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

RESPONDENTS

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INDEX

Overview	1
Part I – Facts	4
Part II – Issues	7
Part III – Submissions	8
Submissions "A" – Power of the Tribunal to dismiss a complaint based on a preliminary ground	8
Submissions "B" – Fairness of the Tribunal process on the comparator issue	11
Submissions "C" – Failure of the Tribunal to address section 5(a) of the CHRA	15
Submissions "D" - Comparator issue: section 5(b) of the CHRA	18
Submissions "E" – Failure of the Tribunal to find a comparator group	25
Submissions "F" – Conclusions	27
Part IV – Order Requested	29
Schedule "A" – Authorities	30

OVERVIEW

1 The Honourable Madam Justice Mactavish of the Federal Court issued her judgment on April 18, 2012. That was just over two months after argument (Feburary 13 to 15, 2012). The decision of the Canadian Human Rights Tribunal ("Tribunal"), which was the subject of the judicial review applications before Justice Mactavish, was issued on March 14, 2011, approximately nine months after the matter was argued before the Tribunal.

- *Appeal Book, Volume 1, pages 5-114.*

2 Even though the Federal Court judgment was reserved for a relatively short time, it is remarkable for its breadth and clarity. In clear and compelling terms, the judgment comprehends: (1) the mechanics of the national on-reserve child welfare program run by the Department of Indian and Northern Affairs Canada ["INAC"]; (2) the nature of the complaints' concern about under-funding, below-standard service, and lack of service, and the resulting risk to vulnerable children and families; (3) the twists and turns of the process before the Tribunal; and, (4) the complexity of the jurisdictional comparator issue raised by the Attorney General of Canada ("Attorney General").

3 The judgment of the Federal Court is highly sensitive to the workings of the Tribunal and, above all, respectful of the jurisdiction and expertise of the Tribunal. The

judgment bends over backwards in this respect. However, in the end, the judgment balances respect for the Tribunal with the higher obligations to protect basic procedural fairness and to implement the *Canadian Human Rights Act* ("CHRA") in a reasonable manner, in accordance with its language and purpose.

4 In contrast to the clear and compelling judgment of Justice Mactavish, the factum of the Attorney General raises a welter of technicalities, mostly connected with the issue of standard of review or the application of the standard of review. This is very much in the spirit of the Attorney General's position before the Tribunal, which focused on the service and comparator jurisdictional issues, as opposed to the merits of discrimination. Anything except the merits, it seems. There is no apparent willingness on the part of the federal government to step up to the plate and take responsibility for its national on-reserve child welfare program. Whether the program is under-funded and whether First Nation children are prejudiced appear to be of little interest to the federal government. Substantive equality is completely beside the point.

5 This case is about the best interests of some of the most vulnerable people in Canada: at-risk First Nation children on reserve. The federal government is responsible for First Nation people pursuant to section 91(24) of the *Constitution Act, 1867*. Based on this jurisdiction, the federal government has developed and implemented a national program for on-reserve child welfare. This includes Ontario

pursuant to the terms of the 1965 Welfare Agreement. The federal program must be scrutinized based on the substantive equality guaranteed by the CHRA.

6 This case is really about money versus First Nation children. If, at the end of the day, after all the technical appeals are exhausted, Canada loses this case, it will have to spend more money on at-risk children on reserve. Rather than embracing its obligations to First Nation people and to substantive equality, the federal government has marshalled its practically unlimited legal and other resources since 2007 to put off or even cancel the day of reckoning. In the meantime, lives are lost or ruined. The reference to the loss of life is not an exaggeration by any means. Substandard child welfare service can lead to the loss of life when children at risk are not properly cared for. The child welfare service under the current INAC model cannot live up to its defining objective of acting of protecting the best interests of children. The best interests litmus test is stated in clear terms in sec. 1(1) of the Ontario *Child and Family Services Act*, RSO 1990, Chap. C. 11.

7 As a result of the excellent judgment of the Federal Court, the Tribunal process is back on track before a panel of three Tribunal members, with hearing dates scheduled for February of 2013. The Attorney General did not seek a stay of the Tribunal process. The appeal of the judgment of the Federal Court should be dismissed and the Tribunal should be permitted to hear real evidence about the real issues. Judicial reviews and appeals will likely follow, but soundly based on the complete evidentiary context, and on a single decision-making track.

