Federal Court  Cour fédérale

Date: 20120418

Docket: T-578-11

Citation: 2012 FC 445

Toronto, Ontario, April 18, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS,
CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-630-11

**FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY**

Applicant

and

**ATTORNEY GENERAL OF CANADA,
ASSEMBLY OF FIRST NATIONS,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-638-11

ASSEMBLY OF FIRST NATIONS

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

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1. Introduction

[1] The Government of Canada funds child welfare services for First Nations children living on reserves. The provinces fund child welfare services for all other Aboriginal and non-Aboriginal children.

[2] The First Nations Child and Family Caring Society and the Assembly of First Nations filed a human rights complaint with the Canadian Human Rights Commission in which they allege that the Government of Canada under-funds child welfare services for on-reserve First Nations children. They say that the result of this under-funding is that the level of some of the services provided for these children is inadequate, and that other child welfare services otherwise available to Canadian children are not available to First Nations children living on reserves. The complainants allege that this amounts to discrimination in the provision of services customarily available to the public on the grounds of race and national or ethnic origin.

[3] The Canadian Human Rights Commission referred the complaint to the Canadian Human Rights Tribunal for hearing. Following a preliminary motion brought by the Government, the Tribunal dismissed the complaint. The Tribunal determined that there could be no adverse differential treatment in the provision of child welfare services to First Nations children living on reserve as no other group receives child welfare services from the Government of Canada.

[4] The Tribunal held that in order for the complainants to establish adverse differential treatment under subsection 5(b) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the Act], a comparison had to be made between the child welfare services provided by the Government of

Canada to First Nations children living on reserves, and similar services provided to others by the same service provider. According to the Tribunal, subsection 5(b) of the Act does not permit a comparison between services provided by two different service providers to two different sets of recipients.

[5] In the absence of a proper comparator group, the Tribunal concluded that there could be no finding of adverse differential treatment on the part of the Government of Canada. As a result, the Tribunal dismissed the complaint without a full hearing on the merits.

[6] These reasons relate to three applications for judicial review brought with respect to that decision.

[7] For the reasons that follow, I have concluded that although the Tribunal had the power to decide this issue in advance of a full hearing on the merits of the complaint, the process that it followed was not fair as the Tribunal considered a substantial volume of extrinsic material in arriving at its decision.

[8] I have also concluded that the decision was unreasonable as the Tribunal failed to provide any reasons as to why it could not consider the complaint under subsection 5(a) of the *Canadian Human Rights Act*. Subsection 5(a) of the Act makes it a discriminatory practice to deny a service to any individual on the basis of a prohibited ground of discrimination.

[9] The Tribunal also erred in its interpretation of subsection 5(b) of the Act, and in concluding that the complaint could not succeed in the absence of an identifiable comparator group. In interpreting subsection 5(b) the way it did, the Tribunal applied a rigid and formulaic interpretation of the provision - one that is inconsistent with the search for substantive equality mandated by the *Canadian Human Rights Act* and Canada's equality jurisprudence.

[10] Finally, in making the factual determination that no appropriate comparator group was available to assist in its discrimination analysis, the Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in its funding policies.

2. The Parties

A. *The Complainants*

[11] The human rights complaint in issue in this proceeding was brought by the First Nations Child and Family Caring Society and the Assembly of First Nations who will be referred to collectively in these reasons as "the complainants".

[12] The First Nations Child and Family Caring Society (the "Caring Society") is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of Aboriginal children, youth and families, including children living on reserves. The Caring Society has a particular interest in the prevention of, and the response to the mistreatment of Aboriginal children.

[13] The Assembly of First Nations ("AFN") is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development.

B. ***The Canadian Human Rights Commission***

[14] Amongst other responsibilities, the Commission is charged with the investigation and conciliation of complaints of discrimination brought pursuant to the *Canadian Human Rights Act*. In the event that the Commission determines that an inquiry is warranted, it may refer the complaint to the Canadian Human Rights Tribunal for hearing. In appearing before the Tribunal, the Commission is statutorily mandated to represent the public interest having regard to the nature of the complaint: see section 51 of the Act.

C. ***The Interveners***

[15] Two organizations were granted "Interested Party" status before the Tribunal and both appeared as interveners in this Court.

[16] Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status before the Tribunal to assist it in understanding the relevance of Canada's international human rights obligations to the complaint, and its submissions in this Court were limited to the international law issues.

[17] The Chiefs of Ontario is a non-profit organization representing the political and other interests of the 132 First Nations in the Province of Ontario. It was granted interested party status before the Tribunal to speak to the particularities of on-reserve child welfare services in Ontario, and its submissions in this Court were largely related to this subject.

D. *The Respondent to the Complaint*

[18] The complaint names Indian and Northern Affairs Canada as the respondent in this case. It is the government department charged with primary responsibility for meeting the federal government's constitutional, treaty, political and legal responsibilities to Canada's First Nations and Inuit peoples. It appears that the department has undergone at least one name change since the complaint was filed, and is now known as Aboriginal Affairs and Northern Development Canada. To avoid confusion, it will be referred to in these reasons as the "Government of Canada" or simply "the Government".

3. The Human Rights Complaint

[19] The complainants filed their human rights complaint with the Commission in February of 2007.

[20] The complaint alleges that the funding formula used by the Government of Canada to fund First Nations child and family services (known as Directive 20-1) results in inequitable levels of child welfare services being provided to First Nations children living on reserves as compared to other Canadian children living off reserve. The complaint further alleges that this inequity amounts

to discrimination in the provision of services to First Nations children on the basis of the children's race and national or ethnic origin.

[21] According to the terms of Directive 20-1, the funding formula aims to ensure that First Nations children living on reserves receive a "comparable" level of child welfare services to that provided to other Canadian children. However, the complaint alleges that studies have revealed that 22 percent less funding is available on a per child basis for First Nations children living on reserves than is provided to children living off reserves in the average province.

[22] The complaint further alleges that the funding formula set out in Directive 20-1 provides unlimited resources for First Nations children who have been removed from their homes and are in foster care. However, child welfare services designed to allow abused or neglected children to remain safely in their homes with the necessary support services (known as "least disruptive measures") are allegedly grossly under-funded. The result of this is that a disproportionate number of First Nations children are removed from their homes, thus perpetuating the legacy of the residential school system.

[23] Moreover, the complaint alleges that jurisdictional disputes between the Government of Canada and the provinces result in delays in the delivery of child welfare services to First Nations children living on reserves, and in certain of these services being denied altogether.

[24] The complaint concludes by asserting that the alleged discrimination is systemic and ongoing. The complainants contend that the Government of Canada has been aware of the problem

for years, and has been presented with studies confirming the inequity in 2000 and again in 2005 and 2006. Yet, according to the complaint, the discriminatory treatment of First Nations children living on reserves continues.

4. Background to the Complaint

[25] Because of the way that the hearing unfolded before the Tribunal, it did not make detailed factual findings regarding the manner in which child welfare services are actually delivered to First Nations children living on reserves, or with respect to the nature and scope of the Government of Canada's role in that regard.

[26] However, in order to put the issues raised by these applications for judicial review into context, it is helpful to have a more fully-developed understanding of the complainants' allegations as they relate to the way child welfare services are provided to First Nations children living on reserves.

[27] It should, however, be made clear at this juncture that what follows is primarily a description of the complainants' *allegations*. It is provided solely for the purpose of putting the Tribunal's decision into context and providing a framework for the issues raised by these applications for judicial review. Nothing in the following description should be understood to be findings of fact made by this Court. The responsibility for making the necessary factual findings in order to determine whether there has been discrimination within the meaning of section 5 of the *Canadian Human Rights Act* rests exclusively with the Canadian Human Rights Tribunal.

[28] Child welfare is ordinarily a matter falling within provincial jurisdiction. Provincial or territorial child welfare laws apply to all children living within the province or territory in question. Provincial and territorial governments ordinarily fund child welfare services for their residents, except where the child is a “Registered Indian” living on a reserve.

[29] Pursuant to the First Nations Child and Family Services Program, funding for child welfare services for First Nations children living on reserves is provided by the Government of Canada. It transfers funds to the provinces or territories, to Bands or tribal councils, or directly to government-authorized First Nations child and family services agencies operating on reserves. The degree of supervision and control exercised by the Government of Canada over these services is a matter of dispute between the parties.

[30] Parliament has not legislated in the area of child welfare, but has instead adopted provincial standards for the delivery of child welfare services on reserves. Government funding for child welfare is complex, and involves three governing policies and hundreds of bilateral and trilateral agreements. 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”: see *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union,* 2010 SCC 45, [2010] 2 S.C.R. 696 at para. 44.

[31] The complaint was originally brought solely with respect to one of the three governing policies, namely Directive 20-1. It was subsequently broadened to include the First Nations Child and Family Services Program, which includes Directive 20-1, the more recent Enhanced Prevention

Focussed Approach ("EPFA") program, and the special agreement governing child welfare services in Ontario known as the "1965 Welfare Agreement".

A. *The First Nations Child and Family Services Program National Program Manual*

[32] I understand the respondent to agree that the Government's "National Program Manual" for First Nations child and family services covers all three of the funding policies governing the delivery of child welfare services to First Nations children living on reserves.

[33] Section 1.3.2 of the Manual provides that:

> The primary objective of the [First Nations Child and Family Services] program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, *in accordance with the legislation and standards of the reference province* [emphasis added].

[34] Funding is primarily provided to recipients through one of the three different arrangements referred to above, each of which is more fully described below. The Government of Canada also has other arrangements or agreements directly with some jurisdictions (such as First Nations governments) which specify how it will fund child welfare services in that jurisdiction.

B. *Directive 20-1*

[35] Directive 20-1 is a funding formula that originally applied to the provinces and the Yukon Territory. It did not, however, apply to the Province of Ontario, nor did it apply to a small number of agencies that operated under separate funding agreements. Directive 20-1 came into effect in 1991.

[36] The "Principles" governing the Directive 20-1 program are set out at section 6 of the document. Section 6.1 provides that "[t]he department … is committed to expanding First Nations Child and Family Services on reserve *to a level comparable to the services provided off reserve in similar circumstances*…" [emphasis added].

[37] Directive 20-1 continues to apply in British Columbia, Manitoba, Newfoundland, New Brunswick and Yukon. Yukon's situation is somewhat unique in that the Government of Canada funds services there for all First Nations children, both on and off reserve. Two First Nations child and family services agencies in Saskatchewan also operate pursuant to Directive 20-1.

[38] The complainants' human rights complaint does not address child welfare services in Nunavut or the Northwest Territories. This is because funding for child welfare services in these territories is provided by or through the territorial governments with funding from the territorial governments' own budgets, a portion of which comes from transfer payments from the Government of Canada.

[39] The way in which funds flow from the Government of Canada to the beneficiaries differs from province to province, and in some cases within different parts of the same province, depending on the specific agreements in place.

[40] Directive 20-1 is characterized by two distinct funding streams: maintenance and operations.

[41] In the maintenance stream, the Government reimburses approved costs incurred by provincial or First Nations child welfare agencies for maintaining a child in care outside the family home. Maintenance funding is based on provincial and territorial rates established by the Government of Canada.

[42] In contrast, funding for operations is calculated according to the population of eligible children on a reserve, plus an amount per band and a further amount for remoteness (where applicable). “Eligible” children are registered Indians with at least one parent resident living on a reserve.

[43] Operational funding covers all other expenses associated with on-reserve child welfare, including programs and services to support children and families, staff salaries and benefits, and operational costs such as travel, bookkeeping, rent and facilities.

[44] The distinction between maintenance and operational funding under Directive 20-1 is central to the complainants’ discrimination claim. They contend that the ‘per child’ operations formula fails to account for the divergent child welfare needs across communities. For example, an isolated reserve with a high proportion of residential school survivors obtains equal funding to an urban reserve with ready access to off-reserve community resources.

[45] Indeed, the complainants allege that the greater the number of at-risk children in a given community, the fewer the services that are actually available to each child.

[46] The complainants further assert that the separation between the two funding streams has resulted in an increase in the number of First Nations children unnecessarily being taken into care. Directive 20-1's emphasis on maintenance funding means that 'least disruptive measures' such as addiction services, special needs support services, counselling, and parenting education (which are funded from the limited 'per child' operations budget) are often unavailable for children living on reserves.

C. *Enhanced Prevention Focussed Funding*

[47] In 2007, the Government of Canada developed the Enhanced Prevention Focussed Approach to child welfare funding. The EPFA was developed as a pilot project in Alberta, but has since been applied to Saskatchewan and Nova Scotia (since 2008), and Quebec and Prince Edward Island (since 2009). The Government anticipates that other jurisdictions will transition to this formula by 2013.

[48] Under the EPFA, agencies submit a multi-year business plan with performance targets. The plan is then approved by the Government of Canada and the relevant provincial government. The funding formula under the EPFA includes budget categories for maintenance, operations and prevention, with allocated resources spread over a five-year period.

[49] Although initially developed to provide greater flexibility to agencies in the allocation of their funds, the complainants take issue with a number of aspects of the EPFA. They allege that maintenance funding - the most costly element of child welfare programs - is capped, and that any deficit in maintenance costs must thus be covered by funding from the least disruptive measures or

operations budgets. The complainants further allege that funding for preventative services is decreased in the third, fourth and fifth years of the plan.

D. *The 1965 Indian Welfare Agreement with Ontario*

[50] Child welfare services are provided to First Nations children living on reserves in Ontario pursuant to a federal-provincial agreement known as the "Memorandum of Agreement Respecting Welfare Programs for Indians" (or "1965 Indian Welfare Agreement").

[51] Pursuant to this agreement, the Government of Canada reimburses Ontario an agreed-upon share of the costs of delivering child welfare services to on-reserve children, including the costs of maintaining children in care. The Government provides additional funding to First Nations and First Nations child and family services agencies for prevention services.

[52] One of the stated objectives of the 1965 Indian Welfare Agreement is to see that the needs of First Nations communities are met in accordance with the standards applicable to non-First Nations communities.

