A-145-12

FEDERAL COURT OF APPEAL

THE ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

**CANADIAN HUMAN RIGHTS COMMISSION,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL**

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Contents

OVERVIEW 1

PART I STATEMENT OF FACTS 2

PART II STATEMENT OF ISSUES 3

PART III ARGUMENT 3

Role of an Appellate Court in Judicial Review 3

The Standard of Review 4

Issue #1 – The Appropriate Standard of Review 4

Issue #2 - Application of the Standard of Review 7

Conclusion - Federal Adoption of Provincial Standards 20

PART IV ORDER SOUGHT 22

PART V LIST OF AUTHORITIES 23

OVERVIEW

1. The issue of substantive equality[1] for First Nations children on reserves in Canada is at the heart of the human rights complaint in this appeal. Federal funding provided to them for child welfare services is significantly less than that provided to children off-reserve, and is approximately 22% less than that in the average province. Underfunding is particularly acute regarding least disruptive measures resulting in more First Nations children on-reserve being removed from their homes. The Respondents, the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society ("Caring Society"), assert there are three times as many Aboriginal children in state care today than at the height of the residential school era.

2. AFN and the Caring Society filed a federal human rights complaint. On a preliminary motion, the Canadian Human Rights Tribunal ("Tribunal") dismissed the complaint on the grounds there was no appropriate comparator group, which she deemed necessary within the meaning of "differentiate adversely" under subsection 5(b).[2] Because of the unique historical and constitutional situation of First Nations people, the federal government delivers child welfare services to "Indian" children on reserve. All other children receive such services from the province. There is no "mirror comparator". However, the goal of federal funding policies is to provide services comparable to those provided by provinces. The Tribunal ignored this material fact, which is one of the points Madam Justice Mactavish took exception to in her Reasons[3].[4]

3. On judicial review, the Federal Court set aside the Tribunal's decision on procedural grounds, but also because she found it unreasonable based on the Tribunal's

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[1] *Withler v. Canada (Attorney General),* 2011 SCC 12 at paras. 29-40. [*Withler*]
[2] *Decision of the Canadian Human Rights Tribunal*, 2011 CHRT 4 [*Tribunal decision*], Appeal Book, vol. 1, tab 4, pgs. 138-206.
[3] *Reasons for Judgment and Judgment of the Honourable Madam Justice Mactavish*, 2012 FC 445 [*Federal Court Judgment*], Appeal Book, vol. 1, tab 2, pgs. 5-113.
[4] *Ibid*. at paras. 362, 373 and 381 citing *Withler* at 43, pgs. 97-98, 100 and 102.

interpretation of s. 5 of the *Canadian Human Rights Act* ("*Act*")[5]. The AFN submits the Federal Court Judgment withstands legal scrutiny and that this appeal should be dismissed.

PART I
STATEMENT OF FACTS

4. The AFN accepts the statement of facts as stated in the Appellant's Memorandum of Fact and Law ("Appellant's Factum").

5. The statutory provisions at the center of this appeal are ss. 2 and 5 of the *Act*, which provide as follows:

> **2.** 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, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> **…**
>
> **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 or accommodation to any individual, or
>
> (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
>
> [emphasis added]

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[5] *Canadian Human Rights Act*, R.S.C., 1985 c. H-6, s. 5.

PART II
STATEMENT OF ISSUES

6. There are a number of issues in this appeal. Included amongst these are issues of procedural fairness identified by the Federal Court. The AFN will leave these to be addressed by the Canadian Human Rights Commission ("Commission") and the Caring Society whose submissions we hereby adopt. However, the AFN will focus on the comparator issue, particularly with regard to two aspects:

    (1) The appropriate standard of review; and

    (2) The application of the standard of review.

PART III
ARGUMENT

Role of an Appellate Court in Judicial Review

7. The AFN disagrees in part with paragraph 24 of the Appellant's Factum and their assessment of the role of an appellate court in a judicial review. The Appellant accurately identifies that an appellate court's role is "to determine whether the applications judge identified the appropriate standard and applied it correctly" citing *Canada Revenue Agency v. Telfer*[6]. However, Appellant goes on to say that the appellate review is on a standard of correctness, citing *Dr. Q. v College and Physicians and Surgeons of British Columbia*[7]. This is not accurate. As stated by this Honourable Court in *Telfer*:

> "However, in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal's decision…The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly... In practical terms, this means that the

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[6] *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at para. 18. [*Telfer*]
[7] *Dr. Q. v College and Physicians and Surgeons of British Columbia,* 2003 SCC 19 at paras. 43-44.

