frivolous and vexatious

For the reasons set out above, the allegations in the complaint do not make out a *prima facie* case of discrimination based on ancestry, ethnic origin, or race. On its face, therefore, the complaint should be dismissed pursuant to section 41(1)(d) of the *Act*.

Conclusion

For the reasons set out above, the complainants have not demonstrated that the federal respondents have discriminated against them in the provision of any service customarily available to the general public. In these circumstances, the Commission should refuse to deal with this matter pursuant to sections 41(1)(c) and (d) of the *Act*.

Yours truly,



Sean Gaudet
Senior Counsel
Public Law Section

cc. Murray Klippenstein
Rebecca Regenstreif