A-145-12

FEDERAL COURT OF APPEAL

THE ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

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

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, THE ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. The key issue in this appeal is the failure of the reviewing court on judicial review to show the appropriate level of deference to a decision of the Canadian Human Rights Tribunal. The case concerns a human rights complaint that alleges that the federal government does not fund child and family service providers for First Nations children living on-reserve to the same level that children living off-reserve are funded by the provincial and Yukon governments. The question before the Canadian Human Rights Tribunal ("Tribunal") was whether the comparison of funding from two different entities – the provincial and federal governments to their respective constituents – is beyond the parameters of section 5(b) of the *Canadian Human Rights Act* ("the *Act*"). The Tribunal answered that question affirmatively and dismissed the complaint as being outside s. 5(b) and the statutory authority of the Tribunal.

2. On judicial review, the Federal Court overturned the Tribunal's decision. Instead of considering whether the Tribunal's decision fell within a range of possible, acceptable outcomes, the applications judge committed an error by imposing her interpretation of s. 5(b) of the *Act*. By substituting her own view of what was important and relevant in deciding the issue that was before the Tribunal, the applications judge failed to pay respectful attention to the Tribunal's decision, and did not show it the deference it is entitled to receive, especially when interpreting its 'home statute'.

3. Also, the application judge's finding that the respondents were reasonably prejudiced in the Tribunal's consideration of extrinsic material is clearly wrong when the specific facts of this case are considered. Finally, the applications judge erred by imposing an obligation on the Tribunal to give reasons for an issue not squarely before it.

PART I - FACTS

4. Canada adopts the facts as set out in the March 14, 2011 decision of the Tribunal and the April 18, 2012 Reasons for Judgment of the Federal Court.[1]

5. The human rights complaint was filed by the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society ("Caring Society"). It alleges the federal government's funding of child and family service providers for First Nations children living on-reserve is contrary to section 5 of the *Act* because it does not provide funding to the same level that children living off–reserve are funded by the provincial and Yukon governments.

6. The focus of this complaint is s. 5 of the *Canadian Human Rights Act*, which states:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.[2]	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*) d'en priver un individu; *b*) de le défavoriser à l'occasion de leur fourniture.

7. The Canadian Human Rights Commission ("Commission") referred the complaint directly to the Canadian Human Rights Tribunal without conducting an investigation, stating that the "main arguments being adduced are legal and not factual in nature and are not settled in law".[3]

8. Canada filed a motion to dismiss the complaint on the basis that the funding of child and family welfare providers is not a "service" for the purpose of s. 5 and that s. 5(b) does not

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1 *Decision of the Canadian Human Rights Tribunal,* 2011 CHRT 4 ("*Tribunal decision*"), Appeal Book, vol. 1, tab 4, pgs. 138-206; *Reasons for Judgment and Judgment of the Honourable Madam Justice Mactavish*, 2012 FC 445 ("*Federal Court Judgment*"), Appeal Book, vol. 1, tab 2, pgs. 5-113.

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

3 *Decision of the Commission, October 14, 2008*, Appeal Book, vol. 1, tab 5, pg. 243.

provide for the comparison of funding levels of two different "service" providers.

9. The parties filed affidavit evidence, conducted cross-examinations on the affidavits and filed written submissions. Following the two day hearing of the motion, the parties were granted a further opportunity to file submissions regarding three new decisions released by the New Brunswick Court of Appeal and the Supreme Court of Canada.[4]

10. The Tribunal found that it had insufficient evidence to determine the "service" issue but it dismissed the complaint as being beyond the parameters of s. 5(b) of the *Act*.[5]

11. The complainants and the Commission sought judicial review of this decision. The consolidated judicial review applications were heard by Justice Mactavish ("the applications judge") and were granted on April 18, 2012.[6]

12. The April 18, 2012 Reasons for Judgement held that the Tribunal's interpretation of s. 5(b) was unreasonable and that the process followed by the Tribunal breached procedural fairness.[7]

PART II - ISSUES

13. The applications judge erred in:

    i) substituting her decision for the Tribunal's on the interpretation of s. 5(b); and

    ii) determining procedural fairness had been breached.

