

## First Nations Education Funding: The Case of Sloan & Marvin

**By: Elysa Hogg**

Sloan and Marvin Miller are twin children with Down Syndrome and because of where they live, their government refuses to provide them with the special education support that they need to go to school.

This story does not take place in Apartheid South Africa, or the Jim Crow South – Sloan and Marvin live in Ontario.

It was estimated by the [Mississaugas of New Credit First Nation](#), where Sloan and Marvin reside, that \$80,000 a year would be needed for the Miller twins to receive the education that they need. Aboriginal Affairs and Northern Development Canada (AANDC) denied a request for funding, and instead recommended that the Nation take the needed amount from their already insufficient \$165,000 a year education budget. In June of 2009 the Mississaugas lodged a formal human rights complaint with the Canadian Human Rights Commission on behalf of Sloan and Marvin. The claim will be heard at the Tribunal sometime this year, but there has already been great speculation about the arguments both sides will raise.

### Background

Insufficient First Nations education funding has been on the political radar for some time. However, after the fallout from then-Assembly of First Nations Chief Shawn Atleo and the government's unsuccessful attempt at educational reform in 2014 (see [here](#)) there has been no further attempt to modernize the governance of First Nations education. The governing legislation begins and ends with the outdated provisions of the *Indian Act*, RSC 1985, c I-5. Beyond allowing the Minister to “establish, operate and maintain schools for Indian children” (section 114(2)), to make regulations regarding “standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools” and to “provide for the transportation of children to and from school” (section 115), the legislation deals primarily with mandatory attendance (sections 116-117). Meanwhile, students on reserve receive far fewer resources and support than their peers off reserve, as the [Assembly of First Nations](#) has documented.

While Sloan and Marvin's case is especially troubling, underfunding of First Nations education in Canada is far from an isolated issue. As noted by James Anaya in [the Report of the Special Rapporteur on the rights of indigenous peoples](#) (at para 18), the Federal government is generally responsible for funding education on reserves, which is then administered by First Nations governments. Exceptions to this general rule are British Columbia and Nova Scotia. In BC, on reserve education is coordinated through a province-wide authority and delivered and regulated by individual Nations. These Nations are provided with stable funding through a tripartite agreement with the provincial and federal governments. In Nova Scotia, many bands are self-governing in education due to an agreement made in 1997. In other provinces, off reserve

schools are funded by provincial and territorial governments and administered by local school boards.

In early June, Perry Bellegarde, the current National Chief of the Assembly of First Nations, [called on](#) the government to step up and meet its financial obligations to First Nations people after it was reported that the Canadian Government fell about \$1 billion short in Aboriginal Affairs spending over five years. This shortfall is acutely felt in education, with off-reserve schools receiving significantly more funding than comparable ones on-reserve.

This means that if Sloan and Marvin lived on the North side of the road that separates the New Credit reserve and Haldimand County, they would be in a public school and would have their special education costs covered by the provincial government. Given the difference in outcome based on a geographical (and racial) determination, there is a strong argument to be made that the Miller twins are being provided an insufficient education due to systemic discrimination.

### **Discrimination Claim**

Section 5 of the *Canadian Human Rights Act*, RSC 1985, c C-H-6 (*CHRA*) prohibits discrimination by government bodies based on a number of protected grounds. It reads:

**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 test for a *prima facie* finding of discrimination under section 5 was set out by the Supreme Court of Canada in *Moore v British Columbia (Education)*, [2012 SCC 61](#), [2012] 3 SCR 360. The test in *Moore* requires complainants to show that: (1) they have a characteristic protected under the human rights legislation, (2) they have experienced an adverse impact with respect to the service in question, and (3) the protected characteristic was a factor in the adverse impact (at para 33).

The application of this test in the case of under-funding for First Nations education would be as follows:

#### ***(1) Is there a Protected Ground?***

Race and national or ethnic origin are protected grounds under section 2 of the *CHRA*. Given that underfunding of education on reserves primarily affects First Nations children, race or ethnic origin can form the basis for a section 5 claim. In the case of Sloan and Marvin, the ground of disability is also engaged by the lack of funding for their specific educational needs.