PART I – FACTS

8 The Chiefs of Ontario ("COO") accepts the facts as described in the Federal Court judgment under appeal. This appears to be the position of the Attorney General as well.

9 There is a distinction to be made with regard to the "facts" from the Federal Court judgment. The facts with regard to the procedural history before the Tribunal are undisputed. Most of the facts with regard to the federal on-reserve child welfare program are not disputed either, but Justice Mactavish is clear that most of these facts are based on allegations from the original complaint and from filings before the Tribunal, mostly from the complainants, the Canadian Human Rights Commission ("Commission"), and COO. The nature of the federal program and the core allegations of underfunding, below standard service, and no service were meant to be tested through live testimony before the Tribunal. However, this normal process was short circuited by the federal jurisdictional motion on the service and comparator issues. As outlined by Justice Mactavish in her procedural history of the case, this short circuiting appeared to be the objective of the federal government almost from the moment the claim was filed in 2007. The Attorney General finally found a sympathetic ear in the Tribunal in 2010.

10 There is an important distinction clearly drawn by Justice Mactavish in terms of the "maintenance" and "operations" components of the INAC on-reserve child welfare program. The terminology may vary from region to region. The basic point is that maintenance tends to be funded on a priority basis. Maintenance typically deals with the situation of an at-risk child being removed from his/her home and placed in some kind of third party situation (eg. foster home). However, typically, it is alleged that INAC does not adequately provide for operations, which includes secondary and tertiary support services for children and families. The predictable and unacceptable result is that on-reserve children tend to be taken into care at a much higher rate than children in the off-reserve provincial system. The service delivered follows the money. In any modern civilized child welfare program, the best interests of the child dictate that out-of-home care (including apprehensions) is the last resort, but used when necessary in the best interests of the child. Under the INAC program, the opposite may be true, based on factual allegations that the Tribunal never got to. The long term and cross-generational impact of a program top heavy with out-of-home care cannot be under-estimated, based in part on the precedent of the residential schools.

11 From a legal point of view, the essence of the case is about the interaction between sections 5(a) and (b) of the CHRA and the INAC on-reserve child welfare program. Is the federal government obliged to provide the program in accordance with the test

of substantive equality? Or, as the Attorney General argues, is INAC free to do as it wishes, thanks to supposed jurisdictional technicalities.

12 This case is hugely significant for First Nation children and their families. Many such families are just now recovering from the scourge of the federal residential school program, for which the federal government recently apologized. Sadly, continuation of an inadequate child welfare program on reserve may be another residential school calamity in the making.

13 The ripple effect of this case goes far beyond the on-reserve child welfare program, important as that is in its own right, as explained above. It is common knowledge that most (if not all) other federal First Nations programs, delivered by INAC and other federal departments, are very similar in structure to the child welfare program; for example, health, education, social services, and policing. If the Attorney General is successful in the child welfare case, a powerful and shocking precedent will be set. Most, if not all, federal First Nation programs will be immune from scrutiny under the CHRA. The federal government will be able to set funding and service levels at will, without legal consequence, at least in terms of federal human rights law. History makes no secret about how this carte blanche is likely to be exercised by Canada. What is at stake is whether federal funding and services for First Nations on reserve are subject to the standard of substantive equality. As noted, this is really a money issue for Canada. For First Nation people, it is about a decent quality of life within the Canadian state.

14 First Nations are not seeking a gold or Cadillac standard for child welfare services on reserves. They are only seeking what similarly placed Canadian children get, subject to any appropriate cultural adjustments. The request is modest indeed – provincial child welfare programs are not renowned for their bells and whistles.

PART II – ISSUES

15 The issues in this appeal are those described in paragraph 108 of the judgment of Justice Mactavish, as follows: [1] The power of the Tribunal to dismiss a complaint based on a preliminary issue, without conducting a full hearing on the merits. [2] The fairness of the Tribunal process on the comparator issue. [3] The failure of the Tribunal to address section 5(a) of the CHRA. [4] The comparator issue and sec. 5(b) of the CHRA. [5] The failure of the Tribunal to find a relevant comparator group.