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4 *Tribunal decision,* at para. 107, Appeal Book, vol. 1, tab 4, pg. 184.
5 *Tribunal decision,* at para. 141, Appeal Book, vol. 1, tab 4, pg. 196.
6 *Federal Court Judgment,* at para. 395, Appeal Book, vol. 1, tab 2, pg. 105.
7 *Federal Court Judgment,* at para. 395, Appeal Book, vol. 1, tab 2, pg. 105.

PART III – SUBMISSIONS

Issue 1: The applications judge erred in substituting her interpretation of s. 5(b) for the Tribunal's

14. The error of the applications judge has three components: 1) she exceeded the role of a reviewing court; 2) she erred in failing to find that the Tribunal's decision on the interpretation of s. 5(b) is reasonable; and 3) her interpretation of s. 5(b) of the *Act* is not in keeping with the applicable principles.

A. The applications judge exceeded the role of a reviewing court

Role of the reviewing court

15. Although the applications judge correctly identified reasonableness as the standard of review for the s. 5(b) issue, she applied the less deferential correctness standard. [8] The rigorous review conducted by the applications judge exceeded the parameters of the reasonableness standard and afforded no deference to the decision of an expert Tribunal interpreting its 'home statute'.

16. When applying the standard of "reasonableness", a reviewing court is to show restraint before interfering with the decision. As the Supreme Court has explained, a decision will be unreasonable only where "there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived." [9]

17. If any of the reasons in the decision being reviewed are sufficient to support the conclusion, even if the explanation is not one that the reviewing court finds compelling, the decision will still be found to be reasonable. [10]

18. The Supreme Court recently considered the proper application of the reasonableness standard of review in *Newfoundland and Labrador Nurses' Union v Newfoundland and*

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[8] *Federal Court Judgment*, at paras. 220-1, 240-2 and 367, Appeal Book, vol. 1, tab 2, pgs. 63, 68-9, and 99.

[9] *Voice Construction Ltd. v Construction and General Workers' Union Local 92,* 2004 SCC 23, at para. 31; *Law Society of New Brunswick v Ryan,* 2003 SCC 20, at para. 55.

[10] *Voice Construction Ltd., supra,* at para. 31.

Labrador (Treasury Board).[11] Writing for a unanimous court, Abella, J. commenced her analysis by referring to key passages from *Dunsmuir,* which emphasized that tribunals have a "margin of appreciation within a range of acceptable and rational solutions" and that reasonableness is concerned not only with the existence of justification, transparency and intelligibility, but also with whether the decision falls within a range of possible and acceptable outcomes which are defensible in respect of the law and the facts.[12]

19. The Court went on to cite the words of Professor Dyzenhaus with approval:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, **the court must first seek to supplement them before it seeks to subvert them.** For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis in original.][13]

20. Finally, the Court commented that "[r]eviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."[14]

21. Once reasonableness is determined to be the correct standard of review, a reviewing court has the obligation to apply this standard in accordance with the principles established by the Supreme Court. However, in this case, the applications judge subjected the Tribunal's decision to review according to the less deferential standard of correctness.

22. In reviewing the s. 5(b) issue, the applications judge ignored the fact that the complaint alleges a comparison between the funding of federal and provincial service providers. Instead, she focused on both a particular legal and factual element (i.e. the need for a comparator group and the existence of a mirror comparator group) and said neither was

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[11] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("*Nurses Union*").

[12] *Nurses' Union, supra,* at para.11, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 46 and 47.

[13] *Nurses' Union, supra,* at para.12, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.

[14] *Nurses' Union, supra,* at para.17.

required to determine whether a claim of adverse differentiation could arise from the different federal and provincial funding schemes.[15] By doing so, the applications judge changed from being a reviewing court to a *de novo* court. The applications judge erred by imposing her view of what was important and relevant in deciding the issue that was before the Tribunal rather than looking to see if the decision of the Tribunal was reasonable.

