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Our File:
Notre dossier: 2-589339

Your File:
Votre dossier:

January 27, 2011

VIA E-MAIL

John Chamberlain
Manager, Investigations
Canadian Human Rights Commission
344 Slater Street, 8th Floor
Ottawa, Ontario
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Dear Mr. Chamberlain:

Re: LOUTTIT, Joseph, Grand Chief of Mushkegowuk - Human Rights Complaint File Nos.: 20070826 and 20070993

I am counsel for the respondents Public Safety (PS) and Indian and Northern Affairs Canada (INAC), and write in response to the Commission investigator's report dated December 23, 2010. In this letter I refer to PS and INAC collectively as the "federal respondents".

As characterized by the investigator, the thrust of the complaints lodged against the federal respondents is that they have discriminated against the complainants by not providing adequate or sufficient funding to the Nishnawbe–Aski Police Service Board (the NAPS Board), and that this alleged under-funding has resulted in First Nations communities in Ontario receiving lower quality policing services and facilities relative to those provided by the Ontario Government elsewhere in Ontario. This complaint is about funding.

For the reasons that are set out below, the federal respondents submit that the investigator's report is seriously flawed and is based on factual assumptions that are not supported by the evidence. The analytical approach adopted by the investigator in determining whether the federal respondents are responsible for discriminating against the complaints in the provision of "services customarily available to the general public" is legally untenable. Finally, following the release by the Supreme Court of Canada of its judgments in *NIL/TU,O Child and Family Services Society v B.C. Government* and *Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, it is clear that the Commission does not have jurisdiction over the complaints, and they should be dismissed pursuant to section 41(1)(c) of the *Canadian Human Rights Act* (*CHRA*).

Breaches of procedural fairness

The flaws in the investigator's report may be attributable, in part, to the fact that she did not interview any representative of the federal respondents in conducting her investigation. Had she met with a representative of PS, as she had been invited to do, she would have had the opportunity to receive a comprehensive explanation of the federal Government's role regarding Aboriginal policing, particularly in relation to:

- the First Nation Policing Policy (the guideline applicable to federal officials for the negotiation of tri-partite contribution arrangements between the federal, provincial/territorial governments and First Nation/Inuit communities),
- the First Nations Policing Program (a non-statutory transfer payment program created to implement the First Nation Policing Policy), and
- the tri-partite agreement negotiated between the Nishnawbe–Aski Nation (NAN) and the Ontario and federal governments – the Nishnawbe–Aski Police Service Agreement.

I also note that, based on the list of documents reviewed by the investigator as set out in paragraph 24 of her report, she failed to consider important documents provided to her by PS, including the 2009 Statistics Canada report entitled "Police Resources in Canada". The investigator's failure to interview any individual on behalf of the federal respondents and her failure to consider evidence provided to her by the federal respondents demonstrate that she conducted an unfair investigation and constitutes a breach of the principles of procedural fairness.[1]

The federal respondents do not provide police services to the complainants

The investigator poses three questions that are set out in paragraph 2 of her report which serve as the template for her analysis. The first question – "Are the complainants treated differently **in the provision of policing** as compared to non-Aboriginals" – demonstrates a serious flaw in the investigator's analysis.

As we have previously advised the Commission, the federal respondents do not provide police services to the complainants; this role is carried out by the Nishnawbe–Aski Police Service (NAPS) and the Ontario Provincial Police (OPP) which is responsible for providing police services in respect of the parts of Ontario that do not have municipal police forces under section 19(1) of Ontario's *Police Services Act*. If, as suggested in the investigator's question, the provision of policing is the "service" in respect of which it is alleged the federal respondents have

[1] *Sketchley v. Canada (Attorney General)*, 2005 FCA 204

discriminated against the complainants, the federal respondents do not provide this "service".

The investigator states in paragraph 6 that the federal respondent shares responsibility for policing in the area that is serviced by the NAPS. This is false. The province has the constitutional and legislative responsibility for policing in Ontario. Under the NAPS Agreement this responsibility has been delegated to the NAPS Board which governs the NAPS, which has primary responsibility for providing police services in the Nishawabe-Aski area.

Articles 5.1 and 5.2 of the 2009 NAPS Agreement (articles 3.1 and 3.2 of the 2003-2009 NAPS Agreement it replaced) make it clear that the police services and facilities are provided by the NAPS 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. First Nations Constables who work for the NAPS are appointed by the Commissioner of the OPP pursuant to section 54 of the Ontario *Police Services Act*, after receiving the NAPS Board's recommendation (article 5.4 of the 2009 NAPS Agreement), and are subject to the Ontario Act. These officers are trained at the Ontario Police College in accordance with the Ontario *Police Services Act* (article 7.1). The Board is also responsible for establishing standards of performance, grievance procedures for matters of discipline and dismissal and public oversight.