16 The appropriate standard of review by the Federal Court and the application of that standard weave their way through most of the above-noted issues. At least on issues decided against Canada, the factum of the Attorney General suggests that the Federal Court Judge had only two gears for the standard of review. Either the Judge

chose the wrong standard (correctness or reasonableness) or applied the correct standard wrongly.

17 The other plank in the federal government's technical jurisdictional position, i.e. the so-called service issue, is not before the Federal Court of Appeal. The Tribunal ruled that there was insufficient evidence on the jurisdictional motion to rule on the service issue. This ruling was not disputed by the federal government before the Federal Court. If the new Tribunal process is allowed to take its normal course, it is anticipated that the federal government will rely on the service issue, as well as the comparator issue. The proposition of the federal government is that its on-reserve child welfare program is not a service reviewable under sec. 5 of the CHRA because Canada sees itself exclusively as a funder, and not a service provider. It allocates funding and is then largely disinterested in the result, apparently. The provincial child welfare program standard, which is cited in the official INAC program material, might be thought of as a check on this federal laissez faire. However, through the comparator position, the federal government is saying that the provincial child welfare standard is inapplicable.

PART III – SUBMISSIONS

A. Power of the Tribunal to dismiss a complaint based on a preliminary ground

18 During the Tribunal case management conference of November 2, 2009, the Chairperson seemingly invited a motion from the Attorney General seeking a stay of the Tribunal process pending related Federal Court proceedings (paragraph 78 of the Federal Court judgment). This was characterized as a motion for a stay, as opposed to dismissal outright. Whether as a matter of coincidence or not, the Attorney General announced at a case management conference about a month later (December 14, 2009) that it intended to file a motion to dismiss, based on the two well known jurisdictional grounds, by December 21. The Chairperson set January 19, 2010 as the motion hearing date, which, in retrospect appears to be very odd, given the Christmas holidays and the significance of the motion (paragraph 87 of the Federal Court judgment). It is possible that the Chairperson was still thinking in terms of a stay. In any event, understandably, the motion date was later adjourned. The material filed by the Attorney General was minimal.

19 COO accepts the jurisprudence outlined by the Federal Court Judge with regard to the discretion of the Tribunal to dismiss a complaint on a preliminary basis where there has been a clear abuse of process. Justice Mactavish also determined there is a very limited discretion to dismiss a complaint on a preliminary basis apart from abuse of process, but only in very extreme circumstances; for example, where the preliminary issue is clear and would obviate the entire hearing (a limitations issue or

the cited example of the employer-employee relationship). Of course, the preliminary process has to be fair as well.

- *Canada (Canadian Human Rights Commission) v. Canada Post, [2004] 2 FCR 581 [Cremasco]*

20 Assuming the discretion beyond abuse of process cases exists, the COO preference would have been that the unusual discretion not be exercised in relation to the comparator issue raised by the Attorney General. The background factual issues across the country are extremely complex, as found by the Tribunal in relation to the service matter. The case raises issues of national importance - no less than the question whether practically all federal programming for First Nations (not "just" the child welfare program) is immune from scrutiny under sec. 5 of the CHRA. Given these and other factors, the more reasonable decision, with respect, would have been to hold the full live witness hearings. There would then have been a full evidentiary platform for the federal government to argue its two purported high cards, the service and comparator issues. Instead, the proceeding before the Tribunal was like a judicial reference, with all the deficits attendant to that kind of artificial proceeding.

21 The decision to proceed with the motion was also very prejudicial in terms of judicial economy. With respect, it would have made more sense to have a single full evidentiary hearing, followed by the certain judicial reviews and appeals. Instead,

there are now parallel tracks in the Tribunal and the Federal Court of Appeal, with the prospect of a full evidentiary hearing still in some jeopardy. If the Tribunal can hold hearings in the usual way, the decision, whichever way it goes, is very likely to be taken to judicial review and then appeal.