23. Rather than starting from the proposition that she must first seek to supplement the reasons before subverting them, the applications judge conducted her own *de novo* interpretation of s. 5(b) and the meaning of "differentiate adversely".[16]

Failure to apply reasonableness is a reviewable error

24. The role of an appellate court in reviewing the decision of a lower court in a judicial review context is to determine whether the applications judge identified the appropriate standard of review and applied it correctly.[17] The question of the right standard for the applications judge to select and apply is one of law and therefore is reviewable by this Court on a standard of correctness.[18]

25. If the applications judge has not chosen and applied the correct standard of review, then this Court should assess the Tribunal's decision in light of the correct standard.[19]

26. The applications judge in this case identified the correct standard of review but failed to properly apply it. This is an error that permits this Court to assess the Tribunal's decision to determine whether it was reasonable.

27. In the alternative, even if the applications judge properly applied the standard of review, her interpretation of s. 5(b) is in error because the term "differentiate adversely" does not allow for the comparison of services between federal and provincial governments.

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[15] *Federal Court Judgment*, at paras. 280-340, Appeal Book, vol. 1, tab 2, pgs. 77-92.
[16] *Federal Court Judgment*, at paras. 251-279, Appeal Book, vol. 1, tab 2, pgs. 71-77.
[17] *Canada (Canada Revenue Agency) v Telfer*, 2009 FCA 23, at para.18.
[18] *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, at paras. 43-44.

B. The Tribunal's interpretation of s. 5(b) is reasonable

28. The Tribunal's interpretation of the relevant provisions of the *Act* and, in particular, of the term "differentiate adversely" is reasonable. It is justified, transparent, intelligible and falls within a range of possible and acceptable outcomes, which are defensible in respect of the law and the facts. Therefore, the applications judge should not have intervened.

29. "Differentiate adversely" has a specific meaning in the context of the *Act*, which properly is reflected in the approach adopted by the Tribunal. Specifically, the Tribunal found that s. 5(b) does not apply to a discrimination claim based on the variations in child welfare funding between the federal and provincial governments to each of their respective constituents. There are two aspects to this finding: different providers of the alleged service and different recipients.

30. To use the Tribunal's own example, "the Act allows an Aboriginal person who receives lesser service from a government to file a complaint if a non-aboriginal person receives better service from the same government. However, the Act does not allow an Aboriginal person, or any other person to claim differential treatment if another person receives better service from a different government." [20] (emphasis in original)

31. Discrimination by a service provider among members of that class on prohibited grounds is the evil the *Act* seeks to address. The Tribunal's interpretation of s. 5(b) recognised this principle, when it noted "the use of more than one service provider expands the reach of the section to nonsensical parameters."[21] Moreover, the addition of the constitutional division of powers makes the comparison even more illogical, as it is not compliant with federalism.[22]

32. The Tribunal properly approached the interpretation of s. 5(b) of the *Act*. Under the modern approach to statutory interpretation, the words of an act must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme

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[19] *Dr. Q., supra*, at para. 43; see also *Starson v Swayze*, 2003 SCC 32, at para. 89, and *Henthorne v British Columbia Ferry Services Inc.*, 2011 BCCA 476, at para. 49; but see Evans J.M., " The Role of Appellate Court in Administrative Law", (2007) 20 Can. J. Admin L. & Prac. 1.

[20] *Tribunal decision*, at para. 13, Appeal Book, vol. 1, tab 4, pgs. 145-6.

[21] *Tribunal decision*, at para. 129, Appeal Book, vol. 1, tab 4, pg. 192.

of the Act, the object of the Act, and the intention of Parliament."[23] As the Supreme Court noted in *Bell ExpressVu*, this approach demonstrates the important role that context plays in the interpretation of legislation. Words "take their colour from their surroundings."[24] The modern approach to statutory interpretation calls for a textual, contextual and purposive analysis of the provision in order to find a meaning that is harmonious with the *Act* as a whole.[25] This is the very same analysis the Tribunal undertook.