> appellate court itself reviews the tribunal decision on the correct standard of review.[8]

The Standard of Review

Issue #1 – The Appropriate Standard of Review

8. On the judicial review to the Federal Court the AFN argued for a correctness standard on the comparator issue as determined by the Tribunal. The Federal Court adopted a "reasonableness" standard and held the Tribunal decision was unreasonable and set it aside. The AFN supports this disposition but maintains the standard of review ought to be "correctness."

9. The AFN submits there are two standards applicable to the comparator issue: the identification and application of an appropriate comparator is a question to which the reasonableness standard applies[9], and the pure legal question as framed by the Tribunal[10] on the comparator issue is one to which the correctness standard applies.

10. The process of judicial review involves two steps according to *Dunsmuir*:

> "First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review."[11]

11. Unquestionably, the prevailing trend since *Dunsmuir* is to favour deference to tribunals interpreting their "home statutes", however there are exceptions. One exception is a "true question of jurisdiction"[12], and the AFN submits the following

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[8] *Telfer*, *supra* note 6 at 19 citing *Prairie Acid Rain Coalition v. Canada* (*Minister of Fisheries and Oceans*), 2006 FCA 31 at para. 14.
[9] *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 at paras. 168 and 182, per Evans J.A. in dissent; aff'd 2011 SCC 57, [2011] 3 S.C.R. 572.
[10] *Tribunal decision*, *supra* note 2 at para. 107, pg. 184.
[11] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 62.
[12] *Ibid*. at para. 59.

jurisprudence as already having satisfactorily determined on that matter: *Watkin v. Canada (Attorney General),* 2008 FCA 170 [*Watkin*].

An Exception: Jurisdictional Question

12. Note that the motion to dismiss with the Federal Court was brought by the Appellant as a jurisdictional motion that stated the "motion is for an order … to dismiss the Complaint before the Tribunal in this proceeding…for lack of jurisdiction…"[13] Two grounds were given: (i) AANDC child welfare funding for First Nations children on-reserve did not constitute a "service" within the meaning of s. 5 of the *Act*; and (ii) the discrimination analysis in s. 5 required a comparator and because there was none it did not apply.

13. This Honourable Court in *Watkin* held that Health Canada, when enforcing the *Food and Drug Act*, was not providing a "service" within the meaning of s. 5 of the *Act*. The decision is post-*Dunsmuir* and was decided on the correctness standard because it was a "true question of jurisdiction"[14]. This decision concerns the same category of question in this appeal; in other words the "comparator" issue is similar to the "services" issue, and it is upon these combined grounds the Appellant advanced its motion to dismiss on lack of jurisdiction. Although the decision does not appear to have been overturned, there is no reason to doubt it was decided in a satisfactory manner, and based upon this authority the AFN submits the appropriate standard of review ought to be correctness.

Other Exceptions: Constitutional Questions and Questions of Central Importance to the Legal System

14. There are two other exceptions to which the correctness standard applies, and taken together, the AFN submits these exceptions apply in this appeal. The first is in

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[13] *Respondent's Motion to dismiss the complaint for lack of jurisdiction dated December 21, 2009*, Appeal Book, vol. 2, tab 5, pgs. 584-589.
[14] *Watkin v. Canada (Attorney General),* 2008 FCA 170 at paras. 22-23.

regard to "constitutional questions regarding the division of powers", and the second concerns a question central to the legal system as a whole".[15]

15. The *division of powers* has been an underlying theme throughout this case[16] and has provided the background to the cross-jurisdictional comparison the Appellant cites as the basis for the Tribunal's lack of jurisdiction. The "division of powers and cross-jurisdiction" issue permeates throughout the Appellant's Factum.[17]

16. Under s. 91(24) of the *Constitution Act, 1867*[18], "Indians and lands reserved for the Indians" is a matter coming within federal jurisdiction. Aboriginal Affairs and Northern Development Canada ("AANDC") provides funding and services for First Nation children on-reserve by virtue of s. 91(24); provinces have jurisdiction over child welfare off-reserve pursuant to s. 92[19]. An understanding of the interplay between these two jurisdictional powers is essential to resolving the comparator issue, the service issue and the discrimination complaint more broadly. Accordingly, the AFN submits the correctness standard ought to apply.