E. *The Alleged Discrimination*

[53] The complainants point out that a 2009 Report of Parliament's Standing Committee on Public Accounts concluded that "the average *per capita* per child in care expenditure of the [Department of Indian Affairs and Northern Development] funded system is 22% lower than the average of the selected provinces": at 5.

[54] This under-funding, the complainants say, translates into fewer services being available to First Nations children living on reserve as compared to children living off reserve. The lack of preventative services for on reserve children, in particular, means that a disproportionately high number of Aboriginal children are in care.

[55] The complainants have provided a "Fact Sheet" from the Indian and Northern Affairs website that observes that the disproportionate placement rates for First Nations children living on reserves "reflect a lack of available prevention services to mitigate family crisis".

[56] Indeed, the complainants allege in their complaint that an estimated 30 to 40 percent of children "in care" in Canada are Aboriginal. They also note that the Report of the Standing Committee on Public Accounts found that five to six percent of First Nations children living on reserves are in care, which is almost eight times the percentage of children living off reserve who are in care.

[57] Dr. Cindy Blackstock, the Executive Director of the Caring Society, filed an affidavit with the Tribunal in connection with the Government's motion to dismiss. According to Dr. Blackstock's affidavit, there are now more First Nations children living away from their families in the care of child welfare authorities than there were at the height of the residential schools program.

[58] The complaint further alleges that various studies have revealed that the level of child welfare services provided to on-reserve children is less than the level of services provided to off-reserve children, notwithstanding the greater needs of First Nations children living on reserves.

These greater needs result from poverty and poor housing conditions, as well as from exposure to family violence and substance abuse.

[59] The complainants have also produced a 2000 Joint National Policy Review conducted by the Government of Canada and the Assembly of First Nations which observed that much of the dysfunction in First Nations communities is attributable to the fall-out from the residential schools experience.

[60] This Review also appears to be the foundation for the claim that there is 22 percent less funding available on a per child basis for First Nations children living on reserves as compared to the provincial average. It should, however, be noted that the Government vigorously disputes this claim. As will be discussed later in these reasons, the Government filed an expert report prepared by KPMG with the Tribunal in connection with the merits of the case that takes issue with this allegation.

[61] The Auditor General of Canada and the Standing Committee on Public Accounts have also concluded that child welfare services for First Nations children living on reserves continue to be under-funded.

[62] The complainants allege that they have made repeated attempts to have the Government address inequities in funding through negotiations and political means, but to no avail. The long-term failure of the Government to address this problem in a meaningful fashion has led to the filing of the human rights complaint.

5. The Procedural History of the Complaint

[63] Because the complainants have challenged the way in which the Tribunal handled this case, it is necessary to review the process that culminated in the decision under review.

A. *The Proceedings Before the Commission*

[64] After the complaint was filed with the Commission and an Assessor had been appointed to examine the complaint, the Government of Canada wrote to the Commission asking that it decline to deal with the complaint under section 41(c) of the *Canadian Human Rights Act*. The Government argued that the complaint was outside the Commission's jurisdiction and did not disclose a *prima facie* case of discrimination.

[65] Amongst other things, the Government argued that it does not itself deliver child welfare services to First Nations children living on reserves. As a consequence, section 5 to the *Canadian Human Rights Act* (which prohibits discrimination in the provision of services) had no application. This argument has become known as the "services issue".

[66] The Government of Canada also argued that because it does not provide funding for child welfare services for anyone other than First Nations children living on reserves, it could not discriminate in the provision of these services. It was not appropriate, the Government submitted, to compare the level of services provided by provincial child welfare authorities to the services provided to on-reserve First Nations children. The Government further argued that such a cross-

jurisdictional comparison could not amount to adverse differential treatment by one service provider on the basis of a proscribed ground. This is the "comparator group issue".

[67] The Assessor recommended that the Commission deal with the complaint. He observed that the funding issue had been exhaustively examined by various experts in the field, who had made numerous recommendations for improvement. The question was whether the alleged lack of funding and the structure of the funding formula were discriminatory. The Assessor concluded that this could not be determined without an inquiry. He thus recommended that the complaint be referred to the Tribunal, without an investigation, for further inquiry.

[68] In a decision dated September 30, 2008, the Commissioners accepted the Assessor's recommendation. In so doing, the Commissioners observed that the determination of whether a *prima facie* case of discrimination had been established was one that should properly be made by the Tribunal. The Commissioners also stated that there was enough information in the complaint to demonstrate a sufficient link to a prohibited ground and an alleged discriminatory practice.

B. ***The Federal Court Proceedings***

[69] The Government of Canada then brought an application for judicial review of the Commission's decision to refer the complaint to the Tribunal for a hearing, citing both the services and the comparator group issues as grounds for review. In turn, the complainants brought a motion to strike the Government's Notice of Application, or, in the alternative, to stay the application until the Tribunal could deal with the complaint on its merits.

[70] Prothonotary Aronovitch refused the complainants' motion to strike the Attorney General's application: *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009), Ottawa T-1753-08 (F.C.) (Proth.). She was satisfied, however, that it would be "just and equitable" to stay the Government's application for judicial review pending the Tribunal's decision: at 6.

[71] Prothonotary Aronovitch noted that the complainants had submitted that the issues raised by the Government's application were novel and complex, and could not be separated from the merits of the complaint. The complainants further argued that if the issues were determined on the basis of the limited record before the Court, it would deprive them of a full hearing on a complete record. Because the issues were complex and of importance to First Nations people, the complainants submitted that a full exploration of the issues before the Tribunal was warranted.

[72] In accepting the complainants' arguments, Prothonotary Aronovitch observed: "The subject matter of the complaint being serious and complex, I agree that it should not be determined in a summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue": at 5. She went on to note that "[t]here is an interest … in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have an impact on the future ability of aboriginal peoples to make discrimination claims": at 6.

[73] Prothonotary Aronovitch's decision was subsequently upheld by Justice O'Reilly: see *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, [2010] F.C.J. No. 397 (QL).

[74] Accordingly, the Attorney General's application to judicially review the Commission's referral decision was stayed pending the outcome of the Tribunal proceedings. Prothonotary Aronovitch subsequently granted a further stay pending the outcome of these applications for judicial review of the Tribunal's decision.

C. *The Tribunal Proceedings*

[75] Once the complaint was referred to the Tribunal, Grant Sinclair, the then-Chairperson of the Tribunal, assumed responsibility for the management of the proceeding. At the first case management conference on February 4, 2009, the Government raised both the services and the comparator group issues, asking the Tribunal to make preliminary decisions in relation to these matters. Mr. Sinclair refused to deal with either of the issues on a preliminary basis. It was his view that the issues were complex, and required a full hearing.

[76] The hearing commenced on September 14, 2009 with an opening statement from Dr. Blackstock on behalf of the Caring Society. Mr. Sinclair then addressed a number of housekeeping matters, including the granting of interested party status to the Chiefs of Ontario and Amnesty International. The hearing then adjourned to the week of November 16, 2009, when it was anticipated that the hearing of evidence would begin. The case was scheduled for 13 weeks of hearing, and it was expected that hearing would be completed in February of 2010.

[77] On November 2, 2009, Shirish Chotalia replaced Mr. Sinclair as Chairperson of the Tribunal. She immediately became involved in the management of the case. Four days after she

took office, Ms. Chotalia held a case management conference with the parties. She advised the parties that she wanted them to work together to narrow the scope of the complaint and to reduce the number of witnesses to be called.

[78] In the course of the November case management conference, the Chairperson asked counsel for the Government why it had not sought a stay of the Tribunal proceedings pending the outcome of its judicial review application in the Federal Court. Counsel responded that he had been instructed not to seek a stay from the Tribunal, but that his client was contemplating bringing a motion to have the services and comparator group issues dealt with "in a summary fashion and before the merits are dealt [with]": Joint Application Record, Volume 11, at 3018. While the Chairperson expressed a concern as to how the necessary evidence would get before the Tribunal to decide the issue, the parties did not discuss the matter further at that time.

[79] The Chairperson asked the parties to file affidavits for each of their proposed witnesses, outlining the witness's evidence-in-chief. She indicated that the parties would then have the option to cross-examine the affiants. This disclosure would allow the Tribunal and the parties to understand the evidence and to identify the points in dispute.

[80] All of the parties strongly opposed this last-minute change in approach to the management of this case. They all felt that the Chairperson's requests would impose onerous burdens on them. Counsel for the Caring Society observed that the case was ready to proceed on its merits in eight days' time, suggesting that the Chairperson was now unilaterally imposing a discovery process on the parties that was more onerous than that in a civil action in a Superior Court. Counsel for the

Government of Canada was also concerned that his client was being asked to plead its defence before hearing the complainants' evidence.

[81] The case management conference concluded with all counsel agreeing to seek instructions with respect to the Chairperson's suggestions. Counsel also agreed to see if progress could be made in relation to an agreed statement of facts.

[82] As a result of this case management conference, there was some confusion on the part of the parties as to whether Mr. Sinclair remained seized with the case. Counsel for the Caring Society wrote to the Tribunal on November 9, 2009, seeking clarification of this issue. The Government of Canada responded, arguing that the former Chairperson had not been seized of the matter, taking no position as to who should preside over the case. The Commission also wrote to the Tribunal submitting that Mr. Sinclair had indeed been seized with the matter.

[83] The parties did not receive any response from the Tribunal in relation to this issue at that time, although the Chairperson subsequently canvassed the idea of appointing a three-person panel to hear the case with the parties in the course of a case management conference held in December of 2009. None of the parties raised any objection to this proposal, apart from the concern being expressed that the appointment of a panel not further delay the proceedings. Similarly, none of the parties objected when the new Chairperson assumed sole carriage of this matter.

[84] While the Caring Society has raised the issue of Mr. Sinclair's status in its Notice of Application, it confirmed at the hearing that it is not seeking any relief in this regard. I note that

subsection 48.2(2) of the Act gives the Tribunal Chairperson the discretion to decide whether or not to allow a member whose term has expired to complete any inquiry that the member had begun. Moreover, Mr. Sinclair had not yet heard any evidence in this case, and he was thus not seized of the matter. There is also no evidence as to whether he was even available to continue dealing with the case. In these circumstances, I do not intend to address this issue any further.

[85] On November 12, 2009, the Tribunal issued a Direction, vacating the November 16-20, 2009 dates that had been set for the commencement of the hearing on the merits. Counsel for the Caring Society again wrote to the Tribunal raising concerns about the Tribunal's unilateral action, the delay of the proceedings and the fairness of the process the Tribunal was following. The Tribunal did not respond to this letter.

[86] A second case management conference was held with the new Chairperson on December 14, 2009. In the course of this conference, the Chairperson suggested that the parties engage in a process mediation in an effort to identify ways to streamline the proceedings. While concerns were repeatedly expressed about the ongoing delay of the hearing, the parties ultimately agreed to engage in such a process, and they subsequently participated in some seven days of meetings with the mediator. This process did not result in an agreement being reached on any of the substantive issues.

[87] In the meantime, counsel for the Government advised the Tribunal during the December 14 case management conference that it would be filing its motion on December 21, 2009 to have the complaint dismissed. The Chairperson set January 19, 2010 for the hearing of the motion. Without

consulting with the parties, the Tribunal subsequently vacated all of the remaining dates that had been set aside for the hearing on the merits.

[88] On December 21, 2009, the Government of Canada filed its motion to dismiss the complaint for want of jurisdiction with the Tribunal, arguing that the complaint did not come within the purview of sections 3 and 5 of the *Canadian Human Rights Act*. A copy of the relevant statutory provisions is attached as an appendix to these reasons.

[89] The Government's motion was based upon the services and comparator group issues, and was supported by a brief affidavit from the Director of the Social Reform Program Directorate at the Department of Indian Affairs and Northern Development.

[90] The following day, the Caring Society filed a motion with the Tribunal to amend its complaint to include allegations of retaliation. The retaliation issue arose when Dr. Blackstock was allegedly excluded from a meeting with Government representatives.

[91] Counsel for the Government responded to the Caring Society's motion by letter dated January 29, 2010, in which it sought to clarify what had occurred at the meeting in issue.

[92] The Tribunal has never dealt with the Caring Society's motion to amend the complaint, nor did the Caring Society ever follow up with the Tribunal in order to have the motion addressed.

[93] The Caring Society raised the Tribunal's failure to deal with its motion to amend its complaint to allege retaliation in its memorandum of fact and law, suggesting at the hearing that it is evidence of unequal treatment on the part of the Tribunal. The Caring Society does not, however, allege bias on the part of the Tribunal, nor does it seek any specific relief in this regard. As a result, I do not intend to deal further with this issue, particularly in light of the fact that Dr. Blackstock's allegations of retaliation are evidently now the subject of a separate human rights complaint.

[94] The Caring Society continued to object to the fairness of the process being followed by the Tribunal in relation to the Government's motion to have the complaint dismissed, alleging, amongst other things, that the motion was premature, and that the evidentiary record was not sufficient to decide the motion.

[95] Nevertheless, the complainants subsequently filed substantial affidavit evidence and documentary material with the Tribunal in response to the Government's motion to dismiss. The parties also cross-examined the deponents of the affidavits filed by the opposing side, and filed the transcripts of the cross-examinations with the Tribunal.

[96] The record before the Tribunal on the motion to dismiss was ultimately approximately 2,000 pages in length, plus an additional amount of legal authorities. As will be discussed later in these reasons, this number becomes important in relation to the fairness of the process followed by the Tribunal in dismissing the complaint.

[97] The motion to dismiss was finally heard on June 2 and 3, 2010. When no decision was forthcoming from the Tribunal, counsel for the Caring Society wrote letters to the Tribunal in August and December of 2010, asking when a decision could be expected. The Tribunal did not respond to either of these letters.

[98] In November of 2010, counsel for the Government of Canada requested an opportunity to make submissions regarding a recent Supreme Court of Canada decision. The Assembly of First Nations also requested leave to comment on Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*. The parties' exchange of submissions on both matters was completed by December 23, 2010.