33. The Supreme Court has also indicated that, while human rights legislation may be considered quasi-constitutional in nature (thus highlighting its important purpose), this does not alter the general principles of statutory interpretation. [26] Further, it is accepted that Parliament is skilful and careful in choosing the words of legislation and does so with a specific purpose in mind. The Supreme Court has noted, "[t]he legislator does not speak in vain."[27] Finally, it has been held that courts must be extremely reluctant to alter the words Parliament has used in legislation, particularly where, as in this appeal, the constitutional validity of the legislation is not at issue.[28]

34. The primary criticism of the Tribunal's decision by the applications judge was that she did not agree with the interpretation of s. 5(b) – even though both engaged in a similar, if not identical, analysis of the purpose of the *Act*, its interpretation and the ordinary meaning of "differentiate adversely".[29] The applications judge's disagreement is couched in language suggesting preference and correctness. [30] Notwithstanding that criticism, the reasonableness of the Tribunal's decision can be amply demonstrated by reviewing the statutory interpretation analysis it conducted and applied to the *Act* and, in particular,

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[22] *Tribunal decision*, at paras. 14-15 and 129-131, Appeal Book, vol. 1, tab 4, pgs.146 and 192-193; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed.), pg.s 461-463.

[23] *Tribunal decision*, at para. 110., Appeal Book, vol. 1, tab 4, pg.186; *R. v Sharpe*, 2001 SCC 2, at para. 33; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, at para. 20.

[24] *Bell ExpressVu v The* Queen, 2002 SCC 42, at paras. 26-27.

[25] *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, at para. 10, *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28, at para. 26; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[26] *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, at para. 40; *Canada (Attorney General) v Mossop*, [1993] 1 S.C.R. 554.

[27] *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para. 73; *Quebec (Attorney General) v Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at para. 28.

[28] *R. v Clay*, [2003] 3 S.C.R. 735, at para. 55; *Tribunal decision*, at para.123, Appeal Book, vol. 1, tab 4, pg.190.

[29] *Tribunal decision*, at paras, 108-131, Appeal Book, vol. 1, tab 4, pgs.185-193; *Federal Court Judgment*, at paras. 243-252 and 258, Appeal Book, vol. 1, tab 2, pgs. 69-73.

concerning the term "differentiate adversely" in s. 5(b).

35. The Tribunal (like the applications judge) refers to s. 2 of the *Act* (purpose section) to glean the scheme and object of the *Act* – the principle that "all individuals should have an opportunity equal with other individuals...."[31] However, unlike the applications judge, the Tribunal found the purpose section supports the meaning of the term "differentiate adversely" as requiring the comparison of two individuals by a single service provider under s. 5(b). The above reasoning and analysis are crucial when considering whether the Tribunal's decision is reasonable.

36. Both the Tribunal and the applications judge considered and applied the 'shared meaning rule' to interpret bilingual statutes, such as this *Act*.[32] The Tribunal also relied upon the presumption of coherence and drew appropriate inferences from the legislative scheme as a whole.[33]

37. The Tribunal's analysis considered both the purpose and consequence of the competing interpretations of "differentiate adversely". The Tribunal observed that its mandate is restricted to remedying discrimination on legislated grounds and does not provide for broader remedies that do not involve a discriminatory practice within the meaning of the *Act*.[34] The relatively narrower and more focused interpretation of that term by the Tribunal accords with the context and text of the *Act* as well as Parliamentary intent, case law and academic commentary.[35]

38. The Tribunal applied the above principles of statutory interpretation correctly in concluding the meaning of the term "differentiate adversely" contemplates a single service provider is to be held accountable for adverse differentiation in the provision of services to two different persons.[36] The applications judge applied the same principles

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30 *Federal Court Judgment*, at para. 254 and 363, Appeal Book, vol. 1, tab 2, pgs. 72 and 98.
31 *Tribunal decision*, at paras. 109 and 113-114, Appeal Book, vol. 1, tab 4, pgs. 185 and 187-88.
32 *Tribunal decision*, at para. 109, Appeal Book, vol. 1, tab 4, pg. 186-187; see also: *Sullivan*, pgs. 93-142.
33 *Tribunal decision*, at para. 110-112, 115, 125 and 128-130, Appeal Book, vol. 1, tab 4, pgs. 186-8 and 191-2; see also: *Sullivan* pgs. 223-225 and 276-277.
34 *Tribunal decision*, at paras. 19 and 111, Appeal Book, vol. 1, tab 4, pgs.147-8 and 186.
35 *Tribunal decision*, at paras. 111 and 131, Appeal Book, vol. 1, tab 4, pgs. 186 and 192-193; *Sullivan*, pgs. 285-287 and 317-320; *Gould v Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at paras. 15 and 41; *Mossop*, *supra*; *Public Service Alliance of Canada v Canada Revenue Agency*, 2012 FCA 7; *Watkin v Canada (Attorney General)*, 2008 FCA 170, at paras. 33- 34.
36 *Tribunal decision*, at para. 128, Appeal Book, vol. 1, tab 4, pg. 192.