#### ***(2) Is there an Adverse Impact?***

The inequality between the quality of off and on reserve education certainly creates an adverse impact. Currently, students who are attending public or private schools off reserve are receiving nearly 50 per cent more government funding than those attending on-reserve schools, as the

Assembly of First Nations [reports](#). There are over 100 school buildings on reserves nationwide that do not meet minimum safety guidelines in terms of physical facilities, let alone the necessary standard as effective places for learning (reported [here](#)). In addition to failing physical structures, children on reserve have limited to no access to modern technology or library support because most on reserve schools do not have gymnasiums, libraries or any computers (reported [here](#)).

Problems in secondary education may lead to problems in later education as well. The Centre for the Study of Living Standards [reports](#) that while the majority of Canada's off reserve population aged 15 and over have a diploma, certificate or degree (76 per cent), some reserves have less than 10% of their population with some sort of completed tertiary education. Even further down the road, the adverse impacts are more severe. Only two reserves in 2006 had unemployment lower than the national average of 6.6 per cent, and the highest unemployment rate was 66.7 per cent, ten times the national average.

Lack of education funding is of course not solely to blame for the often-marginalized position of First Nations people in Canadian society, but it is certainly a factor that contributes to the lower health and employment achievements of First Nations people compared to the rest of the Canadian population.

### ***(3) Is the Protected Characteristic a Factor in the Adverse Impact?***

The final step in the *Moore* analysis requires the complainant to demonstrate that the protected characteristic was a factor in the adverse impact. The claimant does not need to prove that the adverse effect was intentional (*Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536, [1985 CanLII 18](#)), merely that it happened at least partially because of the characteristic (*Peel Law Association v Pieters*, [2013 ONCA 396](#) at para 126). Even if the government did not explicitly set out to discriminate against First Nations children on reserve, the unequal funding between on and off reserve education still creates a prejudicial effect, an effect that can only be explained by racially determined policies that very likely run afoul of section 5(b) of the *CHRA*. And, as suggested earlier, disability is also a factor in the adverse impact experienced by children such as Sloan and Marvin.

### **The Federal Government's Anticipated Response**

The Federal government in responding to this complaint could argue that education funding is not "the provision of goods, services, facilities..." as contemplated by section 5. After all, the federal government does not actually educate anyone on reserve, it does not employ teachers or principals and does not build the schools, it only provides the money. This argument begins to fall apart though in light of sections 114-122 of the *Indian Act*. These provisions allow the Minister to enter into agreements for elementary and secondary school services to Indian children on reserve. These agreements, and the broad oversight powers of the federal government over First Nations education make it more likely than not that the funding itself can be seen as provision of a service.

If provision of a service is found to exist, then a government body responding to a *CHRA* discrimination claim faces two main tasks: first, to show that there is no *prima facie* case which must be answered, and second, if a *prima facie* claim is established, to show that there is a *bona fide* justification for the discrimination.

### ***Refuting a Prima Facie Claim?***

In light of the arguments raised above, it will be difficult for the government to defeat a finding that there is a *prima facie* claim of discrimination. However, there are several potential arguments it could adopt, based on the requirements of the *Moore* test: that there is no protected ground, no adverse impact, and that even if there are, the two are not linked.

In arguing against the presence of a protected ground, the government could try and reframe the issue not as discrimination against First Nations children, but merely as discrimination against children who happen to live in certain areas – which does not engage a protected ground. For example, children in poor inner city areas tend to have lower educational outcomes than wealthy suburban children (see e.g. [here](#) and [here](#)), and this has not been the subject of any human rights claims. However, it is the race and ethnicity of First Nations children that dictate where they live, such that they are marginalized by on-reserve education systems based on those grounds.