[99] In February of 2011, the Caring Society, Amnesty International and the Commission each wrote to the Tribunal, once again expressing their concern regarding the delay in the delivery of a decision on the motion to dismiss. When no response was received from the Tribunal, the Caring Society commenced an application in this Court seeking an order of *mandamus* to compel the Tribunal to render a decision in relation to the Government's motion to dismiss the complaint. This application was discontinued when the Chairperson released her decision on March 14, 2011, dismissing the complaint.

6. The Tribunal Decision

[100] I will discuss the Tribunal's analysis of certain issues in greater detail later in these reasons, as I examine each of the grounds for judicial review. However, the following brief synopsis of the decision will assist in putting the ensuing discussion into context.

[101] The Tribunal determined that it had the authority to dismiss a human rights complaint without a full *viva voce* hearing on the merits where the facts of the case were clear and uncontroverted or where the issues involved raised pure questions of law, provided that the parties had had a full and ample opportunity to be heard.

[102] The Tribunal considered whether the Government's funding program for child welfare services for First Nations children living on reserves constituted a 'service' within the meaning of section 5 of the *Canadian Human Rights Act*. The Tribunal concluded that the Attorney General had not met its burden in establishing that the facts necessary to decide the issue were clear, complete and uncontroverted. The Tribunal held that the services question was "a fact-driven inquiry", that there were material facts in dispute, and that the evidentiary record on the motion was not sufficient to decide whether the Government of Canada provides a "service" to First Nations children living on reserve.

[103] The Tribunal was, however, satisfied that the comparator group issue raised a pure question of law and that the parties had had a full and ample opportunity to be heard in relation to the issue. According to the Tribunal, there was no additional evidence that the complainants could provide that could further their position.

[104] Subsection 5(a) of the *Canadian Human Rights Act* makes it a discriminatory practice to deny a service or access to a service to an individual on the basis of a prohibited ground. The

Tribunal was satisfied that no comparator group is required to establish discrimination in cases where a service is denied altogether.

[105] Subsection 5(b) of the Act makes it a discriminatory practice to "differentiate adversely in relation to any individual [in the provision of services], on a prohibited ground of discrimination". The Tribunal held that a finding of discrimination under subsection 5(b) requires a comparison to be made to the treatment accorded by the service provider to a different service recipient who does not share the personal attribute identified as the basis for the discriminatory practice.

[106] The Tribunal then considered whether two different service providers could be compared to each other in order to find adverse differentiation under subsection 5(b) of the Act. Specifically, the Tribunal asked itself whether it could compare the child welfare services provided by the Government of Canada to those provided by the provinces in order to determine whether the Government of Canada had committed a discriminatory practice in the provision of services.

[107] In concluding that such a comparison could not be made, the Tribunal held that subsection 5(b) required a comparison to be made to services provided to others by the same service provider. Given that the Government of Canada did not provide child welfare services to recipients other than First Nations children living on reserves, it followed that there could be no adverse differentiation in the provision of services under subsection 5(b) of the Act. As a result, the Tribunal dismissed the complaint.

7. The Issues on These Applications

[108] The issues raised by these applications for judicial review are the following:

1. Does the Tribunal have the power to decide issues that could result in the dismissal of a human rights complaint without conducting a full hearing on the merits of the complaint that provides the parties with an opportunity to adduce *viva voce* evidence?
2. Was the process the Tribunal followed in deciding the comparator group issue fair?
3. Did the Tribunal err in failing to consider the complaint under subsection 5(a) of the *Canadian Human Rights Act*?
4. Does subsection 5(b) of the *Canadian Human Rights Act* require that there be a comparator group in all cases? and
5. Did the Tribunal err in concluding that there was no relevant comparator group in this case?

[109] It will also be necessary to identify the appropriate standard of review to be applied in relation to the Tribunal's decision on each of these issues.

[110] It is also important to understand what is *not* in issue in these applications.

[111] None of the parties has sought to judicially review the Tribunal's decision on the services issue, and that issue is thus not before me.[1]

[1] To the extent that I refer to child welfare services provided by the Government of Canada, or refer to the Government as a "service provider" in these reasons, I am merely adopting the terminology used by the parties during this proceeding and do so only to identify the activities in issue in this matter. My use of this nomenclature should not be interpreted as acceptance by the Court that the Government's actions in providing funding for child welfare programming amounts to the provision of a "service" for the purpose of section 5 of the *CHRA*. The proper characterization of the Government's actions in this regard is an issue for another day.

[112] The Government also argued before the Tribunal that its funding formulae are an expression of pure executive policy, and that the issues raised by the complaint are thus not justiciable. However, the parties agree that the justiciability issue is not before me in these applications.

8. The Procedural Issues

[113] The applications for judicial review raise two issues with respect to the process that was followed by the Tribunal in this case. The first is whether the *Canadian Human Rights Act* permits the Tribunal to decide an issue that could determine the outcome of a case before embarking on a full hearing on the merits of the complaint that allows the parties to lead *viva voce* evidence. The second is whether the process followed by the Tribunal in this case was fair to the parties.

[114] I will first consider whether the Tribunal has the authority to address issues on a preliminary basis in advance of a full hearing on the merits. The fairness of the process that the Tribunal followed in this case will be addressed further on in these reasons.

A. *Does the Tribunal have the Power to Decide Issues that Could Result in the Dismissal of a Human Rights Complaint without Conducting a Full Hearing on the Merits of the Complaint that Provides the Parties with an Opportunity to Adduce Viva Voce Evidence?*

[115] The Commission characterizes this issue as "whether the Tribunal had the jurisdiction to summarily dismiss the complaint on the merits", whereas the Caring Society states the issue as "whether the Tribunal erred in dismissing the complaint without a hearing".

[116] Neither characterization properly identifies the issue before the Court as the premise underlying each description is erroneous. The Tribunal did not dismiss the complaint "summarily" or "without a hearing". It did conduct a hearing on the comparator group issue. The parties were able to adduce evidence addressing the issue, and were able to challenge the evidence led by the opposing side. Each party was also afforded the opportunity to appear and to make submissions to the Tribunal in relation to the comparator group question. What the applicants really take issue with is the form that the hearing took.

[117] The applicants argue that the process the Tribunal followed in this case raises a true question concerning its jurisdiction. As a result, they say that the Tribunal's choice of procedure should be reviewed against the standard of correctness.

[118] In contrast, the Government of Canada contends that the Tribunal's conclusion that it had the authority to decide a discrete issue on the basis of a preliminary motion, in advance of a full hearing on the merits, involves the interpretation of the powers conferred on the Tribunal by its enabling legislation. As a consequence, the Government says the issue is reviewable on the reasonableness standard.

[119] I need not resolve this issue as I am satisfied that the Tribunal correctly concluded that it had the authority to determine the process to be followed in deciding the issues raised by a human rights complaint. The Tribunal also correctly decided that it does not always have to hold a full evidentiary hearing in relation to each and every issue raised by a complaint in order to decide substantive issues coming before it.

[120] The applicants submit that the *Canadian Human Rights Act* requires the Tribunal to inquire into each complaint referred to it by the Commission. They further submit that the Act and the jurisprudence only allow the Tribunal to dismiss a complaint without a full hearing on the merits in limited circumstances: that is, where there has been an abuse of process, including an undue delay in the process.

[121] In dismissing this complaint on its merits on a preliminary motion, the applicants say that the Tribunal expanded its jurisdiction in a way that is unsupported by either the Act or the jurisprudence.

[122] The applicants further contend that it is not open to the Tribunal to usurp the screening function that Parliament has assigned to the Commission by summarily dismissing a complaint without a full hearing on the merits.

[123] Finally, the applicants submit that this Court has already determined that this case raises important and complex issues which should not be determined in the absence of the necessary factual record.

[124] Subsection 49(1) of the Act empowers the Commission to ask the Tribunal Chairperson to "institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted". Subsection 53(1) allows the Tribunal to

dismiss a complaint at the conclusion of an inquiry if the Tribunal is satisfied that the complaint is not substantiated. The Act does not, however, specify the form that the inquiry must take.

[125] That said, after providing due notice, subsection 50(1) of the Act requires the Tribunal member assigned to the case to "give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations".

[126] Paragraph 50(3)(e) of the Act empowers the Tribunal to decide procedural issues related to the inquiry. Moreover, the Tribunal is not bound by the strict rules of evidence, and is specifically empowered to receive evidence by oath, affidavit or otherwise: paragraph 50(3)(c).

[127] Administrative tribunals are intended to provide a fast, flexible and informal alternative to the traditional court system. This is reflected in subsection 48.9(1) of the Act which provides that "[p]roceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow".

[128] It is, therefore, properly part of the Tribunal's adjudicative role to identify an appropriate procedure to secure the just, fair and expeditious determination of each complaint coming before it. The nature of that procedure may vary from case to case, depending on the type of issues involved.

[129] Administrative tribunals are "masters of their own procedure". In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (QL) at para.

16, the Supreme Court observed that "[i]n the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

[130] In the case of the Tribunal, subsection 48.9(2) of the Act empowers the Chairperson to make rules of procedure governing the practice and procedure before the Tribunal. Rule 3 of the Tribunal's *Rules of Procedure* permits the parties to bring motions before the Tribunal, and allows the Tribunal to establish a procedure for the resolution of the issues raised by the motion.

[131] Nothing in either the Act or the Tribunal's *Rules of Procedure* limits the type of motions that can be brought before the Tribunal. Consequently, I see no statutory or regulatory impediment that would preclude the bringing of a motion to have the Tribunal determine a substantive issue in advance of a full hearing of the complaint on its merits.

[132] Nor is there anything in the Act or the Tribunal's Rules that would preclude the Tribunal from deciding such a motion, as long as it provides the parties with a "full and ample opportunity" to adduce the evidence necessary to decide the issue and to make submissions. The process followed by the Tribunal in relation to the hearing of the motion must also be fair, and the rules of natural justice must be respected.

[133] The applicants say that the jurisprudence has established that the Tribunal may only dismiss a complaint on a preliminary motion in the clearest of cases, and then only where proceeding with the case would amount to an abuse of process.

[134] In support of this contention, the applicants rely on the decision of this Court in *Canada (Canadian Human Rights Commission) v. Canada Post*, 2004 FC 81, [2004] 2 F.C.R. 581 [*Cremasco*], as well as the Tribunal's decisions in *Harkin v. Canada (Attorney General)*, 2009 CHRT 6, [2009] C.H.R.D. No. 6 (QL) and *Buffet v. Canada (Canadian Armed Forces)*, 2005 CHRT 16, [2005] C.H.R.D. No. 9 (QL).

[135] In *Cremasco*, the human rights complaint before the Tribunal was over eight years old, and the issues raised by the complaint had already been the subject of two labour arbitrations and a separate complaint to the Commission. Following a motion brought by the respondent to have the complaint dismissed without a hearing, the Tribunal concluded that the proceeding amounted to an abuse of process and dismissed the complaint.

[136] In upholding this decision on judicial review, Justice von Finckenstein stated that he could not accept "the proposition advanced by the Commission that the Tribunal must hold a full hearing when a matter is referred to it": at para. 16.

[137] After examining some of the statutory provisions referred to above, Justice von Finckenstein observed that it was "hard to fathom" why it would be in anyone's interest for the Tribunal to hold a hearing in a case where the hearing would amount to an abuse of its process: at para. 18. He concluded that there was no statutory or jurisprudential bar that would preclude the Tribunal from dismissing a complaint on the basis of a preliminary motion on the grounds of abuse of process,

"always assuming there are valid grounds to do so": at para. 19. This decision was subsequently affirmed by the Federal Court of Appeal: 2004 FCA 363, 329 N.R. 95.

[138] While the decision in *Cremasco* arose in the context of an alleged abuse of process, nothing in the decisions of either the Federal Court or the Federal Court of Appeal states that the Tribunal can *only* dismiss a human rights complaint without a full hearing on the merits in cases of abuse of process. What Justice von Finckenstein's decision *does* say is that the Tribunal is not obliged to hold a full hearing in relation to every complaint that the Commission refers to it.

[139] I have also carefully reviewed the Tribunal's decisions in *Harkin* and *Buffet*. I do not read either decision as saying that the Tribunal may *only* dismiss a complaint in advance of a full hearing in cases of abuse of process or undue delay.

[140] I do, however, understand the Government to agree with the statement in *Buffet* that the Tribunal's power to dismiss a human rights complaint in advance of a full hearing on the merits should be exercised cautiously, and then only in the clearest of cases: above at para. 39. I also agree with this statement.

[141] Most human rights cases are highly dependant on their individual facts and those facts are often hotly contested. As a result, many cases involve serious issues of credibility. While it is open to the Tribunal to receive evidence by way of affidavit, the more contested the facts and the greater the issues of credibility, the less appropriate this will be. Such cases may well require a full hearing

on their merits, including *viva voce* evidence in chief and cross-examinations held in the presence of a Tribunal member.

[142] Similarly, where the issues of fact and law are complex and intermingled, it may well be more efficient to await the full hearing before ruling on the preliminary issue: see *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)* (1998), 164 Nfld. & P.E.I.R. 251, 13 Admin. L.R. (3d) 142 at para. 21.

[143] That said, there may be cases where a full hearing involving *viva voce* evidence is not necessarily required. As the Tribunal noted, this could include cases where there is no dispute as to the facts, or where the issue is a pure question of law.

[144] There may also be cases where it is appropriate to decide issues raised by a complaint in stages, in a particular order, so that the hearing may unfold in an efficient manner.

[145] For example, it may be entirely appropriate for the Tribunal to choose to hear and decide a truly discrete or threshold question in advance of the full hearing on the merits of the complaint, particularly if the determination of the question has the potential to narrow the issues, focus the hearing, or dispose of the case altogether.

[146] A hypothetical example discussed during the course of the hearing illustrates this point. The Tribunal could be faced with a pay equity case that would potentially involve a two-year-long hearing, in which a question arises as to whether the relationship between the complainants and the

respondent is such that the respondent was in fact an "employer" within the meaning of section 11 of the Act. In such a case, it might well be appropriate for the Tribunal to hear and decide this issue first, as a negative decision on this point might dispose of the entire complaint.