17. *Dunsmuir* states "correctness" will apply where "the question at issue is one of general law "…that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' …"[20] Undoubtedly, the question involved is truly a legal question, and, as previously mentioned, the Tribunal clearly framed the issue as a "true question of law".

18. The AFN submits the issue of "substantive equality" is central to the legal system as a whole. It is imbedded in both s. 5 of the *Act* and s. 15 of the *Charter*[21]; and the

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[15] *Dunsmuir*, *supra* note 11 at paras. 58 and 60.
[16] See for example: *Tribunal decision*, *supra* note 2 at paras. 66-70, 98 and 130, pgs.168-169, 180 and 192.
[17] *Appellant's Factum*, paras. 31, 65-75 and 84.
[18] *Constitution Act*, *1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 91(24).
[19] *Ibid*., s. 92.
[20] *Dunsmuir*, *supra note 11* at para. 60.
[21] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 15.

comparator issue is common to both. Indeed, the Supreme Court of Canada ruled in *Withler* just days before the Tribunal issued its decision that a formalistic approach ought to be avoided in discrimination cases, and that a mirror comparator is not strictly required in discrimination cases.[22] While the terms of s. 15 of the *Charter* and s. 5 of the *Act* differ, the purposes and animating principles are the same: the protection of human rights and pursuit of substantive equality.

19. *Dunsmuir* states the question must be "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". Human rights are obviously within the expertise of the Tribunal, but the AFN submits constitutional and aboriginal issues, particularly those involving the unique historical and constitutional status of Aboriginal peoples, are outside the expertise of the Tribunal.

20. This entire exception to the reasonableness standard can be attributed to *Toronto (City) v. C.U.P.E., Local 79,* particularly the Reasons for Judgment of Justice Lebel. Although the case pre-dates *Dunsmuir*, it was an important precursor to that decision. It is important to note that in those Reasons at paragraph 67 Justice Lebel states questions involving "constitutional and human rights" and "civil liberties" typically fall to be decided on a correctness standard:

> "As I noted in brief above, certain fundamental legal questions — for instance, constitutional and human rights questions and those involving civil liberties**,** as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation — typically fall to be decided on a correctness standard." [emphasis added][23]

Issue #2 - Application of the Standard of Review

21. The Tribunal identified the comparator issue as a true question of law, and as such the AFN submits the standard of review is correctness. Despite the Federal Court's application of "reasonableness", that is, despite the deference afforded to the

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[22] *Withler*, *supra* note 1 at paras. 41-43 and 55-60.
[23] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 67.

specialized decision-maker under this standard of review, the Tribunal's decision was found wanting. Madam Justice Mactavish ruled the decision was unreasonable, set it aside and remitted it back to a differently constituted panel of the Tribunal for re-determination. Therefore, Madam Justice Mactavish found the Tribunal's decision wanting on the process and the outcome. In ruling that the Tribunal's decision failed to meet the reasonableness standard, by logical extension the Tribunal's decision also fails to meet the correctness standard.

22. The AFN submits this Honourable Court, as an appellate court, ought to apply the correctness standard, but should affirm the Federal Court judgment on both standards of review. In other words, if this Honourable Court rules the appropriate standard on the comparator issue is reasonableness, then the AFN submits this Honourable Court ought to uphold the decision of Madam Justice Mactavish in her finding the Tribunal's decision was unreasonable.

23. The Appellant's Factum submits that the Federal Court erred in the application of the reasonableness standard. The remainder of the AFN's submissions will address this matter. However, the AFN maintains that if the Tribunal Decision is unreasonable, then it is also incorrect.

Dunsmuir: Defining the Reasonableness Concept

24. In determining whether the Federal Court properly applied the reasonableness standard of review analysis, it is first necessary to define what the Supreme Court of Canada understood the concept of reasonableness to signify.

25. *Dunsmuir* defined "reasonableness" as follows:

> "Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for

> reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[24]

26. According to the Supreme Court of Canada there are two aspects of the reasonableness concept: (i) one concerns *process* (i.e. "justification, transparency and intelligibility within the decision-making process"), and (ii) the other concerns substance or *outcomes* (i.e. "outcomes which are defensible in respect of the facts and law"). A reviewing court must inquire into both.

