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Our File:
Notre dossier: 2-589339

Your File:
Votre dossier:

July 27, 2009

BY FACSIMILE

Ms. Natalie Dagenais
Director, Investigations
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario
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Dear Ms. Dagenais:

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

Please accept this letter as the submissions of the federal respondents to this human rights complaint – the Departments of Indian and Northern Affairs Canada (INAC) and Public Safety and Emergency Preparedness Canada (PSEP) – in response to the assessor's report dated June 24, 2009. In her report, the assessor recommends that the Canadian Human Rights Commission (the "Commission") deal with the complaint, and that the Commission refer the complaint directly to the Canadian Human Rights Tribunal without conducting an investigation prior to the inquiry.

This submission is not intended to replace our submission dated February 10, 2009, setting out the reasons why the Commission should refuse the deal with this complaint pursuant to paragraphs 41(1)(c) and (d) of the *Canadian Human Rights Act* (*CHRA* or the *Act*), and we request that our original submission also be placed before the Commission for its consideration of the assessor's recommendation.

The lack of clarity in the complaint

Due to the level of generality at which it has been cast, there is significant confusion as to what this complaint is about. In its letter to the Commission dated July 29, 2009, the federal respondents sought clarification of several aspects of the complaint. In their September 11, 2008 response to our request for additional information, the complainants refused to explain the basis for the complaint, maintaining that our questions were premature and that they could only be answered in the course of an investigation by the Commission. As a result, there is a fundamental lack of clarity about what this case is about.

This lack of clarity extends to the services the federal respondents are alleged to have provided to the complainants, as well as what the appropriate comparator is for the purpose of the discrimination analysis.

The respondents to this complaint are both the federal Governments and the Government of Ontario. The thrust of the complaints filed against both levels of government is that the complainants allege that they are receiving "lower quality police services and facilities in and around the Mushkegowuk communities compared to services customarily available to the public." According to the complainants, since the Governments of Canada and Ontario are responsible for "overseeing and funding these services and facilities", it is alleged that their "practices" (which have not been particularized) amount to discrimination in the provision of services and facilities on the basis of the complainants' ancestry, ethnic origin, and race. The complaint is based on the allegation that the federal respondents have discriminated against the complainants by providing them inferior "police services and facilities" when compared to "the public".

In our submission dated February 10, 2009, we set out two reasons why the Commission did not have jurisdiction over the complaint:

1) The federal respondents do not provide a service to the complainants 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.

The assessor has not adequately addressed either of these arguments in her report.

Funding is not a service

In our February 10, 2009 submission, we highlighted the fact that the role of PSEP 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"). Under the NAPS Agreement, the federal Government and the Government of 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. The policing services are provided by the Nishnawbe–Aski Police Service, which is governed by the Police Services Board.

According to the assessor, the complainants say that the federal respondents have more than a funding role. She maintains that the complainants point to provisions in the NAPS Agreement where they allege that the federal Government has a "contractual role" to ensure complement levels are sufficient and housing and infrastructure requirements are met. These contractual provisions are not identified by the assessor in her report. In actual fact, the only provisions in the NAPS Agreement that could possibly be applicable in this context - articles 11.4 and 11.5 – do not support the assessor's interpretation. These provisions are as follows:

> 11.4 During the negotiation process, the Parties ***agree to examine*** Nishnawbe-Aski Officer complement levels to ensure that the policing services being provided to Nishnawbe-Aski area are adequate, effective and meeting the needs of the

communities. The Parties also agree that ***best efforts will be undertaken*** to secure funding if necessary to support a justifiable increase in complement levels.

11.5 During the term of the Agreement, the Parties shall continue to work with NAN officials ***to examine*** the housing requirements for NAPS Officers throughout the Nishnawbe-Aski area, and ***explore options*** to meet those requirements. The Parties shall continue to work with NAN to develop a multi-year capital plan for police infrastructure and to continue working towards securing the funding necessary to meet the demonstrated need. (emphasis added)

These provisions are directed at the process of examination and exploration of options to secure **funding** for complement levels and infrastructure. The assessor fails to refer to any other activity carried out by the federal respondents other than funding that would qualify as a service that the federal Government provides to the complainants.