[147] Indeed, it would make no sense in this hypothetical scenario to compel the parties to go through the time and expense of a two-year-long hearing, if the legal status of the relationship between the complainants and the respondent was potentially dispositive of the complaint, and could quickly and fairly be determined before a full examination of the wage discrimination issue.

[148] The examples referred to above are not intended to provide an exhaustive list of all of the circumstances where the Tribunal might choose to deal with issues in advance of a full hearing on the merits of a complaint. In every case, the Tribunal will have to consider the facts and issues raised by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow.

[149] However, the process adopted by the Tribunal will have to be fair, and will always have to afford each of the parties "a full and ample opportunity to appear[,] … present evidence and make representations" in relation to the matter in dispute.

[150] I do not agree with the applicants' suggestion that Prothonotary Aronovitch provided specific directions to the Tribunal as to the form that the Tribunal hearing should take. Prothonotary Aronovitch was faced with a motion to stay an application for judicial review pending the

Tribunal's decision in relation to the applicants' human rights complaint. It was in that context that she observed that the issues before the Tribunal were "serious and complex", and that there was an interest in allowing a full and thorough examination of the issues raised by the complaint in the specialized forum of the Tribunal. It was up to the Tribunal to decide how best to conduct that examination, subject always to the rules of fairness and natural justice.

[151] I also do not accept the applicants' argument that, in considering the Government's motion, the Tribunal was improperly usurping the Commission's screening function and was reviewing the Commission's decision to refer the complaint to the Tribunal.

[152] In this regard, I adopt the words of Justice von Finckenstein in *Cremasco*, where he stated that "[t]his was not a review of the decision to refer by the Commission. Rather, it was a *de novo* decision in which the Member was determining how best to deal with the issues which had been referred to the Tribunal": above at para. 14.

[153] It also bears noting that the Commission's Assessment Report made no finding as to whether the applicants' human rights complaint disclosed a *prima facie* case of discrimination. Moreover, the Commission's September 30, 2008, decision made it clear that such a finding could only be made by the Tribunal: see also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 23.

[154] Finally, I do not accept Amnesty International's argument that the proper monitoring and enforcement of Canada's international human rights obligations require that the Tribunal hold a *viva voce* hearing on the merits.

[155] I accept Amnesty's contention that international human rights law requires Canada to monitor and enforce individual human rights domestically, and to provide effective remedies where these rights are violated: see, for example, the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, article 8; Committee on the Rights of the Child, *General Comment No. 2: The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child*, 32^{d} Sess., UN Doc. CRC/GC/2002/2 (15 Nov. 2002) at paras. 1 and 25; Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, 34th Sess., UN Doc. CRC/GC/2003/5 (3 Oct. 2003) at para. 65.

[156] That said, I do not read the international instruments relied upon by Amnesty to mandate the particular form that these enforcement measures must take. Provided that the Tribunal operates independently, and that the procedures it follows are fair and are able to address the issues in question, Canada will have met its international obligations.

[157] I am thus satisfied that the Tribunal's power to control its own process allows it to consider motions raising substantive issues, including motions to dismiss human rights complaints, brought in advance of a full hearing into the merits of the complaint in some circumstances. The process

followed by the Tribunal in this regard will, however, always be subject to the requirements of procedural fairness.

[158] The next question, then, is whether the process followed by the Tribunal in this case was fair.

B. *Was the Process that was Followed by the Tribunal in Deciding the Comparator Group Issue Fair?*

[159] The applicants raise several issues with respect to the fairness of the process followed by the Tribunal in this case. Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[160] The Commission argues that it was treated unfairly, as it was not aware that the Tribunal was actually going to address the merits of the complaint in deciding the motion.

[161] I do not accept this argument. It was clear from the Notice of Motion served by the Government of Canada that it was seeking to have the complaint dismissed by the Tribunal, and on what grounds.

[162] One of the grounds the Government cited in its Notice of Motion supporting the dismissal of the complaint was that the complaint did not fall within section 5 of the *Canadian Human Rights Act*. The Notice of Motion asserted that the Government does not provide funding for child welfare

services for anyone other than First Nations children living on reserve, and that it could not be compared to provincial child welfare service providers. It is also clear from the transcript of the motion hearing that the applicants, including the Commission, understood what was at stake on the motion.

[163] I am thus satisfied that the Commission was aware of what was at issue on the Government's motion, notably that the complaint could be dismissed if the Tribunal found that it did not come within the scope of the service and/or discrimination requirements of section 5 of the Act.

[164] The applicants also say that the process that the Tribunal followed was unfair as they were unable to lead the necessary evidence to respond to the comparator group issue. There is, however, no indication that the Tribunal limited the type or amount of evidence that could be adduced on the motion in any way. Nor have the applicants identified any specific evidence that they were unable to put before the Tribunal in response to the Government's motion. Consequently, I am not persuaded that they were treated unfairly in this regard.

[165] The applicants further contend that the Tribunal erred by failing to respect First Nations culture in deciding one of the most important cases to come before it involving Canada's First Nations people. They submit that the Supreme Court of Canada has long recognized the value of oral evidence in cases involving Aboriginal peoples. By insisting on proceeding with the motion on the basis of a written record, the applicants say that the Tribunal failed to respect First Nations' customs and traditions.

[166] There are two difficulties with this argument. The first is that, once again, the applicants have failed to identify *any* evidence that they were unable to put before the Tribunal in relation to the comparator group issue as a result of the Tribunal's choice of procedure. The second difficulty is that the applicants have not explained how oral evidence would be relevant to the interpretive exercise that the Tribunal undertook in relation to section 5 of the *Canadian Human Rights Act*.

[167] I am, however, satisfied that there was a breach of procedural fairness in this case as the Tribunal considered extrinsic evidence, without advising the parties that it would be considering this evidence in deciding the motion, and without affording the parties any opportunity to respond to it.

[168] In preparation for the hearing on the merits of the complaint, the parties served and filed documents with the Tribunal which related to the merits of the case. These filings continued after the Government brought its motion to dismiss in December of 2009. Indeed, the parties continued to file material with the Tribunal that related to the merits of the complaint well after the motion to dismiss was heard in June of 2010.

[169] By all accounts, the parties filed many thousands of pages of documents with the Tribunal addressing the merits of the complaint.

[170] I do not understand the Government to take issue with the assertion in paragraphs 42 and 51 of Dr. Blackstock's affidavit that the parties were never advised that the Tribunal would be considering material filed outside of the motion context in connection with the motion to dismiss.

[171] The materials filed by the Government of Canada in support of its motion to dismiss were relatively brief, whereas the applicants filed a significant amount of responding material. Affiants were cross-examined on their affidavits, and the transcripts of those cross-examinations were filed with the Tribunal. As mentioned earlier in these reasons, the record before the Tribunal on the motion to dismiss was approximately 2,000 pages in length, plus authorities.

[172] The Tribunal appeared to recognize at paragraph 62 of its decision that the motion to dismiss should be decided "on the basis of the record generated by the motion".

[173] However, it is clear from other statements in the reasons that the Tribunal did not confine itself to "the record generated by the motion". The reasons show that the Tribunal did not distinguish between the material filed by the parties in relation to the Government's motion to dismiss and the materials filed in relation to the merits of the complaint, and that the Tribunal considered material filed outside of the motion context in deciding the issues before it.

[174] In paragraph six of its decision, the Tribunal states that:

> The Crown's motion has resulted in the following evidence being placed before me. In this case, the Crown, and the complainants, and two interveners, Chiefs of Ontario (The Ont. Chiefs) and Amnesty International (Amnesty), have filed the documents and the submissions as outlined in Appendix "A".

Other references to the documents in Appendix "A" appear at paragraphs 17 and 107 of the decision.

[175] Appendix "A" contains a list of 118 documents, including document lists, witness lists, will-say statements, statements of particulars, documentary disclosure, experts' reports and so on. Many of these documents relate to the merits of the case and were not filed in connection with the motion to dismiss.

[176] Of particular concern to the applicants is one of the Government's experts' reports – the report prepared by KPMG – which the Government filed with the Tribunal several months *after* the hearing of the motion. The KPMG report is an opinion prepared by an accounting firm addressing, amongst other things, the feasibility of comparing child welfare funding levels across jurisdictions. The report also calls into question the complainants' assertion that the Government of Canada provides 22 percent less funding per child for child welfare services than does the average province.

[177] The Tribunal went on in paragraph 6 of its decision to state that "I have vetted the materials filed relevant to this motion, *more than 10,000 pages*" [emphasis added]. The Tribunal then observes that "[i]ronically, this volume of materials appears to be grossly insufficient to address the scope and breadth of this complaint".

[178] The Tribunal's confusion as to the scope of the record before it is clearly reflected in the statement appearing at paragraph 49 of the decision, which states that "*[t]he Tribunal record on this motion alone consists of more than 10,000 pages*" [emphasis added].

[179] The Tribunal's decision was released on March 14, 2011, "subject to editorial revisions". On April 7, 2011, the Tribunal issued an amended decision correcting various errors in the original text. Significantly, it made no changes to any of the statements cited above.

[180] It thus appears on the face of the decision that, unbeknownst to the parties, the Tribunal considered as much as 8,000 pages of extrinsic material in deciding the Government's motion to dismiss. The parties were not aware that this was going to happen, and thus had no opportunity to address or respond to any of the material.

[181] The Caring Society commenced its application for judicial review on April 13, 2001. One of the grounds for review cited in the Caring Society's Notice of Application was that it was denied procedural fairness as a result of the Tribunal's reliance on extrinsic evidence.

[182] On April 18, 2011, the Government of Canada filed a request under Rule 317 of the *Federal Courts Rules*, SOR/98-106.

[183] The Tribunal's Director of Registry Operations responded to the Rule 317 request shortly thereafter. The Registry official provided a "Certified Index confirming all of the documentation that was before Chairperson Chotalia when making the determination of March 14, 2011, which dismissed the complaint in the matter T1340/7008". The Index included all of the materials referenced in Appendix "A" to the Tribunal's decision, except the parties' experts' reports. The covering letter from the Registry official states: "Please note that the expert reports filed by the

parties were not taken into consideration by the Chairperson when rendering her ruling. As such, they do not appear in the Certified Index".

[184] I am not prepared to attach any weight whatsoever to this statement.

[185] First of all, it flies in the face of the Tribunal's own statement that it had "vetted" the materials relevant to the motion, which it identified as the documents listed in Appendix "A" of the decision. The parties' experts' reports are specifically referenced in Appendix "A".

[186] Moreover, the Registry official's statement appears to have been an attempt to respond to the procedural fairness arguments advanced by the Caring Society in its Notice of Application for Judicial Review. As such, it is improper.

[187] Reviewing courts have repeatedly cautioned adjudicators against trying to shore-up their decisions through after-the-fact affidavit evidence filed in response to applications for judicial review of their decisions: see, for example, *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35, 413 N.R. 70 at para. 51, and *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576 at para. 45.

[188] What happened in this case is even more problematic than what occurred in *Sapru* and *Sellathurai*. When a decision-maker files an affidavit in an *ex post facto* attempt to improve on his or her decision, the statements in issue are made under oath and it is at least open to the aggrieved party to challenge statements contained in the affidavit through cross-examination.

[189] In this case, the statement as to what materials the Tribunal did and did not consider in deciding the motion to dismiss came not from the Tribunal member herself, but rather from a public servant within the Tribunal Registry. There is no explanation as to how the Registry official knew what the Tribunal member had or had not considered in arriving at her decision. Nor is there any explanation as to why contradictory statements appear in the decision itself. Moreover, the statement in question is contained in a letter rather than in an affidavit. Consequently, the applicants have no way to challenge the Registry officer's assertions.

[190] At the end of the day what we are left with is the Tribunal's own statement that it had "vetted" 10,000 pages of material in relation to the motion to dismiss, when the record on the motion before it was only some 2,000 pages in length. There is, moreover, no suggestion by any of the parties that the authorities filed in relation to the motion came anywhere close to accounting for the 8,000 page difference.

[191] Taking the Tribunal's statements in its decision at face value, I can only conclude that the Tribunal considered thousands of pages of material not properly before it on the motion to dismiss, without advising the parties accordingly, and without affording them any opportunity to make representations in this regard. This is a clear breach of procedural fairness: *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1977] 1 S.C.R. 456 at 463.

[192] As the Ontario Court of Appeal observed in *Khan v. University of Ottawa*, 148 D.L.R. (4th) 577, 34 O.R. (3d) 535 (C.A.) at para. 33, "[t]he right to procedural fairness means little unless the

person affected is informed of contrary information and arguments and given an opportunity to address them before the decision is made".

[193] I do not understand the Government to dispute that the Tribunal considered extrinsic evidence in arriving at its decision on the motion to dismiss. However, it points out that there is no reference to anything in the KPMG report in the Tribunal's reasons. While the Government accepts that the applicants are not required to show that they were actually prejudiced by the Tribunal's reliance on extrinsic evidence, it says that the applicants do have to show that the material the Tribunal relied upon may have affected the result.

[194] The Government submits there is no evidence in this case that the extrinsic material played any role in the Tribunal's decision to dismiss the applicants' human rights complaint. As a result, any error on the part of the Tribunal was not material to the outcome.

[195] I would start by noting that the applicants need not show actual prejudice resulting from the Tribunal's consideration of extrinsic evidence in order to prove that they have been denied procedural fairness in this matter. They need only show that the Tribunal's breach of fairness may reasonably have prejudiced them: see *Khan*, above at para. 34; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at 1116.

[196] The Tribunal's consideration of extrinsic evidence in this case was, moreover, not limited to its review of the KPMG report. As I previously noted, it appears from the Tribunal's decision that it

considered thousands of pages of material that was not part of the motion record. The KPMG report is only 141 pages in length.

[197] While I have not been provided with the all of the documentary material that was filed with the Tribunal in relation to the merits of the case, it is clear from the record before me that this material included document lists, witness lists, will-say statements, statements of particulars, documentary disclosure, the applicants' experts' reports and so on. In my view, the sheer volume of extrinsic materials "vetted" by the Tribunal cannot help but raise real concerns about the fairness of the process followed in relation to the motion to dismiss.