The next facet of the government’s case could attack the position that an adverse impact exists, and if it does, that it is caused by government action. While no one could seriously argue that First Nations children on reserve do not face significant challenges, there is a causation argument to be made. The Crown could put forward the case that adverse effects on aboriginal children are the result not of a lack of education funding but of systemic socio-economic problems within First Nations communities.

This argument was addressed in the *Report of the Special Rapporteur on the Rights of Indigenous Peoples in Canada*, above. It noted that: “government representatives have attributed the gap in educational achievement in large measure to high levels of poverty, the historical context of residential schools, and systemic racism” (at para 17).

While forcing current education policy to take the blame for the effects of centuries of mistreatment is overstating the case, the Supreme Court has recently found (in the context of section 15 of the *Charter*) that “If the state conduct widens the gap between the historically disadvantaged group and the rest of the society rather than narrowing it, then it is discriminatory” (*Quebec (Attorney General) v A*, 2013 SCC 5, [2013] SCR 61 at para 332). This approach to discrimination is cited in the Memorandum of Fact and Law of the [First Nations Child and Family Caring Society](#) in a similar discrimination claim currently before the Canadian Human Rights Tribunal (at para 95). If the Tribunal chooses to import this reasoning, then this government argument is almost certain to fail.

### ***Bona Fide Justification: Grismer Analysis***

Once a *prima facie* case of discrimination is established the onus shifts to the defendant to prove (on a balance of probabilities) that the discriminatory standard had a *bona fide* and reasonable justification (*CHRA* s 15(1)(g)). The test from *Grismer (British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 1999 CanLII 646) is the applicable test for this defence provision. There are three elements that must be proven (at para 20):

- 1) Did the defendant prove that it adopted the standard for a purpose or goal rationally connected to the function being performed?;
- 2) Did the defendant adopt the standard in good faith with an honest belief that it was necessary for the fulfillment of the purpose or goal?; and
- 3) Did the defendant prove that the standard is reasonably necessary to accomplish the purpose or goal?

The government justifications for claims of discrimination in education funding may be centered around the impracticality of providing additional funding outside of the Federal budget for education or special education. As mentioned earlier though, auditors' reports have uncovered more than a billion dollars in unspent funds sitting in the coffers of Indian and Northern Affairs. Given this surplus, arguments around limited resources cannot get too far.

## **Remedy**

A successful claim would result in a remedy under the *CHRA*. Unfortunately, legislation such as the *Indian Act* cannot be changed through *CHRA* claims, as human rights commissions lack jurisdiction to make such an order. The appropriate remedies for this claim are found under section 53(2) of the *CHRA*, which includes an order for the “adoption of a special program, plan or arrangement”. It is through this remedy that First Nations communities could seek educational programs that are both well-funded and in keeping with their aspirations for a self-determined curriculum.

If the panel does find in favour of the complainants, then hopefully children such as Sloan and Marvin Miller will be able to access the resources that are readily available to other children, including those with disabilities, across Canada. The immediate impact that equalizing education funding can have is illustrated by an example from Manitoba.

The [Waywayseecappo reserve school](#) sits just five miles away from a provincially funded, off reserve school called Rossburn Collegiate. Despite the close proximity, a Waywayseecappo student received only \$7,300 annually from the federal government while a Rossburn student receives \$10,500 a year from the provincial government. Chief Clearsky of the Waywayseecappo band convinced the provincial and federal governments to let them join the local school board. In effect, the Waywayseecappo students became provincial students. As a result of this change, the Waywayseecappo students can access specialists who help with curriculum and special development, the Waywayseecappo teachers received anywhere from \$13,000 to \$18,000 more a year, and literacy and learning rates amongst on reserve children improved almost immediately.

## Conclusion

While equalizing education funding between on and off reserve children will not solve all the disadvantages faced by First Nations children living on reserves, it could certainly help. Given the strong *prima facie* case of discrimination based on the *Moore* test, it seems likely that the Canadian Human Rights Tribunal will rule in favour of the Mississaugas of New Credit First Nation. This could prove to be an important first step in making a high quality education accessible to all Canadian children.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>  
Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