27. According to the Supreme Court of Canada the "reasonableness" analysis is contextual in nature stating in *Khosa* "[r]easonableness is a single standard that takes its colour from the context."[25]

Summary of the Appellant's Position and the Deficiencies in its Application of the Reasonableness Standard

28. Considering "reasonableness takes its colour from context", the Appellant's position must also be contextualized within the larger substantive issue in this appeal. The substantive issue involves the interpretation of s. 5 of the *Act*, and whether a comparator group analysis is always necessary in determining the meaning to "differentiate adversely" under s. 5(b).

29. The Tribunal's decision stated the following on this issue, and it remains the Appellant's position in this appeal:

> "The Crown argues that s. 5(b) of the Act requires that in order to find adverse differentiation a comparator is required. It further argues that there must be a difference in the provision of services to two different individuals or service recipients. The section does not allow a

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[24] *Dunsmuir*, *supra* note 11 at para. 47.
[25] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59.

> comparison between two different service providers serving two different "publics". Further, the section does not allow comparisons between the federal government and the provinces."[26]

30. The Tribunal accepted the Appellant's argument (the Crown), and the Federal Court rejected it.

31. In this appeal, the Appellant's overall argument on the comparator issue is that the judicial review undertaken by Madam Justice Mactavish under the reasonableness standard was too rigorous and thus inappropriately applied.[27] They further argue that Madam Justice Mactavish erred by imposing her own interpretation of s. 5(b).[28] Thus, the Appellant takes issue with her application of the reasonableness standard of review. [29]

32. The AFN submits the Appellant's Factum misinterprets the reasonableness standard of review analysis under *Dunsmuir* by misconstruing the role of a reviewing court in applying that standard. Not only does the Appellant confuse the process and outcome aspects of the "reasonableness" review, the submissions seems to suggest that it is never open for a reviewing court to disagree with a tribunal's interpretation of its home statute; they suggest that doing so somehow converts the review from reasonableness to correctness. This Honourable Court has made it clear that: "although the primary focus of judicial review for unreasonableness is the "justification, transparency and intelligibility" of the decision-making process, a reviewing court should also consider whether the outcome itself is unreasonable."[30]

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[26] *Tribunal Decision*, *supra* note 2 at para. 102, pg. 182.
[27] *Appellant's Factum*, para. 15.
[28] *Appellant's Factum*, para. 2.
[29] *Appellant's Factum*, para. 22-23.
[30] *Telfer*, *supra* note 6 at para.42.

33. The Appellant's position is at odds with the Supreme Court of Canada's decision in *Dunsmuir* where it states ""deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered…"[31]

Applying the Standard – Reasonableness of the Tribunal's Interpretation

34. The AFN submits Madam Justice Mactavish judgment meets both branches of the *Dunsmuir* reasonableness analysis. It is not the intention here to review the Federal Court's decision in great detail; the decision speaks for itself. However, it is appropriate to summarize the main errors identified by Madam Justice Mactavish in the Tribunal's Decision.

35. The Federal Court's overall approach in its judicial review of the Tribunal's interpretation of s. 5 of the Act is consistent with *Dunsmuir* and the recent decision, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*[32]. The latter case involved the interpretation of the Canadian Human Rights Tribunal's home statute and whether the statute conferred the authority to award costs. The Supreme Court undertook a complete statutory interpretation analysis: it reviewed the text of the provisions, the purpose of the Act as well as the context and decided that the Tribunal's interpretation was unreasonable.

36. Madam Justice Mactavish approached her review similarly, and began her analysis with a statement of the law according to the leading authorities:

> "When addressing a question of statutory interpretation, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: see *Re Rizzo and Rizzo Shoes Ltd.* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2

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[31] *Dunsmuir*, *supra* note 11 at para. 48.
[32] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 (*sub nom*. Mowat). [*Mowat*]

(QL) at para. 21, and see Ruth Sullivan, ed., *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1."[33]

37. Next, she reviewed the purpose of the *Act* in s. 2 to ensure that individuals have an equal opportunity to make for themselves the lives they are able and wish to have without being hindered by discriminatory practices.[34] She referred to all of the most significant decisions from the Supreme Court of Canada on the importance of the purpose of the *Act* and the need to give the provisions of the *Act* a large, purposive and liberal interpretation. For example, in paragraph 246 of her Reasons, she noted that human rights legislation has been described as "… the final refuge of the disadvantaged and disenfranchised".[35]