[198] Moreover, the comparator group issue has been "on the table" from virtually the moment the complainants filed their complaint with the Commission in 2007. Indeed, the Government's response to the receipt of the complaint was to immediately seek to have the Commission summarily dismiss it for want of jurisdiction on the basis of both the services and comparator group issues.

[199] As a consequence, it is impossible to imagine that there would be no mention of the comparator group issue in any of the thousands of pages of material that the parties filed with the Tribunal in relation to the merits of the complaint. It is therefore only reasonable to assume that some of these submissions would have been relevant to the issues being addressed by the Tribunal on the motion to dismiss. Consequently, I am satisfied that the Tribunal's breach of fairness may reasonably have prejudiced the applicants.

[200] The Government of Canada also submits that even if I were to conclude that the Tribunal's reliance on extrinsic evidence did constitute a breach of procedural fairness, this error, by itself, would not justify setting aside the Tribunal's decision. According to the Government, the decision should be allowed to stand if this Court finds that the Tribunal did not err in its interpretation of section 5 of the Act as it relates to the comparator group issue.

[201] However, as the Supreme Court of Canada observed in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661, [1985] S.C.J. No. 78 (QL), the denial of a fair hearing "must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision".

[202] In reaching this conclusion, the Supreme Court observed that "[t]he right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have". The Court further observed that it is not for a reviewing court to deny that right "on the basis of speculation as to what the result might have been had there been a [fair] hearing": all quotes at 661.

[203] I recognize that there is a limited exception to this rule. A reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless": W. Wade, *Administrative Law* (6th ed. 1988) at 535, as cited in *Mobil Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228, [1994] S.C.J. No. 14 (QL). See also *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172

N.R. 308, 27 Imm. L.R. (2d) 135 at para. 9 (F.C.A.). This may arise where, for example, the circumstances of the case involve a legal question which has an inevitable answer: *Mobil Oil*, above at 228.

[204] I am not persuaded that this case comes within either the *Yassine* or *Mobil Oil* exceptions. I am, moreover, satisfied that the Tribunal committed three different reviewable errors in its interpretation and application of section 5 of the Act and in its treatment of the comparator group issue. As a result, the Tribunal's decision must be set aside.

[205] These errors will be addressed in the next section of these reasons.

9. The Section 5 Issues

[206] As will be explained below, I have concluded that the Tribunal erred in failing to provide any reasons as to why the complaint could not proceed under subsection 5(a) of the *Canadian Human Rights Act*. I have also found that its interpretation of subsection 5(b) of the Act was unreasonable. Finally, I have concluded that the Tribunal failed to have regard to a material fact in concluding that no appropriate comparator group was available to assist in the analysis under subsection 5(b) of the Act, namely the Government's own choice of provincial child welfare standards as the appropriate comparator.

A. *The Tribunal's Failure to Consider the Complaint under Subsection 5(a) of the Act*

[207] The human rights complaint at issue in this proceeding was brought under section 5 of the

Canadian Human Rights Act, which provides that:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5**. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	b) de le défavoriser à l'occasion de leur fourniture.

[208] Section 3 of the Act identifies "race" and "national or ethnic origin" as prohibited grounds of discrimination.

[209] The complaint under consideration by the Tribunal asserts that as a result of the Government of Canada's under-funding of child welfare services, First Nations children living on reserves receive a lower quality of certain services. However, at page three of the complaint form, the complainants specifically allege that jurisdictional disputes between the Government of Canada and the provinces have caused First Nations children living on reserve to be *denied* services that are otherwise available to Canadian children living off reserve.

[210] The complainants also put evidence before the Tribunal on the motion to dismiss alleging that the Government of Canada's actions have denied First Nations children on reserves access to

certain child welfare services: see, for example, Dr. Blackstock's affidavit at paras. 11, 42 and 48; Elsie Flette's affidavit at paras. 24 and 26.

[211] Of particular concern to the complainants is the alleged lack of funding for preventative measures that would allow First Nations children living on reserves to remain in their homes under the supervision of child welfare authorities. According to the complaint, the denial of these services has resulted in a disproportionate number of First Nations children living on reserves being taken from their homes and placed into foster care. As was noted earlier, the complainants argue that this has the effect of perpetuating the legacy of the residential schools experience.

[212] Documentary evidence was also put before the Tribunal through Dr. Blackstock's affidavit to support the complainants' contention that the Government's actions have resulted in certain child welfare services being denied altogether to First Nations children living on reserves. For example, the October, 2006 "Fact Sheet" from Indian and Northern Affairs states:

> [T]he current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with provincial and territorial policy changes. *As a result, First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians* [emphasis added].

[213] Similar comments regarding the unavailability of some child welfare services for First Nations children living on reserves appear in the report of the Parliamentary Standing Committee on Public Accounts.

[214] While the complaint form tracks the language of section 5 of the Act in general terms, it does not make specific reference to section 5, nor does it distinguish between subsections 5(a) and (b) of the legislation. Moreover, the Government's motion to dismiss simply references section 5 of the Act in support of its contention that the Tribunal lacks jurisdiction to deal with the complaint, and does not distinguish between subsection 5(a) and (b) as they may apply to the complaint.

[215] There was some discussion between the parties and the Tribunal, both before and during the hearing of the motion to dismiss, as to whether the complaint related to both subsections 5(a) and (b) or just to subsection 5(b) of the Act. Moreover, some of the parties' arguments on the motion to dismiss referred specifically to subsection 5(b) of the Act.

[216] That said, most of the written and oral submissions before the Tribunal were directed at the question of whether there could be discrimination under section 5 of the Act *as a whole* if the Government of Canada did not provide child welfare services to anyone other than First Nations children living on reserves.

[217] There was no attempt by any of the parties during the hearing of the motion to dismiss to address the differences in wording between subsections 5(a) and 5(b) of the Act, nor were any submissions made with respect to the implications that the differences in wording between subsections 5(a) and 5(b) might have for the complaint.

[218] In addition, a number of the applicants' oral submissions addressed the fact that the alleged result of the Government's conduct was to deny certain child welfare services to First Nations children living on reserves, seemingly bringing the complaint within subsection 5(a) of the Act.

[219] At paragraph 125 of its decision, the Tribunal concluded that a comparator group is not required in cases where there has been a *denial* of services as contemplated by subsection 5(a) of the Act, although it made no factual findings in this regard. The Tribunal did, however, find that a comparator group was required to establish adverse differential treatment under subsection 5(b) of the legislation.

[220] Although the Tribunal examined the complaint in relation to subsection 5(b) of the Act at some considerable length, it provided no explanation whatsoever as to why the complaint could not be considered under subsection 5(a) of the Act, to the extent that it dealt with the alleged denial of child welfare services to First Nations children living on reserves. This is an error of law and a breach of procedural fairness: see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 22.

[221] The complete absence of reasons on this point also means that this aspect of the Tribunal's decision lacks the justification, transparency and intelligibility required of a reasonable decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47, and *Khosa*, above at para. 59.

B. ***Does Subsection 5(b) of the Canadian Human Rights Act Require that there be a Comparator Group in all Cases?***

[222] It will be recalled that subsection 5(b) of the *Canadian Human Rights Act* makes it a discriminatory practice to "differentiate adversely in relation to any individual, on a prohibited ground of discrimination" in the provision of services customarily available to the general public.

[223] The Tribunal accepted the Government's argument that in order to find adverse differential treatment for the purposes of subsection 5(b) of the Act, the treatment accorded to the complainant must necessarily be compared to the treatment accorded to others receiving the same service from the same service provider.

[224] In reaching this conclusion, the Tribunal acknowledged the need for a broad, liberal and purposive approach to the interpretation of the Act. However, it also noted that the words of the statute must be capable of bearing the interpretation sought.

[225] The Tribunal observed that the French version of subsection 5(b) used the term "défavoriser" in lieu of "differentiate adversely", accepting that this term did not necessarily contemplate the need for a comparison. As a result of the Tribunal's finding that the English version of the provision necessarily required a comparison, whereas the French version of the provision did not, the Tribunal turned to consider principles of statutory interpretation and case law in an effort to ascertain Parliament's intent in enacting subsection 5(b) of the Act.

[226] Applying general rules of statutory construction, the Tribunal held that the narrower interpretation in the English version of subsection 5(b) was to be preferred. In coming to this

conclusion, the Tribunal also had regard to jurisprudence which it saw as confirming the need for a comparator group analysis in every case. It also attempted to distinguish jurisprudence leading to the opposite result.

[227] Having determined that a discrimination analysis under subsection 5(b) necessarily required a comparison, the Tribunal then concluded that it could not compare child welfare services provided by the Government of Canada with similar services provided by the provinces. This led the Tribunal to conclude that there was no appropriate comparator group in this case for the purposes of a subsection 5(b) analysis.

[228] The Tribunal was also not persuaded that the repeal of section 67 of the *Canadian Human Rights Act* (which insulated discrimination under or pursuant to the *Indian Act* from review under the Act) had any relevance to the issue before it. According to the Tribunal, the amendment merely subjected the Government of Canada and First Nations to the prohibitions against discrimination on prescribed grounds in their provision of services to Aboriginal persons.

[229] The Tribunal concluded that the complainants could not establish adverse differentiation in the provision of services for the purposes of subsection 5(b) of the Act without comparing the child welfare services provided by the Government of Canada to First Nations children living on reserves with the child welfare services provided by the Government to others. Given that the Government of Canada did not provide child welfare services to anyone other than First Nations children living on reserves, and having determined that the child welfare services provided by the Government of

Canada could not be compared to the child welfare services provided by provincial or territorial governments, the Tribunal dismissed the complaint.

[230] I will first examine the Tribunal's finding that the wording of subsection 5(b) necessarily required a comparison in order to establish adverse differential treatment in the provision of a service. I will then go on in the next section of these reasons to address the Tribunal's conclusion that there was no appropriate comparator group in this case as the child welfare services provided by the Government of Canada to First Nations children living on reserves could not be compared to provincial child welfare services for the purposes of establishing discrimination under subsection 5(b) of the Act.

i) ***The Standard of Review***

[231] The first issue for determination in examining the Tribunal's conclusion that subsection 5(b) of the Act necessarily required a comparison to be made to another group receiving the same service from the same service provider is the standard of review to be applied to this aspect of the Tribunal's decision.

[232] The applicants argue that the Tribunal's conclusion that a comparator group is required to establish discrimination under subsection 5(b) of the Act is a true question of jurisdiction, thus requiring review on the correctness standard: *Dunsmuir*, above at para. 59. I do not agree.

[233] The interpretive exercise engaged in by the Tribunal required it to identify the necessary elements in a discrimination analysis under a provision of the *Canadian Human Rights Act*. The

Tribunal was interpreting a provision in its own enabling legislation in relation to an issue falling squarely within its "core function and expertise": see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 [*Mowat*] at para. 24.

[234] It is now well established that decisions involving the interpretation of a Tribunal's enabling legislation presumptively attract a reasonableness standard of review, and will only attract a correctness standard in limited circumstances: see, for example, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 28 and *Dunsmuir*, above at paras. 58-61. See also *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 420 N.R. 364 at para. 18; *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at para. 34.

[235] The applicants have attempted to classify this issue as 'jurisdictional' and thus reviewable on the correctness standard. However, decisions of the Supreme Court since *Dunsmuir* have repeatedly emphasized the need for reviewing courts to shift their focus away from historically broad notions of 'jurisdiction' in favour of increased deference to specialized decision-makers interpreting their enabling legislation: see *Mowat*, above; *Smith*, above at para. 28; and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, 339 D.L.R. (4th) 428.

[236] I also do not accept the applicants' argument that the interpretation of subsection 5(b) of the Act is an issue of general importance to the legal system as a whole, thus attracting the correctness standard of review.

[237] It is true that reviewing courts did not historically defer to human rights tribunals on legal questions, which they often perceived to be of general importance. However, the Supreme Court has recently distanced itself from this position: see *Mowat*, above at paras. 19-24.

[238] Indeed, the Supreme Court recognized in *Mowat* that there is a "degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals": at para. 21. However, it concluded that reviewing courts owe the same deference to human rights tribunals interpreting their enabling legislation as is owed to other administrative tribunals. Moreover, the Court instructed reviewing courts to exercise restraint in classifying human rights issues as being issues 'of central importance to the legal system', even where they are of broad import: at paras. 23-24.

[239] *Mowat* also reminds us that regard must be had to the expertise of the Tribunal in relation to the issue before it: at para. 25. In this case, the Tribunal has expertise in human rights matters: see subsection 48.1(2) of the Act.

[240] The Tribunal was thus interpreting a provision in its own enabling legislation relating to the definition of discrimination, an issue falling squarely within its core function and expertise. As such, the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is reviewable on the standard of reasonableness.

[241] I would note, however, that at the end of the day, my conclusion regarding the standard of review has no impact on the result. This is because I am satisfied that the Tribunal's interpretation of subsection 5(b) was unreasonable.

[242] In coming to this conclusion, I would start by considering the purpose of the *Canadian Human Rights Act* and the general interpretive principles that apply to it.

ii) ***The Purpose of the CHRA and its Interpretation***

[243] 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] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL) at para. 21, and see Ruth Sullivan, ed., *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1.

[244] In this case we are dealing with the *Canadian Human Rights Act*, quasi-constitutional legislation which Parliament has enacted to give effect to the fundamental Canadian value of equality - a value that the Supreme Court of Canada has described as lying at the very heart of a free and democratic society: see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 615, [1993] S.C.J. No. 20 (QL), per Justice L'Heureux-Dubé, dissenting (but not on this point).

[245] As identified in section 2 of the Act, 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, national or ethnic origin, sex and age, amongst others.

[246] Human rights legislation has been described as "...the final refuge of the disadvantaged and the disenfranchised": *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, [1992] S.C.J. No. 63 (QL) at para. 18. As such, the Supreme Court of Canada has repeatedly warned of the dangers of strict or legalistic interpretative approaches that would restrict or defeat the purpose of such a quasi-constitutional document: see *Mossop*, above at 613, per Justice L'Heureux-Dubé J., dissenting (but not on this point). Rather, the task of the Court is to "breathe life, and generously so, into the particular statutory provisions [in issue]": *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 7.