22 The ruling of the Federal Court on the issue of the power of the Tribunal to entertain a preliminary motion to dismiss in limited circumstances is a clear sign post that the Court was very sensitive to and respectful of the jurisdiction and expertise of the Tribunal. The factum of the Attorney General seems to suggest the opposite, i.e. that the judgment was generally insensitive to the independent expertise of the Tribunal. It is the submission of COO that nothing could be further from the truth.

23 This is one of many instances where the Court bent over backwards to respect the jurisdiction and authority of the Tribunal. In spite of the concerns raised about the national importance of the case, the factual complexity of the case, and the value placed by First Nations on live testimony, the Federal Court ruled that the preliminary dismissal power existed and that the Tribunal Chairperson was within her rights to hear the motion on the comparator and service issues. The Federal Court Judge did not substitute her view for the ruling of the Chairperson, but fully respected it.

B. Fairness of the Tribunal process on the comparator issue

24. Given the extraordinary nature of the preliminary motion to dismiss, a very high standard of fairness was required. An issue of national importance was being decided and the complainants and related parties were being deprived of their legitimate expectation (though not necessarily a right) to a full evidentiary hearing after the complaint referral from the Commission.

25. Once again, this is an instance where, in spite of the high standard of fairness required, the Federal Court gave the Tribunal a broad latitude. If there was a temptation to second guess, it was not acted upon in the least.

26. It is the submission of COO that there were several steps taken by the Tribunal that, in their totality, created at least a sense or appearance of unfairness. However, actual bias is not being alleged. The steps in question include the following: (1) the near invitation from the Chairperson to the Attorney General to bring a stay motion in November of 2009; (2) the sudden involvement of the Chairperson in the case immediately after her appointment, and the unexplained displacement of Mr. Sinclair; (3) the cancellation of scheduled hearing dates; (4) the lack of attention to the Caring Society material on retaliation; and, the (5) the long delay in issuing the Tribunal decision, is spite of the alleged ongoing jeopardy to children in the on-reserve child welfare system. Other

instances of alleged unfairness are canvassed by the Federal Court Judge starting at paragraph 159 of her judgment.

27. In spite of this seeming blizzard of procedural issues, Justice Mactavish carefully examined each issue and determined that the Tribunal Chairperson had acted reasonably or at least within her permitted margin of reasonable error. This confirms the underlying theme of knowledgeable respect for the jurisdiction and work of the Tribunal. The Federal Court backed up the Tribunal in all of the above-noted instances, in spite of the unusual nature of the motion to dismiss. COO submits that this once again contradicts the overriding theme of the Attorney General's factum, i.e. alleged serial substitution of the views of the Federal Court Judge for those of the Tribunal.

28. Having parsed out all of the above-noted procedural concerns, the Federal Court came to the overwhelming issue of the Tribunal's access to extrinsic evidence, without notifying any of the parties before the Tribunal ruling and giving them an opportunity to respond.

* *Pfizer Co. V Deputy Minister of National Revenue (Customs & Excise), [1977] 1 SCR 456 at 463.*

29. The sheer volume of the extrinsic evidence which the Chairperson admits to in her judgment is breathtaking. Whereas there were about 2,000 pages on the record for the motion to dismiss, the Chairperson admitted that she vetted approximately 10,000 pages of material. The extrinsic material was from the main complaint and was itemized in a schedule. The extrinsic material included items that addressed the core comparator issue, notably the expert KPMG report submitted by the Attorney General. This report was submitted after the hearing of the dismissal motion and, obviously, the parties had no opportunity to comment on it.

30. The breach of procedural fairness here is overwhelming, particularly in the context of an extraordinary early dismissal motion. If this admitted use of extrinsic material is not deemed to be unfair and a reversible error, what would be?

31. COO supports the ruling of the Federal Court Judge that the breach of fairness may have reasonably prejudiced the complainants and the Commission (paragraph 195 of the Federal Court judgment). COO also supports the ruling that the breach of fairness renders the decision of the Tribunal invalid, even if the decision would probably have been the same without the unfairness (paragraph 201 of the Federal Court judgment) – something which is not conceded, but denied. There are very limited exceptions to this standard, which are not relevant here. In any event, there is no certainty that the

Tribunal decision would have been the same regardless of the unfairness, as demonstrated by the rulings of the Federal Court on the comparator issue.