Nowhere in her report does the assessor address the federal respondents' submission that funding does not constitute a service within the meaning of section 5 of the *Act*. She does not address the jurisprudence referred to in our submission, in particular, *Watkin v. Canada*, 2008 FCA 170, *Bitonti v. British Columbia* (1999), 36 C.H.R.R. D/263 (B.C.C.H.R.), and *Martyn v. Laidlaw Transit Ltd.* 2005), 55 C.H.R.R. D/235 (Alta.H.R.P.). These cases all support the conclusion that funding does not constitute a "service" within the meaning of human rights legislation. The assessor simply does not address these authorities at all.

In paragraph 38, the assessor asserts that "federal responsibility is triggered" because of the different role the police plays in the complainants' communities (more "service-oriented and informal"), particularly given the communities' small nature, rapid change, and the lack of resources to deal with issues involving mental health and domestic violence. No explanation is given for what "federal responsibility" means in this context. Nor is any explanation given for why these factors should be considered relevant to the inquiry – i.e. whether the federal respondents provide a service within the meaning of section 5 of the *Act*. Even if they could be proven on the evidence, none of these factors establish that by providing a source of funding the federal Government is providing a "service" within the meaning of the *CHRA*.

Nor, for that matter, are any of the considerations that the complainants urge on the Commission in the balance of paragraph 38 of her report, i.e. the destructive legacies of colonialism and neglect, relevant to this question. These factors have no bearing on the analysis as to what constitutes a service within the meaning of section 5 of the *Act*.

The assessor's reference in paragraph 39 of her report to the "Federal spending power" or section 91(24) of the *Constitution Act, 1867* are misplaced in this context. These heads of constitutional jurisdiction, while justifying the federal Government's role as a funder under the NAPS Agreement, do not have any bearing on whether or not the provision of funding under the NAPS Agreement amounts to a service within the meaning of section 5 of the *Act*.

Thus, the question as to whether the federal respondents provide a "service" remains essentially unanswered by the assessor. All that she says in paragraph 18 of her report that is remotely on point is that:

> The question of whether ***programs and policies specific to First Nations*** constitute a "service" within the meaning of section 5 of the *Canadian Human Rights Act* is an outstanding legal issue that remains to be determined, and it does not appear "plain and obvious" that the Commission lacks jurisdiction to deal with this complaint.
>
> (emphasis added)

This is a fundamental mischaracterization of the federal respondents' submission, which was that the funding provided by PSEP for the Nishnawbe-Aski Police Service did not amount to the provision of a service within the meaning of section 5 of the *Act*. As stated above, the assessor failed to address this fundamental question in her report, and based on the existing jurisprudence, the only proper conclusion is that a funding-provider does not provide a service within the meaning of section 5 of the *CHRA*.

The lack of an appropriate comparator group

There is significant confusion in the assessor's report as to whether a comparator group is required for a section 5 discrimination analysis, and if one is, what that comparator group is in this case.

In paragraph 28 of the report, referring to the Federal Court in *Morris v. Canada (Canadian Armed Forces)* [2005] F.C.J. No. 731, the assessor states that a comparative analysis is not necessary to prove discrimination. *Morris* is a very different case than this complaint; *Morris* involved a complaint of age discrimination in the employment context. Moreover, contrary to the assessor's interpretation of the case, the Federal Court of Appeal did not reject the notion that a comparative analysis was necessary to establish discrimination. It recognized that a comparator existed, although some of the characteristics of the comparator group had not been disclosed to the complainant or submitted as evidence before the Tribunal.

Notwithstanding the assessor's conclusion that no comparator is required for a discrimination analysis, in paragraph 2 of her report she characterizes the appropriate comparator group as being "the public in Ontario":

> They (the complainants) allege that First Nations communities in Ontario are receiving lower quality policing services and facilities compared to services customarily available to the public in Ontario.

This characterization corresponds with paragraph 22 of the joint complaint filed with the Commission (as well as with the Ontario Human Rights Commission), where the complainants assert that they have the "right to receive police services and facilities that any member of the general public in Ontario also receives either directly or indirectly from the respondents."

However, in paragraph 24 of her report, the assessor appears to have expanded the scope of the complaint to encompass a comparison between Aboriginal communities living in

Mushkegowuk communities on the one hand, and "non-Aboriginals in communities in either Ontario ***or Canada***" on the other. There is inconsistency within the assessor's report as to what level of geography the comparison should be made.