[247] Indeed, the Supreme Court has observed on numerous occasions that human rights legislation is to be given a large, purposive and liberal interpretation in a manner consistent with its overarching objectives, so as to ensure that the remedial goals of the legislation are best achieved: see, for example, *Mossop*, above at 611-12. See also *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 3 C.H.R.R. D/1163; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74 (QL) [*O'Malley*]; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42 (QL) [*Action Travail*].

[248] These cases teach us that ambiguous language should be interpreted in a way that best reflects the remedial goals of the statute. It follows that a strict grammatical analysis may be

subordinated to the remedial purposes of the law: see *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc*., 2008 SCC 45, [2008] 2 S.C.R. 604 at para. 67.

[249] That is, "it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at para. 30 (citing *Gould*, above, and *O'Malley*, above).

[250] This interpretive approach does not, however, permit interpretations which are inconsistent with the wording of the legislation: see *Potash Corporation*, above at para. 19. See also *Mowat*, above at para. 33, and *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710 at para. 25.

iii) ***The Ordinary Meaning of "Differentiate Adversely"***

[251] 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.

[252] The term "differentiate adversely" is not unique to the services provision in section 5 of the *Canadian Human Rights Act*. Identical language also appears in subsection 6(b) of the Act, which makes it a discriminatory practice to "*differentiate adversely* in relation to any individual" on a

prohibited ground of discrimination in the provision of commercial premises or residential accommodation [emphasis added].

[253] Subsection 7(b) of the Act similarly makes it a discriminatory practice "in the course of employment, to *differentiate adversely* in relation to an employee" on the basis of a prohibited ground [emphasis added].

[254] In my view, the ordinary meaning of the phrase "*differentiate adversely* in relation to any individual" on a prohibited ground of discrimination is to treat someone differently than you might otherwise have done because of the individual's membership in a protected group. This interpretation is one that accords with the purpose of the Act and the intention of Parliament in enacting the *Canadian Human Rights Act*.

[255] In contrast, the Tribunal's conclusion that 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 leads to patently absurd results that could never have been intended by Parliament.

[256] On the Tribunal's analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.

[257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.

[258] It will be recalled that section 2 of the Act identifies the purpose of the *Canadian Human Rights Act* as being 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 sex, colour, religion and sexual orientation*, amongst others.

[259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.

[260] Other examples discussed during the hearing serve to further illustrate that a person or a group can be treated in an adverse differential manner even if there is no one else working for the same employer or receiving the same services from the same service provider.

[261] Take the employer who sets out to hire only foreign workers in the belief that the company could pay such workers 50 percent of the going rate. On the Tribunal's analysis, that employer would not have committed a discriminatory practice if the company did not employ any Canadian workers to whom the foreign workers could be compared.

[262] Similarly, the restaurateur who insists on seating a customer at the back of the room because of the colour of the customer's skin would not have committed a discriminatory practice if the restaurant never served another customer.

[263] Lastly, the Tribunal's interpretation of subsection 5(b) of the Act would mean that it would not be a discriminatory practice for the Government of Canada to limit the services it provides only to a single protected group, even if the Government *admitted* that its decision to do so was based on discriminatory considerations.

[264] That is, no recourse would be available under subsection 5(b) of the Act in the hypothetical situation where the responsible Minister expressly acknowledged that the Government made the decision to limit the services it provided to a particular class of individuals because it did not like or respect the group in question because of their race or their national or ethnic origin, and did not feel that they were worthy of support or dignity because of their membership in that particular group.

[265] 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.

[266] 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.

[267] Subsections 5(b), 6(b) and 7(b) of the Act must be read together, and accorded a harmonious interpretation. Therefore, to the extent that the Tribunal attempted to distinguish case law arising under subsection 7(b) on the basis that "[d]isability cases bring with them particular and individualized situations", the Tribunal erred: see Tribunal's decision at paras. 124-25.

[268] Moreover, the examples cited above illustrate that the types of situations in which a direct comparator will not be available to prove discrimination extend well beyond the disability in employment context. Yet each example clearly involves a discriminatory practice.

[269] My conclusion as to the interpretation of the phrase "differentiate adversely" as it is used in subsection 5(b) of the *Canadian Human Rights Act* is confirmed when regard is had to the French version of the legislation, and to the incoherence that the Tribunal's interpretation of subsection 5(b) would create within section 5 as a whole.

[270] Further confirmation of my interpretation of the legislation is found in the jurisprudence dealing with what is required to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act* and the role of comparator groups in discrimination analyses. My interpretation also accords with Parliament's intention in repealing section 67 of the *Canadian Human Rights Act* and with Canada's obligations under international law.

[271] I will address each of these matters in turn.

iv) ***The French and English Versions of Subsection 5(b)***

[272] The French version of subsection 5(b) states that it is a discriminatory practice "s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur … de services … destinés au public … de le *défavoriser* à l'occasion de leur fourniture" [emphasis added].

[273] As the Tribunal noted, the term "défavoriser" as it is used in subsection 5(b) of the Act does not necessarily require a comparator in all cases: see para. 114 of the Tribunal's reasons.

[274] I have already explained why the English version of section 5(b), properly interpreted, also does not require a comparison. As a result, there is no incoherence between the English version of subsection 5(b) and the French version of the same provision: the two versions share a common meaning.

[275] The Tribunal's interpretation of subsection 5(b) does, however, create an internal incoherence within section 5 of the *Canadian Human Rights Act*. This issue will be addressed next.

v) ***The Incoherence Created Between Subsections 5(a) and (b)***

[276] A further reason for concluding that the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is unreasonable is that it would create an internal incoherence between subsections 5(a) and (b) by establishing different legal and evidentiary requirements in order to establish discrimination under each provision.

[277] There is a general principle of statutory interpretation that "the provisions of an Act fit together to form a coherent and workable scheme" to "give effect to a plausible and coherent plan": Sullivan, above at 361 and 364. Interpreting section 5 of the Act so as to impose a higher evidentiary burden on claimants who suffer adverse differentiation in the provision of a service than is imposed on those who are denied the service altogether does not support a "plausible and coherent plan": Sullivan, above at 364. Indeed, the Tribunal's interpretation of section 5 of the Act has the opposite effect.

[278] That is, requiring a comparator group in every case brought under subsection 5(b) of the Act but not for complaints brought under subsection 5(a) would create anomalous results. As the Commission has pointed out, the Tribunal's interpretation would mean that "[i]f the funding was $0, the *CHRA* would apply; if the funding was $1 and arguably insufficient, the *CHRA* would not apply": Memorandum of Fact and Law of the Commission, at para. 101.

[279] Neither the wording of the legislation nor the jurisprudence contemplates such an anomalous result: see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, 140 D.L.R. (4th) at para. 49, McLachlin J. (as she then was), concurring.

vi) *The Role of Comparator Groups in a Discrimination Analysis*

[280] My conclusion that the Tribunal's interpretation of subsection 5(b) of the Act is unreasonable is further supported by the jurisprudence that has developed under both the *Canadian Human Rights Act* and under section 15 of the *Canadian Charter of Rights and Freedoms*, s. 7, Part

I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the Charter].

[281] While not a universally accepted proposition[2], the Supreme Court of Canada has long held that equality is an inherently comparative concept, and that determining whether discrimination exists in a given case will often involve some form of comparison: *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6 (QL) at para. 26.

[282] This does not mean, however, that there must be a formal comparator group in every case in order to establish discrimination under subsection 5(b) of the Act.

[283] The onus is on a complainant to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act*. The test for establishing a *prima facie* case of discrimination is a flexible one, and does not necessarily contemplate a rigid comparator group analysis.

[284] According to the Supreme Court of Canada, a *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent: *O'Malley*, above.

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[2] See, for example, Sophia Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 J.L. & Equal. 81; and Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) at 410 and 427.

[285] Once a complainant has established a *prima facie* case of discrimination, the burden shifts to the respondent to provide a reasonable explanation for the conduct in issue.

[286] Although rarely mentioned in early human rights cases, the notion of comparator groups has figured prominently in equality jurisprudence in recent years, particularly in cases brought under section 15 of the Charter: see, for example, *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12 (QL).

[287] While the analytical frameworks under section 15(1) of the Charter and under federal and provincial human rights statutes have evolved separately and have taken distinct forms, they have not done so in isolation from one another. As the British Columbia Court of Appeal recognized in *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478, 326 D.L.R. (4th) 77 at para. 40, Rowles J.A., dissenting (but not on this point), there has been "considerable cross-fertilization" between the two areas of the law.

[288] One area of "cross-fertilization" from the Charter jurisprudence has been the occasional adoption of a formal comparator group analysis in the interpretation of human rights legislation: *Moore*, above at para. 112, Rowles J.A., dissenting (but not on this point).

[289] It is thus important to understand precisely what it is that we are talking about when we consider whether a comparator group is required in order to establish adverse differential treatment in the provision of services for the purposes of subsection 5(b) of the *Canadian Human Rights Act*.

[290] 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.

[291] There are many types of human rights cases in which no comparator group analysis will be required. A woman who is sexually harassed by her boss does not need to establish that other employees have not been subjected to similar treatment to succeed in establishing a *prima facie* case of discrimination.

[292] Similarly, a comparator group may not be necessary to establish adverse differential treatment in employment on the basis of disability: see, for example, *Lane v. ADGA Group Consultants Inc.* (2008), 91 O.R. (3d) 649, 295 D.L.R. (4th) 425 at para. 94 (Ont. Div. Ct.). Looking to a comparator group may in fact be *inappropriate* in such cases. Disabled employees are often not seeking to be treated in the same way as their co-workers. Rather, it is often the crux of a disability claim that the individual seeks to be treated *differently* than his or her co-workers in order to have a disability accommodated.

[293] Indeed, identical treatment may in some cases result in "serious inequality": see, for example, *Andrews*, above at para. 26. It is therefore sometimes necessary to treat people differently in order to achieve substantive equality: *Law*, above at para. 46.

[294] A test for discrimination that requires likes to be treated alike is the essence of formal equality, "leaving persons who are differently situated to be treated differently": see Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike & M.

Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 73 at 76.

[295] Such a "similarly situated" approach to equality is one that harkens back to invidious 'separate but equal' regimes, and has long been rejected in Canadian law: see, for example, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, [1989] S.C.J. No. 42 (QL) versus *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

[296] In some cases, a comparison to others may be helpful. An unsuccessful candidate for a position may seek to compare his or her own qualifications to the qualifications of the successful candidate in an effort to establish that there has been discrimination in the hiring process: see, for example, *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.H.R. D/1001 (Ont. Bd. Inq.).

[297] However, an unsuccessful job applicant can also establish that he or she has been the victim of discrimination in employment, *even if no one else was ever hired*: *Israeli v. Canadian Human Rights Commission* (1983), 4 C.H.H.R. D/1616 (C.H.R.T.).

[298] Moreover, as the Federal Court of Appeal observed in *Lincoln v. Bay Ferries Ltd.,* 2004 FCA 204, 322 N.R. 50, the decisions in *O'Malley* and *Ontario (Human Rights Commission) v. Etobicoke (Borough*), [1982] 1 S.C.R. 202, [1982] S.C.J. No. 2 (QL) explain what it is that a complainant must demonstrate in order to establish a *prima facie* case of discrimination. The Court noted that "[t]he tribunals' decisions in *Shakes* … and *Israeli* … are but illustrations of the application of that guidance": at para. 18.

[299] Similarly, in *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, 334 N.R. 316, the Federal Court of Appeal held that the legal definition of a *prima facie* case does not require the complainant to adduce any particular type of evidence to prove the facts necessary to establish that he or she was the victim of a discriminatory practice within the meaning of the *Canadian Human Rights Act*: see para. 27.

[300] It should be noted that *Morris* involved a complaint brought under subsection 7(b) of the Act alleging adverse differential treatment in employment on the basis of a prohibited ground. As noted earlier, subsection 7(b) uses precisely the same language as appears in subsection 5(b) of the Act, making it a discriminatory practice to "differentiate adversely" in employment on the basis of a prohibited ground.

[301] The Tribunal in *Morris* had concluded that the complainant had established discrimination on the basis of age, even though he had been unable to produce comparative evidence regarding the treatment accorded to his co-workers. In finding that the complaint had been substantiated, the Tribunal held that it would suffice "if the evidence establishes that discrimination was a factor in denying the complainant an employment opportunity": *Morris v. Canada (Canadian Armed Forces)* (2001) 42 C.H.R.R. D/443, [2001] C.H.R.D. No. 41 (QL) (C.H.R.T.) at para. 75.

[302] In upholding the Tribunal's decision, the Federal Court of Appeal specifically rejected the appropriateness of a fixed formula or test for the establishment of a *prima facie* case, noting that a flexible legal test is better suited to advancing the broad purpose underlying the Act. The Federal

Court of Appeal noted that "[d]iscrimination takes new and subtle forms" and that it was "now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*": *Morris*, above at para. 28.

[303] While not binding on the Tribunal Chairperson in this case, it is noteworthy that the Canadian Human Rights Tribunal has previously determined that a comparator group is not always required for the purposes of establishing a *prima facie* case of discrimination under section 7(b) of the Act: see, for example, *Lavoie v. Canada (Treasury Board of Canada)*, 2008 CHRT 27, [2008] C.H.R.D. No. 27 (QL) at paras. 143 and 153.

[304] In finding that a comparator group is always required to establish discrimination under subsection 5(b) of the Act, the Tribunal in this case placed great reliance on the decision of the Federal Court of Appeal in *Re Singh*, [1989] 1 F.C. 430, [1988] F.C.J. No. 414 (QL) at para. 17.

[305] *Singh* involved alleged discrimination in the refusal of visitors' visas. The matter came before the Federal Court of Appeal on a reference, and the issue for the Court was whether the Commission could investigate a human rights complaint filed by a Canadian resident alleging discrimination in the provision of a service customarily available to the general public as a result of the refusal of a visitor's visa to the complainant's family member living outside of Canada.