* *Kane v. Board of Governors of the University of British Columbia, [1980] 1 SCR 1105 at 1116.*

32. Overall, the Federal Court gave a broad latitude to the Tribunal on procedural fairness, in spite of numerous identified issues, which, in their totality, were of significant concern to COO. However, the hand of the Court was forced by the egregious error of accessing approximately 8,000 pages of extrinsic material without notice. This is a classic instance of the proper function of judicial review, respecting expert administrative bodies, but stepping in when absolutely necessary to maintain the integrity of the process.

C. Failure of the Tribunal to address section 5(a) of the CHRA

33. The original complaint in 2007 was based on sec. 5 in general terms, which would bring in both paragraph (a) [denial of service] and paragraph (b) [adverse differentiation in the provision of a service]. The complaint specifically referenced the denial of services in certain instances (para. 209 of the Federal Court judgment).

34. The federal motion to dismiss the complaint on jurisdictional grounds invoked section 5 in general terms (para. 214 of the Federal Court judgment).

35. Most of the argument before the Tribunal dealt with sec. 5 of the CHRA in general terms.

36. The COO affidavit of Tom Goff, who, at one point in his distinguished career was the INAC Regional Director (for Ontario) for social services, including child welfare, suggests the denial of service in some instances.

* *Appeal Book, volume V, page 1572 (para. 16 of the affidavit)*

37. In general terms, the evidence, as summarized by the Federal Court, should have pointed the way to a full consideration of sec. 5(a) by the Tribunal. The factual allegation is that funding is usually available for maintenance, i.e. the support of children away from their family homes (eg. apprehensions). However, it is alleged that there was under-funding and under-servicing up to 22% in relation to operations, including secondary and tertiary services designed to keep children out of third party

care. This alleged funding and service gap logically pointed to the likelihood of service denial, and not just different service.

38. The Tribunal Chairperson referred specifically to the purported difference between secs. 5(a) and 5(b) on the comparator issue. She ruled that a strict mirror comparator was required for sec. 5(b), but that no comparison was required for sec. 5(a). As she turned her mind directly to the operation and meaning of sec. 5(a) [denial of service] and as sec. 5 as a whole was the subject of the complaint, it is clear that the Chairperson should have ruled on the application of sec. 5(a). Even in the context of her ruling that there was no comparator, the Chairperson could have and should have decided that the complaint could proceed under sec. 5(a). There was a heavy onus to look for reasonable and available means to keep the complaint alive, given the extraordinary nature of the motion to dismiss.

39. COO agrees with the ruling of the Federal Court that the Tribunal's failure to explain why the complaint could not proceed under sec. 5(a) was a breach of procedural fairness and an error of law.

* *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, at para. 22.*

40. Again, contrary to the general tenor of the factum of the Attorney General, this is not an instance of the Federal Court Judge being intrusive and not respecting the jurisdiction and expertise of the human rights Tribunal. As in the case of the extrinsic material, the Court had no choice but to intervene in accordance with its circumspect role of judicial review. The Tribunal failed to address an obvious statutory mechanism to keep the complaint alive, regardless of the comparator issue.

D. Comparator Issue: section 5(b) of the CHRA

41. The Tribunal interpreted sec. 5(b) to mean that a strict mirror or algebraic comparator is required when there is an allegation of adverse differentiation of service based on a prohibited ground. Paradoxically, the Tribunal ruled that no comparison is required where there is a complete denial of service under sec. 5(a).

42. Contrary to the general theme of the Attorney General's factum, the Federal Court gave every measure of proper respect to the Tribunal's decision-making in this instance. Based on the expertise of the Tribunal with its own statute and other considerations, the Court determined that the standard of review is reasonableness, not correctness. The sec. 5(b) interpretation would be upheld as long as it came within the possible range of reasonable or acceptable outcomes. It is the submission of COO that the

application of this standard was leaning over backwards in deference to the Tribunal, given the national importance of the case.