The only role performed by the PS is funding – which is not a "service customarily available to the general public"

The investigator states in her report that the role of PS and INAC in the provision of police services on reserve "**includes** funding" (paragraph 8). No explanation is ever provided by the investigator in her report as to the federal respondents' role beyond providing funding for the NAPS under the First Nations Policing Program.

INAC has no role in the First Nations Policing Policy, the First Nations Policing Program, or the NAPS Agreement. It should not be a respondent to these complaints.

In paragraph 8 of her report, the investigator indicates that the Commission has jurisdiction over complaints filed against the federal government. It's not the identity of the respondent that is the issue; it is the nature of the service being provided and

whether the federal government's role is sufficient to implicate it in the provision of the service.

PS's role, as previously explained, is to provide discretionary financial contribution with the Government of Ontario pursuant to the tri-partite NAPS Agreement. PS is a discretionary financial contributor to the NAPS – nothing more. It has no other role in respect of front-line policing in Ontario.

The investigator incorrectly states in her report (paragraph 5) that the federal government has a role in deciding what "kinds and quality" of police services are provided by the NAPS Board. This is false. These choices are made by the NAPS Board. Contrary to the investigator's opinion (paragraphs18 and 19 of her report), PS has no legal or *de facto* authority to direct or control the manner in which the policing services are to be carried out by NAPS. The investigator simply states this as a fact without any substantiation or reference to supporting evidence.

The investigator concludes that the provision of funding under the tri-partite NAPS Agreement is a service because "Funding for policing is customarily available to the general public" (paragraph 21). This is legally unsupportable. The federal government does not customarily offer "funding for policing" to members of the general public. Again, the investigator has provided no evidentiary support for this bald assertion. The funding that is provided is done so on a "government-to-government" level to recognize the legitimate aspirations of Aboriginal people to control important elements of their institutions of government. It therefore does not fit within the notion of being provided pursuant to a "public" relationship between the user and the purported service provider,

In Canada *(Attorney General) v. Watkin*, 2008 FCA 170, the Federal Court of Appeal has established that "services" for the purpose of section 5 of the *Act* contemplate something of benefit being "held out" as a service and "offered" to the public in the context of a public relationship. The provision of financial contribution by Canada does not fit within the meaning of "services customarily available to the general public".

In paragraph 12 of her report, the investigator refers to the *Shubenacadie* case. The issue in *Shubenacadie* was not whether federal funding in and of itself engages a complaint against the federal government. Indeed, the federal government was not a respondent to the complaint, but only an interested party. The Tribunal in that case in fact disavowed that DIAND was a supplier of the service in question.

Throughout her report, the investigator alternatively refers to providing police services and providing *funding* for police services as the service at issue in these complaints. The distinction is an important one. While the former may be viewed as "services" under section 5 of the *CHRA*, as found by the investigator (paragraph 17), the latter cannot. In paragraph 22, the investigator concludes that funding policing confers a benefit, and that it is a service customarily available to the general public. This is flawed reasoning. The benefit – policing – is customarily provided to the

general public; the "service" – funding – is not. It is provided to the NAN pursuant to the tri-partite agreement with the province of Ontario. This funding is not provided customarily to the general public.

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

Engaging in a comparative analysis, the investigator concluded that there were "clear differences" in the policing provided by the NAPS and that provided by the OPP in two communities – Pickle Lake and Moosenee (paragraph 35). The investigator characterized this as "adverse differential treatment" that "may" be linked to the complainants' national and ethnic origin (paragraph 61). The investigator's analytical approach is legally flawed.

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). By comparing the quality of police services and facilities provided by the province to those provided by the NAPS (for which the investigator claims the federal respondents are responsible), the investigator has established the level of services provided by the provincial OPP in the two selected communities as the benchmark against which the services provided by NAPS are to be measured. The problem with this analytical approach is that the federal respondents have no control, role or responsibility over delivering or funding police services in the comparator communities. This is not how discrimination is established in law.

Section 5 of the CHRA requires that in the provision of a service one cannot either deny that service or provide a lesser service to another. A proper discrimination analysis focusses on one service provider and one particular service customarily provided to the general public. These fundamental elements constitutive of discrimination have been formulated into a simple algebraic formula in *Singh* (Re), [1989] 1 F.C. 430 (C.A.). In *Singh*, Justice Hugessen stated:

> 17. [...] *in algebraic terms, it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C. Or, in concrete terms, it would be a discriminatory practice for a policeman who, in providing traffic control services to the general public, treated one violator more harshly than another because of his national or racial origins.*

By comparing the government of Canada to the government of Ontario (different service providers) and the provision of financial contributions to the provision of policing services (different "services"), the investigator applied a fundamentally flawed approach to establishing "differential treatment" on the basis of national or ethnic origin.