[306] It was in this context that the Federal Court of Appeal said: "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": at para. 17. The Court thus concluded that the Commission could indeed investigate such complaints.

[307] The Tribunal appears to have understood the Federal Court of Appeal's algebraic formulation as the Court having "restated the s. 5(b) test" for all purposes: see the Tribunal decision at para. 117.

[308] However, 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 710, 167 A.C.W.S. (3d) 135 at para. 29.

[309] All the Federal Court of Appeal was saying with its algebraic formulation in *Singh* was that an individual could suffer discrimination for the purposes of section 5(b) of the *Canadian Human Rights Act* as a result of adverse differential treatment accorded to a family member.

[310] The Federal Court of Appeal did go on in *Singh* to state: "Or, in concrete terms, it would be discriminatory practice for a policeman who, in providing traffic control services to the general public, treated one violator more harshly than another because of his national or racial origins": at para. 17.

[311] I agree with the Caring Society that the police example provided by the Federal Court of Appeal in *Singh* is just that: one example provided in a particular context in an effort to explain the

nature of discrimination in that case. It is, moreover, clear from the reasons in *Singh* that the Federal Court of Appeal did not intend its comment to identify the only form that discrimination could take, nor did it foreclose other means by which discrimination may be proven.

[312] Indeed, as the Caring Society points out at paragraph 75 of its memorandum of fact and law, "the Court did not preclude a finding of discrimination if the same policeman treated a violator more harshly because of his national or ethnic origin than he would have had the violator *not* been of that origin" [emphasis in the original].

[313] I also agree with the Caring Society that "[i]n treating *Singh* as prescriptive of the only manner of proving discrimination, the Chairperson incorrectly determined that a comparator group is required in every case, and by extension, in this case": Memorandum of Fact and Law at para. 75.

[314] It is also important to note that the issue of whether a comparator group is required to establish discrimination under subsection 5(b) of the Act was not even before the Federal Court of Appeal in *Singh*. As a result, the Tribunal's reliance on the *Singh* decision was misplaced.

[315] As was noted earlier, the use of comparator groups in the statutory human rights context has been imported from the section 15 Charter jurisprudence. However, the Supreme Court of Canada has recently expressed real concern with respect to the role of comparator groups in the evaluation of section 15 claims. As will be discussed in the next section of these reasons, the recent decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 lends further support for the view that the Tribunal's interpretation of subsection 5(b) of the Act is unreasonable.

vii) ***The Supreme Court of Canada's Decision in Withler***

[316] 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.

[317] Indeed, as Justice Rowles observed in her dissenting opinion in *Moore,* importing concepts from Charter jurisprudence into the statutory human rights context "is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of the enabling statute": above at para. 51, citing Leslie A. Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 373 at 375.

[318] Moreover, as I noted earlier, the use of comparator groups as an evidentiary tool in identifying discrimination has been imported into the statutory human rights context from section 15 Charter jurisprudence. To the extent that the comparator group analysis is a creature of the Charter, the jurisprudence developed in the Charter context is of obvious assistance in understanding the role and limitations of comparator group analyses in statutory human rights cases.

[319] It also bears mentioning that the differences in the analytical frameworks under section 15 of the Charter and statutory human rights cases are narrowing. Indeed, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, the Supreme Court rejected the *Law* decision's focus on human dignity, and refocused the Court's approach to discrimination on the principles outlined in the *Andrews* case: see *Moore*, above at para. 52, Rowles J.A., dissenting (not on this point).

[320] *Andrews* is an early Charter decision which "closely parallels traditional human rights jurisprudence": see *Moore*, above at para. 53, Rowles J.A., dissenting (but not on this point). Indeed, in attempting to define "discrimination" in *Andrews*, Justice McIntyre drew on established statutory human rights jurisprudence, including the decisions in *O'Malley* and *Action Travail*, above, in articulating the definition of discrimination that has formed the foundation of the section 15(1) Charter analysis.

[321] In *Withler*, above at para. 43, the Supreme Court observed that the application of a strict comparator approach can be detrimental to the goal of substantive equality and to the discrimination analysis.

[322] As summarized in the headnote, *Withler* states that:

> A "mirror comparator group" analysis may become a search for sameness, may shortcut the substantive equality analysis and may be difficult to apply. While equality is inherently comparative and comparison plays a role throughout the s. 15(1) analysis, a mirror comparator approach can fail to identify - and may, indeed, thwart the identification of - the discrimination at which s. 15 is aimed. What is required is an approach that takes account of the full context of the claimant group's situation, the actual impact of the law on that

> situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

[323] The Supreme Court noted in *Withler* that the central issue in section 15(1) cases is whether the impugned law violates what it described as "the animating norm of s. 15(1)", namely substantive equality: at para. 2. The Court went on in the same paragraph to observe that in order to determine whether there has been a violation of substantive equality, regard must be had to the "full context" of the case, "including the law's real impact on the claimants and members of the group to which they belong".

[324] The Court cautioned that "[c]are must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the 'proper' comparator group". According to the Court there was, at the end of the day, only one question, namely "[d]oes the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?": at para. 2.

[325] The Supreme Court reiterated in *Withler* that equality is an inherently comparative concept. While recognizing that a level of comparison may be "inevitable", it did not accept that a rigid comparator group analysis is essential in every case. Indeed, the Court cautioned that comparison must be approached with caution, advocating instead for consideration of "the full context of the claimant group's situation and the actual impact of the law on that situation": at para. 43.

[326] The Court observed that decisions such as *Law*, above, emphasize that the analysis more usefully focuses on "factors that identify impact amounting to discrimination". These factors

include the "perpetuation of disadvantage and stereotyping as the primary indicators of discrimination": both quotes from *Kapp*, above at para. 23, as cited in *Withler*, above at para. 53.

[327] Indeed, the Court recognized in *Withler* that there may even be cases *where there is no appropriate comparator group* – such as the circumstances that present themselves in the present case - where no one is like the complainants for the purpose of comparison: see para. 59.

[328] Quoting Professor Margot Young, the Court cautioned that "[i]f there is no counterpart to the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance": "Blissed Out: Section 15 at Twenty", in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: Butterworths, 2006) 45 at 63, as cited in *Withler*, above at para. 59.

[329] The Supreme Court thus concluded that a mirror comparator group analysis "may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive inequality analysis, and may be difficult to apply". Not only may such an approach fail to identify discrimination, the Court said, it may actually thwart that identification: at para. 60.

[330] While recognizing that the first stage of the subsection 15(1) analysis requires a "distinction", thus engaging the concept of comparison, the Court nevertheless held in *Withler* that:

> *It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination*. Provided that the claimant establishes a distinction

> based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. *It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited* [at para. 63, emphasis added].

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

viii) ***The Lessons to be Learned from Withler***

[332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure. They are, moreover, the only class of people identified by the Government of Canada for legal purposes on the basis of race.

[333] This creates many unusual or singular situations. Indeed, the *sui generis* nature of the Crown's relationship to First Nations people has long been recognized by the Supreme Court: see, for example, *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55 (QL) at para. 44.

[334] At the same time, no one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society.

[335] As a result of their unique position in the Canadian constitutional order, Canada's First Nations people receive services from the federal government that are not provided to other Canadians at the federal level. These include child welfare services, education services and health care, amongst others.

[336] This has the effect of placing Canada's First Nations people in the "no man's land" envisaged by Professor Young, where there may be no counterpart to the experience or profile of those marginalized or dispossessed individuals or groups who are seeking the vindication of their rights through the legal process.

[337] 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.

[338] The *O'Malley* test is flexible enough to allow the Tribunal to have regard to all of the factors that may be relevant in a given case. These may include historic disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.

[339] Canadian legislation must be interpreted in a manner that is consistent with the Charter. As the Caring Society observed, "[a]n interpretation of the Act that invariably requires a perfect mirror comparator group, and thereby excludes First Nations from the ability to make discrimination claims in respect of government services that other Canadians are able to make, is not consistent with the *Charter* or *Charter* values": see Memorandum of Fact and Law at para. 81.

[340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.

ix) ***The Significance of the Repeal of Section 67 of the Canadian Human Rights Act***

[341] The applicants and the Chiefs of Ontario point to the recent repeal of section 67 of the *Canadian Human Rights Act* as evidence of Parliament's intention to be bound by subsection 5(b) of the Act in relation to services that the Government of Canada provides to First Nations people. They further submit that this is a contextual factor supporting a generous interpretation of subsection 5(b) of the Act.

[342] Section 67 of the Act formerly provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act".

[343] In particular, the AFN and the Chiefs of Ontario point to comments made in the course of Committee hearings leading up to the passage of the Bill repealing section 67. There, Jim Prentice (the then-Minister of Indian Affairs) discussed the significance of the repeal of section 67.

[344] Minister Prentice testified that the *Canadian Human Rights Act* would now provide a basis for reviewing federal actions, including the quality of services provided by the Government of Canada. In this regard, the Minister stated that:

> The repeal of section 67 will provide [F]irst [N]ation citizens, in particular [F]irst [N]ation 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 [F]irst [N]ation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, *the quality of services that they've accessed*, in addition to other issues …
>
> Canada, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 39th Parl., 1st Sess. (22 March 2007).

[345] The Government argues that the repeal of section 67 of the *Canadian Human Rights Act* is irrelevant to the issues in this case, as section 67 applies only to decisions authorized by the *Indian Act*, R.S.C., 1985, c. I-5 or its Regulations, which is not the case here. The federal funding of child welfare is not statutorily based, but flows from agreements between the federal government and agency recipients pursuant to the federal spending power.

[346] The Government further submits that the federal spending power is not restricted to matters falling within its legislative authority, and that child welfare falls within provincial jurisdiction: see *NIL/TU,O Child and Family Services Society*, above.

[347] I do not need to consider all of the ramifications that the repeal of section 67 of the *Canadian Human Rights Act* may have for the ability of First Nations people to challenge actions of the Government of Canada. Suffice it to say that my interpretation of subsection 5(b) of the Act is one that is consistent with Parliament's intent in repealing section 67 of the Act.

x) ***The International Law Arguments***

[348] Amnesty International, the AFN and the Chiefs of Ontario submit that the Tribunal also erred in failing to consider Canada's international human rights obligations in interpreting subsection 5(b) of the *Canadian Human Rights Act*, and that its interpretation of the legislation is inconsistent with Canada's obligations under international law.

[349] Amnesty International provided detailed arguments regarding a number of international instruments, the consideration of which, it says, is necessary to properly interpret section 5(b) of the Act. These include the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 Sept. 1990, accession by Canada 13 Dec. 1991); the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 Mar. 1976, accession by Canada 19 May 1976); the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 Jan. 1976, accession by Canada 19 May 1976); and the *International Convention on the Elimination of all forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 Jan. 1969, accession by Canada 14 Oct. 1970).

[350] Amnesty and the AFN also point to the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) [*UNDRIP*] (which has now been formally endorsed by Canada) as an important indication of the Government of Canada's commitment to treating First Nations peoples fairly and equitably. They further submit that *UNDRIP* also reflects emerging norms in international law regarding the rights of indigenous peoples.

[351] 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.

[352] While these presumptions are rebuttable, clear legislative intent to the contrary is required: see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53; Sullivan, above at 548.

[353] 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] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL) at paras. 69-71.

[354] As a result, insofar as may be possible, an interpretation that reflects these values and principles is preferred: see Amnesty International's Memorandum of Fact and Law at para. 29; Sullivan, above at 547-49; *Hape*, above at paras. 53-54; *Baker*, above at paras. 65 and 70; and *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 175.

[355] I have already explained why the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is unreasonable when considered in light of domestic legal principles. Suffice it to say that my interpretation of the provision also accords more fully with Canada's international obligations than does that of the Tribunal, and is thus to be preferred.

[356] Before leaving this issue, I would observe that a number of Amnesty International's other arguments (which relate to the alleged obligations of the Government of Canada under international law with respect to the provision of child welfare services) are more properly directed to the underlying merits of the applicants' human rights complaint. These arguments need not be addressed in the context of the issues before this Court.

xi) *Summary of Conclusions Regarding the Need for a Comparator Group under Subsection 5(b) of the Act*

[357] Ultimately, the focus of both the Tribunal and of the Court must be on the wording of subsection 5(b) of the *Canadian Human Rights Act*, which makes it a discriminatory practice to "differentiate adversely in relation to any individual [in the provision of services], on a prohibited ground of discrimination".

[358] The ordinary meaning of the phrase "*differentiate adversely* in relation to any individual" on a prohibited ground of discrimination is to treat an individual or group differently than one might otherwise have done on the basis of a prohibited ground.

[359] The Tribunal's interpretation of subsection 5(b) as requiring a comparator group receiving the same services from the same service provider in every case is contrary to the purpose and language of both the French and English versions of the Act, and as such is unreasonable.

[360] The Tribunal's interpretation also leads to consequences that do not fall within the range of possible acceptable outcomes which are defensible in light of the facts and the law. This is because it would deny the protection of the Act to individuals and groups who have been victims of discriminatory practices if they are unable to identify a suitable comparator for the purposes of their complaints.

[361] The Tribunal's interpretation is, moreover, contrary to the teachings of the Federal Court of Appeal in *Morris* that the use of the term "differentiate adversely" in the Act does not require a complainant to adduce any particular type of evidence in order to prove the facts necessary to establish that he or she was the victim of a discriminatory practice.

[362] The Tribunal's interpretation is also inconsistent with the Supreme Court's decision in *Withler*, which recognizes that reliance on comparator groups is not always necessary - and may even thwart the objective of substantive equality - the animating purpose of both section 15 of the Charter and of the *Canadian Human Rights Act*: see *British Columbia (Public Service Employee*

Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (QL) at para. 41 [*Meiorin*].