38. Madam Justice Mactavish also acknowledged at paragraph 250 of her Reasons that this liberal interpretive approach does not permit interpretations that are inconsistent with the wording of the legislation.[36] On this point there is no disagreement with the Tribunal Decision; the departure comes with the Tribunal's interpretation of the ordinary meaning of the term "differentiate adversely" in s. 5(b) of the *Act.*

39. The Tribunal Decision is that "…the plain meaning of 'differentiate adversely' necessitates a comparison between two groups."[37] The entire Tribunal Decision turns on this interpretive ruling. For example, the Tribunal finds that the French version of the provision does not necessarily require a comparison but claims it is ambiguous in this regard. She therefore favours the English version because she claims it is unambiguous.[38] Madam Justice Mactavish identifies the subordination of the French version to the purported "plain meaning" of the English version as one of the deficiencies in the Tribunal Decision.

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[33] *Federal Court Judgment*, *supra* note 3 at para. 243, pg. 69.
[34] *Ibid*. at paras. 244-249, pgs. 69-71.
[35] *Ibid*. at para. 246, pg. 70 citing *Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321 at para. 18.
[36] *Ibid*. at para. 250, pg. 71.
[37] *Tribunal Decision*, *supra* note 2 at para. 113, pg. 187.
[38] *Ibid*. at paras. 113-114, pgs. 187-188.

40. The Federal Court disagreed with the Tribunal's finding that "differentiate adversely" requires a comparator in every case. Madam Justice Mactavish stated in her Reasons:

> "As will be explained below, the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely" in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the *Act*, and leads to patently absurd results that could not have been intended by Parliament."[39]

41. Madam Justice Mactavish's analysis in arriving at this conclusion is unassailable.

42. First, in paragraphs 252 – 268, she examines the scheme of the *Act*, particularly in terms of other provisions which use similar language, namely s. 6(b) and 7(b), using examples to illustrate how the Tribunal's restrictive interpretation can lead to absurd results. On this aspect of her analysis, Madam Justice Mactavish concludes as follows:

> "The Government of Canada agrees that the Tribunal's interpretation of subsection 5(b) leads to the results described above. Nevertheless, it maintains that the Tribunal's interpretation of the legislation is not only reasonable, but is in fact correct.
>
> I cannot agree. An interpretation of "differentiate adversely" as the term is used in subsections 5(b), 6(b) and 7(b) of the *Act* that leads to the above conclusions does not fall within the range of possible acceptable outcomes which are defensible in light of the facts and the law. Such an interpretation is inconsistent with Parliament's clearly articulated purpose in enacting the *Canadian Human Rights Act*, and could not have been what Parliament intended in enacting these provisions of the *Act*. It is simply unreasonable."[40]

43. Secondly, as noted by the Federal Court, the Tribunal placed great emphasis on the *Singh* decision of this Court to support her interpretation that s. 5(b) of the *Act* always required a comparator. In that case, the Federal Court of Appeal said:

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[39] *Federal Court Judgment*, *supra* note 3 at para. 251, pg. 71.
[40] *Ibid.* at paras. 265-266, pgs. 74-75.

"Restated in algebraic terms, it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C".[41] However, as the Madam Justice Mactavish points out:

> "… the comment in *Singh* cited above was clearly not intended to be a definitive statement of the test to be applied in all subsection 5(b) cases. Indeed, this statement was subsequently described by the Federal Court of Appeal as "an apparent obiter": see *Canada (Attorney General) v. Watkin*, 2008 FCA 170 (CanLII), 2008 FCA 170, 167 A.C.W.S. (3d) 135 at para. 29."[42]

44. Challenging the reasoning process of the Tribunal, the Madam Justice Mactavish stated reliance on *Singh* was misplaced.[43]

45. And thirdly, another major flaw in the Tribunal's Decision identified by the Federal Court, which the AFN intends to examine, is the inconsistency with the Supreme Court of Canada's approach to the issue of comparators, as demonstrated in *Withler*. With regard to this case, Madam Justice Mactavish notes:

> "The Supreme Court's decision in *Withler* was released approximately 10 days before the Tribunal rendered its decision in this case, although the decision does not appear to have been brought to the Tribunal's attention. Although it is not determinative of this case because of the differences in the analytical frameworks applicable under the *Canadian Human Rights Act* and the *Charter*, *Withler* is nevertheless instructive as it provides important guidance with respect to the use and limitations of comparator groups in identifying discrimination."[44]

46. Although *Withler* acknowledges that discrimination is a comparative concept, it nevertheless emphasizes the importance of substantive equality over formal equality. The Court highlighted the "detrimental" nature of converting the inquiry into a formal equality analysis based on "mirror comparator groups":

> "To determine whether the law violates this norm [of substantive equality], the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the

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[41] *Ibid.* at para. 306, pg. 83 citing *Re Singh*, [1989] 1 F.C. 430, [1988] F.C.J. No. 414 at para. 17.
[42] *Ibid.* at para. 308, pg. 84.
[43] *Ibid*, at para. 314, pg. 85.
[44] *Ibid*, at para. 316, pg. 86.

> group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group."[45]

47. The Federal Court Judgment correctly points out that "[a] comparator group is not part of the *definition* of discrimination. Rather, it is an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases."[46]

48. One of the reasons cited in the literature, noted by the Supreme Court in *Withler,* for rejecting a rigid adherence to comparators is that it places an unfair burden on claimants. That is, "finding a mirror comparator group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison."[47]

49. This is exactly the situation in the present case. The comparator test may work in some instances, depending on the facts, but it does not work in the unique constitutional context of First Nations people. The formulaic approach would deny First Nations children on-reserve their right to a remedy from the federal government's discriminatory conduct, and shield the government from all accountability for its actions. It is the unique history and constitutional relationship between the federal government and First Nations that has given rise to this situation, which has resulted in discrimination against First Nations children on-reserve in contrast to their peers in any other Canadian jurisdiction.

50. The Federal Court noted the following in *Withler*:

> "The Court observed that the probative value of comparative evidence will depend on the circumstances of the particular case: at para. 65. In

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[45] *Withler*, *supra* note 1 at para. 2.
[46] *Federal Court Judgment*, *supra* note 3 at para. 290, pg. 80.
[47] *Withler*, *supra* note 1 at para. 59.

> cases where no precise comparator exists due to the complainants' unique situation, a decision-maker may legitimately look at circumstantial evidence of historic disadvantage in an effort to establish differential treatment: see *Withler*, above at para. 64."[48]

51. The AFN submits that one of the means intended to prove discrimination in this case is through evidence of historic disadvantage, including the longstanding impacts and legacy of residential schools.

52. The Royal Commission on Aboriginal Peoples ("RCAP") has observed that the churches and the federal government contributed to significant harms suffered by First Nations children while in IRS:

> "...there can be no dispute: the churches and the government did not, in any thoughtful fashion, care for the children they presumed to parent. While this is traceable to systemic problems, particularly the lack of financial resources, the persistence of those problems and the unrelieved neglect of the children can be explained only in the context of another deficit — the lack of moral resources, the abrogation of parental responsibility. The avalanche of reports on the condition of children —hungry, malnourished, ill-clothed, dying of tuberculosis, overworked —failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action."[49]

53. The Federal Government has taken responsibility for the harms caused by the IRS, and on June 11, 2008, Canadian Prime Minister Steven Harper issued the apology for the its role in IRS. In doing so, he acknowledged the serious harms caused to First Nations communities as a result of these schools: "Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country."[50]

54. The Federal Court's analysis on this point noted the unique constitutional and legal status of Aboriginal people, the *sui generis* nature of the Crown's relationship to

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[48] *Federal Court Judgment*, *supra* note 3 at para. 331, pg. 90.
[49] The Royal Commission on Aboriginal Peoples, Volume 1, Chapter 10, Part 2.
[50] Statements by Ministers – Apology to Former Students of Indian Residential Schools, June 11, 2008, Hansard House of Commons Debates 142:110 39th Parliament, Session 2.