In actual fact, any differential treatment in the provision of funding for policing services is in the complainants' favour. The respondents do not provide any type of

funding to the Pickle Lake or Moosenee Ontario Provincial Police detachments. As such, the complainants actually benefit from preferential treatment relative to the Ontario government, the potential recipient of funding for police services in the two communities selected by the investigator as the baseline for her comparative analysis.

The Commission and the Tribunal have no jurisdiction over the complaints

Following the issuance by the Commission of its section 41 decision, the Supreme Court of Canada issued its judgments in *NIL/TU,O Child and Family Services Society v B.C. Government* and *Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*. These cases support the federal respondents' position that the complaints filed in this case fall within the jurisdiction of the Ontario Human Rights Tribunal, not the Commission.

It is well established that the provinces have legislative jurisdiction over policing under section 92(14) of the *Constitution Act, 1867*. This provision has been interpreted as attributing to the provinces legislative jurisdiction with respect to policing (see *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152 and *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770).

In *NIL/TU,O* and *Native Child*, the Supreme Court of Canada was required to decide the labour relations jurisdiction of provincially regulated child welfare agencies that provided child welfare services in respect of Aboriginal children in a culturally sensitive manner. In *NIL/TU,O*, the services were provided on reserve. In both cases, the Supreme Court unanimously determined that labour relations fell within provincial jurisdiction. In addition, the majority of the Court rejected the argument that federal funding to these organizations extended federal labour relations jurisdiction over them (In *NIL/TU,O* the organization received 65% of its funding from the federal government).

The majority of the Court applied the functional test articulated *in Four B Manufacturing v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, for determining whether an entity is federal for the purpose of triggering labour relations jurisdiction. This requires the court to examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If it is, its labour relations (and human rights) will be federally regulated.

The majority in *NIL/TU,O* found that the delivery of child welfare services to First Nations pursuant to powers delegated by the provincial government, in accordance with provincial legislation, fell within provincial labour relations jurisdiction.

The parallels between *NIL/TU,O* and this case are compelling. The CHRA provides in section 2 that "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming **within the legislative authority of Parliament**..." Thus, as is the case of the *Canada Labour Code*, the provisions of the CHRA are confined to those matters falling within the legislative competence of the federal government. The powers exercised by the NAPS Board are delegated by the province and are subject to provincial regulatory authority under the Ontario *Police Services Act*. Applying the Four B functional test to the NAPS, an examination of its nature, operations and habitual activities leads to the ineluctable conclusion that it is subject to provincial, not federal, human rights jurisdiction. This may well be why the complainants simultaneously filed an identical complaint with the Ontario Human Rights Tribunal.

The investigator refers in her report to the B.C. Human Right Tribunal's decision in *D'Cruz v. Stl'atl'imx Tribal Police Board*, [2008] B.C.H.R.T.D. No. 457. This case, which was decided prior to the Supreme Court's decision in *NIL/TU,O* is on all fours with the Louttit complaints. The member of the B.C. Tribunal held that the Stl'atl'imx Tribal Police Board (STP), which had been established pursuant to the same kind of tri-partite agreement under the First Nations Policing Program, was subject to provincial, not federal, human rights jurisdiction. The fact that the STP provided policing services predominantly to Aboriginal people, predominantly on reserve land, in a manner sensitive to their needs, under Aboriginal governance, and pursuant to the tri-partite agreements with the federal and provincial governments, did not oust provincial jurisdiction for human rights purposes. The investigator attempts to distinguish this decision on the basis that the NAPS Agreement contains a clause to the effect that the parties will discuss statutory amendments to provide a statutory foundation for the NAPS. Article 9.1 of the 2003-2009 NAPS Agreement provided that:

> 9.1 The Parties agree to participate in discussions involving the process of seeking legislative changes to provide a legislative foundation for NAPS.

This provision does not specify whether the legislation would be federal or provincial, and the parties can't alter constitutional jurisdiction by contract. Further, the provision was not carried over into the 2009 NAPS Agreement which replaced the 2003-2009 Agreement (see article 15.1 of the 2009 NAPS Agreement). In any event, there has been no such legislative amendment, and the Native constables employed by the NAPS continue to be governed by and exercise powers under provincial legislation.

Being without jurisdiction to investigate the complaints, the Commission should dismiss them in accordance with section 41(1)(c) of the *CHRA*.

Conclusion

In closing, as the Commission does not have jurisdiction to investigate the complaints, as the provision of financial contributions is not a service within the meaning of section 5 of the *Act*, and as the respondents have not discriminated against the complainants in the provisions of those financial contributions, the respondents submit that the Commission should dismiss the complaint.

Yours truly,

Sean Gaudet
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Regulatory Law Division

SG/dt