[363] Finally, an interpretation of section 5 of the Act that invariably requires a mirror comparator group would exclude First Nations Canadians from the protection of the Act in relation to services provided by the Government of Canada only to Aboriginal people. Unlike other Canadians, First Nations people would be unable to make a complaint under section 5 of the *Canadian Human Rights Act* if they believed that they were the victim of a discriminatory practice in the provision of those services. Such an interpretation of what is intended to be a remedial statute is not consistent with the purpose of the Act, with Charter values, or with Canada's obligations under international law. As such, it is unreasonable.

[364] This then takes us to the final issue.

[365] Having concluded that a comparator group is always required in order to establish discrimination under subsection 5(b) of the *Canadian Human Rights Act*, the Tribunal went on to find that there was no appropriate comparator group in this case, as the child welfare services provided by the Government of Canada to First Nations children living on reserves could not be compared to provincial child welfare services for the purposes of establishing discrimination under subsection 5(b) of the Act. This finding led the Tribunal to dismiss the applicants' human rights complaint.

[366] As I will explain below, I am of the view that the Tribunal erred by failing to have regard to material evidence in concluding that there was no appropriate comparator group in this case.

C. *The Failure of the Tribunal to Consider Canada's own Choice of Provincial Child Welfare Standards as an Appropriate Comparator*

[367] I have concluded that subsection 5(b) of the *Canadian Human Rights Act* does not require a comparator group in order to establish adverse differential treatment in the provision of services. However, even if I am mistaken in that conclusion, I am satisfied that the Tribunal erred concluding that there was no relevant comparator group in this case. The Tribunal failed to address the parties' submissions in relation to a material fact on the record. As a result, its decision on this point lacks the transparency, intelligibility and justification required of a reasonable decision.

[368] Although the Tribunal characterized the comparator group issue as a "pure question of law", there was a factual component to the Tribunal's analysis. That is, it is implicit in the Tribunal's decision that it determined that no appropriate comparator group existed in this case: see Tribunal's decision at paras. 5, 10-13 and 128-130.

[369] Having determined that a discrimination analysis under subsection 5(b) necessarily required a comparison to be made in order to establish adverse differentiation in the provision of services, the Tribunal determined that it could not compare the child welfare services provided by the Government of Canada with those provided by the provinces.

[370] According to the Tribunal, the grammatical and ordinary sense of the words of subsection 5(b) requires a comparison between the services provided by a single service provider to different

individuals. To hold otherwise, the Tribunal stated, would be to open floodgates to new types of complaints across jurisdictions or between employers. The Tribunal concluded that nothing in the case law supports such an interpretation.

[371] The Tribunal was further of the view that allowing what it called a "cross-jurisdictional" comparison in this case would constitute preferential treatment of the complainant parties, and would have the adverse effect for First Nations of inviting future claims against them, using different First Nations as comparators.

[372] There are two aspects to the Tribunal's finding in this regard: one factual and the other legal. To the extent that the Tribunal determined that there was no appropriate comparator group in this case, that determination is one of mixed fact and law, reviewable on the standard of reasonableness.

[373] The Tribunal's conclusion that there is no appropriate comparator group in this case is unreasonable, as it failed to consider a material fact in determining that there was no appropriate comparator group available in this case. That is, the Tribunal failed to consider the significance of the Government of Canada's own adoption of provincial child welfare standards as the appropriate comparator for the purposes of its child welfare programs.

[374] As was noted earlier in these reasons, the Government of Canada has itself chosen to hold its child welfare programming for First Nations children living on reserves to provincial child welfare standards in its programming manual and funding policies.

[375] The Government's "National Program Manual" for First Nations Child and Family Services program governs all three of the current policies for the funding and delivery of child welfare services to First Nations children living on reserves. It will be recalled that section 1.3.2 of the Manual provides that the "primary objective" of the First Nations Child and Family Services program is to support "culturally appropriate" child welfare services to First Nations children living on reserves "in the best interest of the child, *in accordance with the legislation and standards of the reference province*" [emphasis added].

[376] Moreover, Section 6.1 of Directive 20-1 provides that "[t]he department … is committed to expanding First Nations Child and Family Services on reserve *to a level comparable to the services provided off reserve in similar circumstances*…" [emphasis added]. Similar language appears in the 1965 Indian Welfare Agreement.

[377] The Caring Society and the AFN specifically addressed this commitment in their complaint form. The implications of the Government's adoption of a provincial comparator for the purpose of its First Nations child welfare programming was, moreover, the subject of vigorous debate before the Tribunal in the course of the hearing of the motion to dismiss.

[378] The Tribunal seemed to be aware that the primary objective of the Government of Canada's First Nations Child and Family Services program was to provide child welfare services to First Nations children living on reserves in accordance with the standards of the reference province: see the Tribunal's decision at paras. 85 and 93.

[379] However, the Tribunal never addressed what, if any, implications this may have in determining that child welfare services provided by the Government of Canada could not be compared with those provided by the provinces. The failure of the Tribunal to come to grips with a key argument advanced by the applicants in support of the Caring Society and AFN's human rights complaint means that this aspect of the Tribunal's decision lacks the justification, transparency and intelligibility required of a reasonable decision.

[380] The Government of Canada argues that little should be made of its reference to provincial child welfare standards in documents governing its First Nations Child and Family Services program. According to the Government, this is simply a "financial accountability issue".

[381] It is not for me to assess the significance of the Government's adoption of provincial child welfare service levels and standards for the purpose of its First Nations Child and Family Services program or what implications this may have for the Caring Society and AFN's human rights complaint. I would simply note that this choice is part of "the full context of the claimant group's situation", and is thus a matter that must be addressed by the Tribunal: *Withler*, above at para. 43.

[382] As the Tribunal noted, the arrangements governing the Government of Canada's funding of child welfare services for First Nations children living on reserves are extremely complex. The Tribunal found that the record before it did not sufficiently explain the true nature of the arrangements surrounding the delivery of the Government's First Nations Child and Family Services program. Nor was information put before the Tribunal with respect to provincial child welfare service standards: see the Tribunal's decision at paras. 7, 76 and 80-97.

[383] It will be the task of the Tribunal to decide what the implications are of Canada's choice to identify the meeting of provincial child welfare standards as a primary objective of its First Nations Child and Family Services program. That determination will require an appreciation of the relationship between the Government of Canada and the provinces in the funding and delivery of child welfare services and will likely require a far more complete evidentiary record than the one that was before the Tribunal on the motion to dismiss.

[384] One final note of caution: to the extent that the Tribunal's decision may be read as suggesting that it is never appropriate to look beyond the actions of a respondent service provider or employer for comparative evidence that may assist in establishing discrimination under the Act, the decision is clearly in error.

[385] In the hypothetical case cited earlier where an employer sets out to hire only foreign workers so as to exploit their vulnerability by paying them less, it would be perfectly open to the Tribunal to receive expert evidence regarding the "going rate" for employees providing similar services to other employers. Expert evidence of market salaries could also assist in the case of the sole employee who believes that she has been paid less by her employer because she is a woman, or black, or a Muslim.

[386] In each case, the probative value of the evidence in question would have to be evaluated by the Tribunal. There is, however, no reason, in principle, why evidence of this nature could not be received to demonstrate that there has been discrimination in a given case.

[387] Indeed, this Court has held that statistical evidence is often a useful tool in identifying discrimination: *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra)* (1998), 146 F.T.R.106, [1998] F.C.J. No. 432 (QL). Moreover, it is not just statistical evidence regarding the respondent employer's own workforce or employment practices that may be relevant in proving discrimination.

[388] For example, in *Action Travail*, above, a comparison was made between the percentage of women employed in certain positions within CN and the percentage of women employed in the labour market generally, and in similar blue-collar positions in the same geographic region, in order to demonstrate the under-representation of women in blue-collar positions within CN: see pp. 1123-24.

[389] Indeed, many human rights cases depend upon circumstantial evidence, some of which may involve trends and practices beyond those of the individual respondent. It has often been observed that "[d]iscrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised": see *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 at D/5038, [1988] C.H.R.D. No. 2 (QL) (C.H.R.T.).

[390] As a result, it may be well be necessary to look beyond the actions of the respondent employer or service provider to see if what was described in *Basi* as "the subtle scent of discrimination" can be detected: at D/5040.

10. Conclusion

[391] I have thus concluded that although the Tribunal had the power to decide the comparator group issue in advance of a full hearing on the merits of the complaint, the process that it followed in this case was not fair as the Tribunal considered a substantial volume of extrinsic material in arriving at its decision.

[392] I have also concluded that Tribunal erred in failing to provide any reasons as to why the complaint could not proceed under subsection 5(a) of the *Canadian Human Rights Act*.

[393] The Tribunal further erred in interpreting subsection 5(b) of the Act as requiring an identifiable comparator group in every case in order to establish adverse differential treatment in the provision of services.

[394] Finally, in determining that no appropriate comparator group was available to assist in its discrimination analysis, the Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in its programming manual and funding policies.

[395] As a result, the three applications for judicial review are granted. The March 14, 2011 decision of the Tribunal is set aside, and the matter is remitted to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination in accordance with these reasons. In accordance with the agreement of the parties, no order is made as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. All three applications for judicial review are granted.

2. The March 14, 2011 decision of the Tribunal is set aside, and the matter is remitted to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination in accordance with these reasons.

3. A copy of these reasons shall be placed on Court Files T-578-11, T-630-11 and T-638-11; and

4. Each party shall bear its own costs.

"Anne Mactavish"
Judge

APPENDIX A

Canadian Human Rights Act, R.S. 1985, c. H-6

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.

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

a) d'en priver un individu;

(b) to differentiate adversely in relation to any individual,

b) de le défavoriser à l'occasion de leur fourniture.

on a prohibited ground of discrimination.

6. It is a discriminatory practice in the provision of commercial premises or residential accommodation

(a) to deny occupancy of such premises or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

6. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de locaux commerciaux ou de logements :

a) de priver un individu de leur occupation;

b) de le défavoriser à l'occasion de leur fourniture.

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
…

(c) the complaint is beyond the jurisdiction of the Commission; …

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…

c) la plainte n'est pas de sa compétence; …

48.1 … (2) Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.
…

48.1 … (2) Les membres doivent avoir une expérience et des compétences dans le domaine des droits de la personne, y être sensibilisés et avoir un intérêt marqué pour ce domaine.
…

48.2… (2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections

48.2 … (2) Le membre dont le mandat est échu peut, avec l'agrément du président, terminer les affaires dont il est saisi. Il est alors réputé être un membre à temps partiel pour l'application des articles 48.3, 48.6, 50 et 52 à 58.
…

48.3, 48.6, 50 and 52 to 58.
…

48.9 (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing

(a) the giving of notices to parties;

(b) the addition of parties and interested persons to the proceedings;

(c) the summoning of witnesses;

(d) the production and service of documents;

(e) discovery proceedings;

(f) pre-hearing conferences;

(g) the introduction of evidence;

(h) time limits within which hearings must be held and decisions must be made; and

(i) awards of interest.
…

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.
…

48.9 (1) L'instruction des plaintes se fait sans formalisme et de façon expéditive dans le respect des principes de justice naturelle et des règles de pratique.

(2) Le président du Tribunal peut établir des règles de pratique régissant, notamment :

a) l'envoi des avis aux parties;

b) l'adjonction de parties ou d'intervenants à l'affaire;

c) l'assignation des témoins;

d) la production et la signification de documents;

e) les enquêtes préalables;

f) les conférences préparatoires;

g) la présentation des éléments de preuve;

h) le délai d'audition et le délai pour rendre les décisions;

i) l'adjudication des intérêts.
…

49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.
…

50. (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

50. (1) Le membre instructeur, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, instruit la plainte pour laquelle il a été désigné; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations.

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

(2) Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie.

(3) In relation to a hearing of the inquiry, the member or panel may
…

(3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir :
…

(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

c) de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

(d) lengthen or shorten any time limit established by the rules of procedure; and

d) de modifier les délais prévus par les règles de pratique;

(e) decide any procedural or evidentiary question arising during the hearing.
…

e) de trancher toute question de procédure ou de preuve.
…

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

51. En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.
…

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.
…

67. [Repealed, 2008, c. 30, s. 1] Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

67. [Abrogé, 2008, ch. 30, art. 1] La présente loi est sans effet sur la Loi sur les Indiens et sur les dispositions prises en vertu de cette loi.

Canadian Human Rights Tribunal Rules of Procedure (03-05-04)

3. (1) Motions, including motions for an adjournment, are made by a Notice of Motion, which Notice shall

(a) be given as soon as is practicable;

(b) be in writing unless the Panel permits otherwise;

(c) set out the relief sought and the grounds relied upon; and

(d) include any consents of the other parties.

(2) Upon receipt of a Notice of Motion, the Panel

(a) shall ensure that the other parties are granted an opportunity to respond;

(b) may direct the time, manner and form of any response;

(c) may direct the making of argument and the presentation of evidence by all parties, including the time, manner and form thereof;

(d) shall dispose of the motion as it sees fit.

3. (1) Les requêtes, y compris les requêtes d'ajournement, sont présentées par voie d'avis de requête. Ledit avis doit

a) être donné dans les plus brefs délais possibles;

b) être communiqué par écrit, à moins que le membre instructeur permette de procéder différemment;

c) indiquer le redressement recherché et les motifs invoqués à l'appui; et

d) préciser tout consentement obtenu des autres parties.

(2) Dès réception de l'avis de requête, le membre instructeur

a) doit s'assurer de donner aux autres parties la possibilité de répondre;

b) peut préciser sous quelle forme, de quelle manière et à quel moment la réponse doit être présentée;

c) peut donner des directives au sujet de la présentation de l'argumentation et de la preuve par toutes les parties, et préciser notamment sous quelle forme,
de quelle manière et à quel moment elles doivent être présentées;

d) doit disposer de la requête de la façon qu'il estime indiquée.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-578-11
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v. ATTORNEY GENERAL OF CANADA ET AL
DOCKET:	T-630-11
STYLE OF CAUSE:	FIRST NATIONS CHILD AND FAMILY CARING SOCIETY v. ATTORNEY GENERAL OF CANADA ET AL
DOCKET:	T-638-11
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS v. ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 13, 14 and 15, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	April 18, 2012

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