43. The federal factum, in places, appears to stress the concept of a possible range of acceptable outcomes, as opposed to reasonable outcomes. This approach seems to verge on saying that all possible outcomes from the Tribunal would acceptable. That sets the bar far too low. After all, it is possible that the sun will not come up tomorrow morning, though it is not reasonable to predict that. The ruling by the Tribunal on sec. 5(b) is a possible outcome – it happened. However, in the submission of COO, the Tribunal interpretation is not acceptable or reasonable, which words are inter-changeable here.

44. There are so many reasons why the Tribunal interpretation of sec. 5(b) is unacceptable and/or unreasonable that, if this was a game of American football, the referee would call a piling-on penalty. However, this is not a game. This case is about the health and well being of some of the most disadvantaged children in Canada.

45. The Tribunal ruling is unreasonable because it amounts to a statutory amendment. Although some form of comparison is almost always part of discrimination analysis and, to some extent, may be suggested by the words "differentiate adversely" in sec. 5(b),

there is nothing in sec. 5(b) that even suggests that a strict mirror test should be a condition precedent for a valid claim. It is submitted that only Parliament has the authority to engage in this kind of wholesale statutory amendment.

46. The Tribunal interpretation is unreasonable because it is inconsistent with the purpose of the CHRA. According to sec. 2, the purpose of the legislation is to ensure that individuals have an equal opportunity to make for themselves the lives that they are able and wish to have, without being hindered by discriminatory practices based upon considerations such as race and the other prohibited grounds. The CHRA is recognized as a quasi-constitutional instrument in the vital area of human rights. Therefore, a broad and liberal interpretation of the CHRA is the correct approach, as long as it can be supported by the statutory wording. Instead, the Tribunal adopted a narrow and grammatical interpretation of sec. 5(b), like a tax statute, contrary to the purpose of the CHRA and contrary to the rule of liberal interpretation for the CHRA.

* *Canada (Attorney Genera) v Mossop, [1993] 1 SCR 554 at 615.*

47. The Tribunal interpretation is unreasonable because its effect is to unnecessarily invalidate language in the French version, which is supposed to have equal interpretive weight. The Tribunal conceded that the French version of sec. 5(b) ["de le defavoriser a l'occasion de leur fourniture"] does not imply comparison. The less restrictive French

version makes sense in terms of the liberal purpose of the CHRA, and is consistent with sec. 5(a), which does not require a strict comparison. In order to get to its restrictive interpretation of sec. 5(b), the Tribunal effectively struck out the French version of the provision. The interpretation also creates an incoherence between sec. 5(a) [no mirror comparison required] and sec. 5(b) [mirror comparison required]. The Tribunal's ruling may imply parallel damage for other discrimination provisions in the CHRA that use similar wording.

* *Battlefords and District Co-operative Ltd. V Gibbs, [1996] 3 SCR 566, para. 49.*

48. The Tribunal interpretation is not reasonable because it effectively sets up a "separate but equal" world for First Nation people, at least in relation to the application of the CHRA. First Nations would not be able to rely on sec. 5(b), and probably other provisions of the CHRA, to challenge most federal programs that apply to First Nations. These are not minor programs, but the building blocks of education, health, and social services, among others. The source of this discrimination would be the CHRA itself. The unreasonableness of the entire analysis of the Tribunal is revealed by the fact that it would expose the CHRA to a discrimination challenge under sec. 15 of the Canadian Charter of Rights, an absurd and embarrassing result on an international scale.

49. The Tribunal interpretation is not reasonable, because it is inconsistent with the clear intent of Parliament to ensure that the quality of federal programs for First Nations would be subject to full scrutiny under the CHRA. This is clear from the statements of then INAC Minister Jim Prentice when Parliament was considering the deletion of sec. 67 from the CHRA, which it proceeded to do. Section 67 protected Indian Act and related provisions and programs from CHRA scrutiny. It is acknowledged that the child welfare program on-reserve was not directly affected by sec. 67, but Parliament was clear in its intent that First Nations should be fully exposed to the benefits and liabilities of the CHRA. When the Minister was making these statements in relation to the intent behind the deletion of sec. 67 of the CHRA, did some other branch of the federal government know, simultaneously, that that it might have nothing to fear, because of the comparator and service jurisdictional positions?