The assessor's summarization of the complaint makes it clear that she accepts that a comparative analysis is required:

> 52. Essentially, the complainant's allegation is that different treatment (the separate funding regime for Aboriginal policing) is resulting in discriminatory results (inadequate services provided to peoples in Mushkegowuk region). In other words, the difference in regimes is creating a different and unequal result or substantive inequality.

This concept of the existence of "two different regimes in Canada" is repeated in paragraph 54 of the assessor's report. What the assessor does not explain is this passage is what the other "regime" is. Nowhere is this question answered in her report. There are ten provinces and three territories in Canada. There are several communities across the country served by a municipal, a local or a regional police force. Which of these communities constitutes the second of the two regimes referred to by the assessor? She does not say. In our July 29, 2008 request for clarification of the complaint, we specifically requested particulars as to the communities that constituted "the public" for the purpose of the comparative analysis that is required to establish discrimination. This information has never been provided to the federal respondents. It is a fundamental element of the discrimination analysis that required an answer before the Commission could determine whether it has jurisdiction over the complaint.

In paragraph 53 of her report, the assessor states that in the NAPS Agreement the federal respondents have committed to providing services "at a comparable level to the provinces..." This is false on two levels. First, under the NAPS Agreement, it is the Police Service Board that provides the policing services, not the federal Government. Second, the Agreement does not state that the services will be delivered "at a comparable level to the provinces". Further, that a contract such as the NAPS Agreement may reference a certain level of policing which may or may not be currently met is not an admission of discrimination.

In paragraph 29 of the report, the assessor cites *R. v. Sparrow*, [1990] 1 S.C.R. 1075, as support for the proposition that the government has the responsibility to act in a fiduciary capacity to Aboriginal peoples. No explanation is provided as to why this statement of law is at all relevant to the issue of the proper comparator group. Likely this is because this statement has no bearing whatsoever on this question. If it meant to imply that the federal Government owes a fiduciary responsibility in the context of the subject matter of this complaint, there is no evidentiary basis for such a conclusion. As stated by the Supreme Court of Canada in *Gladstone v. Attorney General of Canada* [2005] 1 S.C.R. 325, not every situation involving aboriginal people and the Crown gives rise to a fiduciary relationship. None of the indicia of such a fiduciary relationship are alleged by the assessor to be present in this case.

As clearly set out in our February 10, 2009 submission, the complainants seek to establish discrimination by comparing the level of funding provided by PSEP to the Nishnawbe-Aski

Police Service with the funding police services and facilities in other communities in Ontario. However, the federal Government is not responsible for providing police services in Ontario – this is a matter of ***provincial jurisdiction***. The province of Ontario is a different constitutional entity. The federal Government does not have any control over how the provincial Government allocates its resources for off-reserve policing. There cannot be a finding of discrimination as between two different levels of government. This fundamental problem – that the Commission (or the Tribunal) cannot engage in a cross-jurisdictional comparison of policing throughout Ontario (or Canada for that matter) – is entirely ignored by the assessor. It is as if this submission, which is dispositive of the jurisdictional concerns that are raised by this complaint, had never made by the federal respondents.

Alternatively, the Commission should conduct a thorough investigation

In the alternative, if the Commission will not dismiss this complaint on the grounds asserted in this submission and in our earlier submission of February 10, 2009, the Commission should conduct a full and complete investigation into the complaint. It is inappropriate for the Commission to refer this case directly to the Tribunal without first conducting a thorough and complete investigation into the complaint. The issues raised in this case are complicated. They affect other levels of government. If the matter is to proceed, the parties and the Tribunal should have the benefit of the work of the Commission in investigating and assembly of documents. Indeed, the complainant's counsel's position throughout has been that the Commission should conduct such an investigation, in light of the "complicated causes and effects involved"[1]. The Tribunal, a quasi-judicial body, is not the appropriate forum in which this exercise should be carried out in the absence of a thorough investigation having first been conducted by the Commission.

Yours truly,

Sean Gaudet
Senior Counsel
Regulatory Law Section

SG/dt

[1] Letters from M. Klippenstein to J. Chamberlin dated September 11 and December 24, 2008