First Nations, and that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society. AFN submits as a result of this unique constitutional status, First Nations on reserve receive child welfare services only from the federal government. This in effect, places them in "no-man's land" with no appropriate counterpart or comparator group for the purposes of s. 5(b) of the *Act*.[51]

55. Madam Justice Mactavish concluded that this is not a reasonable outcome:

> "By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the *Act* if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome."[52]

56. The AFN wishes to address two final flaws in the Tribunal's interpretation of s. 5(b), which were identified in the Federal Court Judgment. The first is with regard to the repeal of s. 67 of the Act, which formerly exempted the *Indian Act* from the application of the *Canadian Human Rights Act*.[53] Of significance here is the following statement in Committee hearings prior to the passage of the Bill which repealed section 67. Then Minister of Indian Affairs, Jim Prentice, told the Parliamentary Standing Committee on Aboriginal Affairs in 2007as follows:

> "The repeal of section 67 will provide first nation citizens, in particular first nation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their first nation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to

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[51] *Federal Court Judgment*, *supra* note 3 at para. 332-336, pg. 90-91.
[52] *Ibid*. at para. 337, pg. 91.
[53] *An Act to Amend the Canadian Human Rights Act*, S.C., 2008, c. 30.

> programs, access to services, *the quality of services that they've accessed*, in addition to other issues."[54]

57. The AFN submits this statement is an indication of Parliament's intention in repealing s. 67, and submits it is relevant to interpreting the scope of s. 5(b) of the *Act*. It indicates that Parliament intended the *Canadian Human Rights Act* to apply broadly and not in a restrictive fashion to First Nations people on-reserve and elsewhere. The Tribunal held that the repeal of s. 67 was irrelevant.[55] More appropriately, Madam Justice Mactavish held her interpretation of s. 5(b) was more consistent with Parliament's intention in repealing of s. 67.[56]

58. Finally, the AFN will briefly turn to the international law issues. As aforesaid, the entire Tribunal Decision regarding the comparator issue rests on an erroneous finding that the ordinary meaning of "differentiate adversely" requires a comparator in every case. This would include the Tribunal's treatment of Canada's international obligations. On this issue the Tribunal Decision stated:

> "Within this analysis the intention of Parliament must be respected. The CHRA is a statutory creature with its genesis within the legislative control of the Parliament. Any exemption from its provisions must be clearly stated (*Vaid, supra*, at para. 81) International covenants, such as the UNDRIP, may inform the contextual approach to statutory interpretation *(Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817). However, "…effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament" *(Rahaman v. Canada (Minister of Citizenship and Immigration),* 2002 FCA 89 at para. 36). Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue."[57]

59. The AFN submits the Tribunal's interpretation of s. 5(b) is incorrect and unreasonable, and as such it ought to have considered more meaningfully the

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[54] Canada, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 39th Parl., 1st Sess. (22 March 2007).
[55] *Tribunal Decision*, *supra* note 2 at para. 137-138, pg. 195-196.
[56] *Federal Court Judgment*, *supra* note 3 at para. 347, pg. 94.
[57] *Tribunal Decision*, *supra* note 2 at para. 112, pg. 187.

application of Canada's obligations under international law, including the *Convention on the Rights of the Child*[58] and the *UN Declaration on the Rights of Indigenous Peoples*[59], which have now been endorsed by Canada.[60]

60. Madam Justice Mactavish considered international law arguments in her Reasons[61], citing leading authorities and judgments of the Supreme Court of Canada[62], and described the applicable law as follows:

> "The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the Canadian Human Rights Act. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional."
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> While these presumptions are rebuttable, clear legislative intent to the contrary is required: see *R. v. Hape*, 2007 SCC 26 (CanLII), 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53; Sullivan, above at 548.
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> International instruments such as the UNDRIP and the Convention on the Rights of the Child may also inform the contextual approach to statutory interpretation: see *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL) at paras. 69-71."[63]

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[58] *Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3.*
[59] *UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.*
[60] Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", November 12, 2010, online: http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp.
[61] *Federal Court Judgment*, *supra* note 3 at paras. 348-356, pgs. 94-96.
[62] *Ibid*. citing *R. v. Hape*, 2007 SCC 26; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. Sharpe*, 2001 SCC 2; and Ruth Sullivan, ed., *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis, 2008) at 547-548.
[63] *Federal Court Judgment*, *supra* note 3 at para. 351-353, pg. 95.

61. To conclude this point, Madam Justice Mactavish found her interpretation of s. 5(b) accorded more fully with Canada's international law obligations and ought to be preferred.