* *Appeal Book, volume I, tab 2, para. 344 of the Federal Court Judgment.*

50. The Tribunal interpretation of sec. 5(b) is unreasonable because it is inconsistent with the honour of the Crown in relation to First Nations. Whenever possible based on the wording, statutes and other measures should always be interpreted in such a way as to uphold the honour of the Crown in relation to First Nations. The special relationship between First Nations and Canada is one of the founding principles of the federation. It is a matter of accommodation and living together on reasonable and rights-based terms.

The Tribunal interpretation of sec. 5(b) creates a "separate but equal" human rights regime for First Nations and is inconsistent with the honour of the Crown at all levels.

* *Mikisew Cree First Nation v Canada, 2005 SCC 69. Reference re Secession of Quebec, [1998] 2 SCR 217.*

51. The Tribunal interpretation of sec. 5(b) is unreasonable because it is inconsistent with the guidance of international law. Of particular note are sections 3, 9, 19, and 20 of the UN Convention on the Rights of the Child (1990). In particular, section 3(1) provides in part that in all state actions concerning children, the best interests of the child shall be a primary consideration. Section 21 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that Indigenous people have the right to the improvement of their social and economic conditions, without discrimination. When the wording of a provision like sec. 5(b) of the CHRA allows an interpretation that accords with Canada's international obligations, that interpretation should always be preferred.

52. The Tribunal interpretation of sec. 5(b) of the CHRA is unreasonable because it does not accord with the ordinary and common sense meaning of the words chosen by Parliament. As found by the Federal Court at paragraph 254 of its judgment, the ordinary meaning of "differentiate adversely" in sec. 5(b) is to say that it is impermissible to treat someone differently in a negative way because of that person's

membership in a protected group. This common sense meaning still implies a notion of comparison, but does not require the strict algebraic mirror test read into sec. 5(b) by the Tribunal.

53. Finally, this being the ninth point, the Tribunal interpretation is unreasonable because it does not accord with the standard and principle of substantive equality, as recently confirmed in ringing terms by the Supreme Court of Canada in the *Withler* decision. This very important case is discussed at length in the Federal Court decision, mostly starting at paragraph 316. COO endorses the analysis of the Federal Court, including, without limitation, the discussion of the application of Charter principles to statutory human rights, depending on the circumstances. Substantive equality dictates a contextual analysis that takes into consideration all of the circumstances of the complaint. The substantive equality and contextual approach are particularly appropriate here given the long and troubled history between First Nations and the federal government. Even in a substantive equality analysis, some flexible comparison analysis may be appropriate, but not the rigid docket-clearing approach of the Tribunal.

* *Withler v Canada (Attorney General), [2011] 1 SCR 396.*

54. In the respectful submission of COO, the case, as so eloquently laid out by the Federal Court, that the Tribunal interpretation of sec. 5(b) is unreasonable and/or unacceptable,

is overwhelming – the equivalent of the procedural problem with the extrinsic evidence discussed earlier on. The interpretation of the Tribunal was certainly possible (it happened), but is nowhere to be found in the range of reasonable or acceptable outcomes. The Federal Court properly applied the reasonableness standard of review.

E. Failure of the Tribunal to find a comparator group

55. COO supports the ruling of the Federal Court that no mirror comparator group analysis is required by sec. 5(b) of the CHRA. A comparator group is an evidentiary tool, not a condition precedent for access to the benefits of sec. 5(b).

56. Even if some form of comparator group is of interest, COO supports the ruling of the Federal Court that the Tribunal erred by not considering the significance of the uncontroverted evidence that INAC itself accepted the provincial program standard as the appropriate comparator. This is confirmed by the terms of the INAC national policy for the on-reserve child welfare program, as well as the terms of the 1965 Welfare Agreement applicable to Ontario. How can INAC confirm in writing that the provincial standard is appropriate for the child welfare program on reserve, and then walk away from that standard, as if nothing happened, when challenged under the CHRA?

57. The Tribunal determined that cross-jurisdictional comparisons are not appropriate under sec. 5(b). However, there is no language in sec. 5(b) that says that. And there was no evaluation by the Tribunal of the implications of INAC adopting the provincial service standard, here, there, and everywhere.