Conclusion - Federal Adoption of Provincial Standards

62. To conclude, AFN submits that discrimination under s. 5(b) Act does not always require a comparator. However, the evidence in this case shows that, in any event, the federal government has offered up its own comparator. The stated goal of AANDC funding policies is that child welfare services provided to First Nation children on reserve are to be comparable to services provided by provinces. As aforesaid, the Tribunal ignored this material fact and the submissions of the Respondents on this matter. On this basis, the Federal Court held that the "decision on this point lacks the transparency, intelligibility and justification of a reasonable decision". [64]

63. AFN submits that irrespective of whether s. 5(b) requires a comparator, AANDC has, in fact, as a matter of policy and law, chosen to measure itself against provincial standards. This is a response, driven by public policy and law, to the unique constitutional situation of First Nations on reserve, and the federal Crown's historic responsibilities to them[65]. AANDC ought to be held accountable to this standard, not just in front of the Auditor General or the Public Accounts Committee, but also under the Act, consistent with its purpose and the principle of substantive equality that animates it.

64. The Appellant's Factum attempts to confuse this point by stating "this case is not about the adoption of provincial standards for child welfare services"[66]. Appellant argues it has more to do with identifying the *differences*, between the federal and provincial governments and respecting jurisdiction. The AFN submits this line of

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[64] *Ibid,* at para. 367, page 99.
[65] *Mitchell v. Peguis*, [1990] 2 S.C.R. 85 at para 116.
[66] Appellant's Factum, para. 90.

argument is purely rhetorical, as is the Appellant's attempt to differentiate between 'subscribing' and 'adopting'. If agreed to, this will in effect grant AANDC a licence to continue discriminating against the most vulnerable in Canadian society - Aboriginal children on reserve.

65. The idea that "*difference* is not *discrimination*" and is somehow a legitimate, acceptable and inevitable outcome or reality of a federalist system is simply untrue. It hollows out the fact, observed by the Federal Court, that "[G]overnment funding for child welfare is complex, and involves three governing policies and hundreds of bilateral and trilateral agreements."[67]

66. These complexities have been addressed by a variety of means over the years. AFN submits that both formal and informal referential incorporation arrangements are very much a part of the current legislative landscape respecting "Indians". For example, section 88 of the Indian Act makes provincial laws of general application applicable to Indians. And in *Natural Parents v. Superintendent of Child Welfare*[68], Justice Beetz held that the Indian status provisions of the *Indian Act* depended upon and in effect imported concepts such as marriage and adoption from provincial law.

67. In addition, though the federal and provincial governments are separate, both represent and are manifestations of the "Crown". Indeed, First Nations regard their relationship as evidenced by treaties as being with the "Crown". So, comparisons between the Crown as represented by the federal government or provincial governments with respect to the provision of child welfare services/funding, is not unreasonable. The common law has proven to be very adept at finding solutions to the jurisdictional conundrum faced by First Nations. For example, the principle of the Honour of the Crown has been held to apply to both the federal Crown and the provincial Crown because both have the capacity to adversely affect First Nation

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[67] *Federal Court Judgment*, *supra* note 3 at para.30, pg. 16.
[68] *Natural Parents v. Superintendent of Child Welfare et al*., [1976] 2 S.C.R. 751, at pg. 785.

rights and interests. As a result, both have the duty to consult and accommodate the rights and interests of Aboriginal peoples[69].

68. AFN submits the Honour of the Crown is a unifying principle that ought to apply to this situation. Quite simply, it would not be honourable for AANDC to insulate itself from any accountability for its discriminatory actions against on-reserve First Nations children, particularly where it states this to be its goal. Such a result would do nothing to promote the cause of reconciliation.

69. Finally, the Appellant's arguments also neglect the concept of 'co-operative federalism' which was the subject of a recent comment by the Supreme Court of Canada regarding the area of child welfare on reserve. As mentioned in the Federal Court Judgment: "One of these arrangements has been described by the Supreme Court of Canada as 'an example of flexible and co-operative federalism at work and at its best."[70]

PART IV
ORDER SOUGHT

The Respondent requests that appeal be denied, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 19, 2012

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[69] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.
[70] *Federal Court Judgment*, *supra* note 3 at para.30, pg. 16 citing *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 at para. 44.

PART V
LIST OF AUTHORITIES

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Court File Nos.: A-145-12

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Appellant

-and-

CHRC, *et al*
Respondents

FEDERAL COURT OF APPEAL

Proceedings commenced at Halifax

NOTICE OF APPEARANCE

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