58. Reference to provincial standards is not unusual in the least in relation to First Nation programs and policy issues. Canadian courts have held that multiple provincial statutes apply on reserve, notably in the social service area. Section 88 of the Indian Act even provides that otherwise excluded provincial statutes can apply as incorporated federal law, subject to some notable exceptions. It is necessary to point out that First Nations do not necessarily accept the application of provincial laws, based on the inherent right of self-government as protected by sec. 35 of the *Constitution Act, 1982*. However, this is Canadian domestic law.

* *Dick v The Queen, [1985] 2 SCR 309.*

59. The Tribunal raised the alarm that the use of cross-jurisdictional comparison would be chaotic, opening the proverbial floodgates, and inviting First Nations to shop for the most favourable comparison. However, with respect, the alarm is not justified. First, the reasonableness of the provincial comparison is a matter of federal policy and law (in the case of the 1965 Welfare Agreement in Ontario). Second, there is no possibility of

inviting First Nations to draw comparisons to Denmark, Sweden, and other idyllic foreign climbs. The comparison is not subject to First Nation control. The comparison is dictated by which Province includes a particular First Nation territory. The same mechanism works for other social services under INAC control, such as social assistance rates.

60. The provincial comparator should not have been dismissed out of hand. The viability of this comparator put forward by Canada should have been considered in the context of a full evidentiary hearing. Such a hearing might even have revealed other possible comparators. The ruling of the Tribunal short circuited any such possible enquiry.

F. Conclusions

61. The Federal Court determined that the Tribunal was correct in deciding that it had the power to deal with the comparator issue on a preliminary basis, without a full evidentiary hearing on all the merits. This power was subject to a duty of procedural fairness, which was breached in the case of the use of a monumental amount of extrinsic evidence without notice.

62. It is submitted that the Federal Court was correct in determining that the Tribunal erred in failing to avail itself of the obvious opportunity to keep the complaint alive based on sec. 5(a) of the CHRA [denial of service].

63. It is submitted that the Federal Court was correct in determining that the Tribunal interpretation of sec. 5(b) of the CHRA was not in the range of reasonable or acceptable outcomes, for numerous compelling reasons.

64. It is submitted that the Federal Court was correct in determining that the Tribunal erred by failing to consider the significance of the comparator chosen voluntarily by Canada, i.e. the comparison to the provincial program standard.

65. It is submitted that the Federal Court was always cognizant and respectful of the jurisdiction and expertise of the Tribunal. The Federal Court chose the correct standards of review and applied them with great sensitivity to the work of the Tribunal.

66. In the end, substantive equality, on the lines suggested by the Supreme Court of Canada in the *Withler* decision, must be the right course. The logical conclusion of the federal position is that real discrimination does not matter under sec. 5(b) of the CHRA,

regardless of the impact on First Nation children. The only things that matter are the legal categories of the mirror comparator test and the service issue. Money prevails over substantive equality for some of the most vulnerable and disadvantaged people in Canada. This cannot be right.

PART IV – ORDER REQUESTED

66. COO respectfully requests that the appeal of the Attorney General of Canada be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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SCHEDULE "A" – AUTHORITIES

International Instruments

United Nations Convention on the Rights of the Child (1989)

United Nations Declaration on the Rights of Indigenous Peoples (2007)

Constitutional and Statutory Instruments

Canadian Human Rights Act, RSC 1985, c. H-6

Child and Family Services Act, RSO 1990, chap. C11

Constitution Act, 1867

Constitution Act, 1982

Indian Act, RSC 1985, c. I-5

Case Law

Battlefords and District Co-operative Ltd. v Gibbs, [1996] 3 SCR 566

Canada (AG) v Mossop, [1993] 1 SCR 554

Canada (CHRC) v Canada Post, [2004] 2 FCR 581 [Cremasco]

Dick v The Queen, [1985] 2 SCR 309

Kane v Board of Governors of the University of BC, [1985] 1 SCR 1105

Mikisew Cree First Nation v Canada, [2005] SCR 69

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708

Pfizer Co. V Deputy Minister of National Revenue (Customs and Excise), [1977] 1 SCR 456

Reference re Secession of Quebec, [1998] 2 SCR 217

Withler v Canada (AG), [2011] 1 SCR 396