but came to a different conclusion regarding the meaning without identifying a particular error in the Tribunal's approach other than her disagreement with the Tribunal's decision and preference for the result she reached.

39. The applicability of the Tribunal's approach to the interpretation of specific terms of legislation is supported by the Supreme Court's judgment in *Celgene Corp. v Canada (Attorney General)*.[37] In *Celgene*, the Court affirmed that when a specialized tribunal is interpreting its enabling legislation, its interpretation will only be set aside if found to be unreasonable.[38] The applications judge did not review the Tribunal's decision according to the Supreme Court's above approach. Instead, she substituted her views of the proper interpretation of s. 5(b) for those of the Tribunal.

40. The applications judge did not disagree with the analysis undertaken by the Tribunal in determining the meaning of s. 5(b). Rather, the applications judge differed in the conclusion reached. However, this was insufficient to demonstrate the decision was unreasonable, as it is undisputed that a reviewing court should not intervene merely because it would have reached a different conclusion.

C. The application judge's interpretation of s. 5(b) is not in keeping with applicable principles

41. Unlike the Tribunal's decision, the interpretation of s. 5(b) given by the applications judge is not supported by the principles underlying adverse differentiation derived from the jurisprudence, or the principles of statutory interpretation.

42. The starting point is, of course, the statute. Under s. 5(a), a complainant must establish a denial of access to a service "on" a prohibited ground of discrimination. Under s. 5(b), a complainant must establish "adverse differentiation" in relation to the provision of a service.

Section 5(b) requires comparison

43. The issue in this case is whether the comparison asserted in the complaint is one contemplated by the *Act*. The language used by Parliament in s. 5(b) is clear – a plain

[37] *Celgene Corp. v Canada (Attorney General)*, 2011 SCC 1.

language reading of the term "differentiate adversely" requires one to compare the situation of a complainant with that of a different individual seeking a service from the same service provider. Moreover, there is nothing in the Tribunal's interpretation that precludes allegations of intentional discrimination, harassment or failure to accommodate where the actions of a single service provider are impugned.

44. The Tribunal in this instance found that the very notion of "differentiate adversely" under s. 5(b) by definition involves a comparison. The Tribunal stated: "[i]n order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, by definition, it is necessary to compare the situation of the complainant with that of a different individual."[39] The applications judge took the view that such analysis is inappropriate – dismissing it as "strictly grammatical."[40]

45. This view is incorrect. Because "differentiate adversely" is not a defined term in the *Act*, it should be given its ordinary and popular meaning, which is exactly what the Tribunal gave it. The key is to read the words "differentiate adversely" in s. 5 in their grammatical and ordinary sense harmoniously with the scheme and object of the *Act* and Parliamentary intent. This is precisely what the Tribunal did in finding the ordinary meaning and popular meaning of the words "differentiates adversely" require a comparison.[41]

46. Furthermore, the Tribunal's interpretation of s. 5(b) as requiring a comparison of the situation of the complainant with that of a different individual does not differ from what the Supreme Court has consistently said regarding the role of comparison in discrimination claims. Jurisprudence does not appear to set out distinct meanings for the expressions "comparison" and "comparator group" as used by the parties, the Tribunal and the applications judge.

47. The Supreme Court has said that anti-discrimination law is essentially comparative in nature and has reiterated the comparative nature of the notion of equality within the context of s. 15 of the *Charter* also. In its first s. 15 case, *Andrews v Law Society of British Columbia*, the Court noted that equality "is a comparative concept, the condition

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[38] *Celgene, supra*, at para.34.
[39] *Tribunal decision*, at para. 113, Appeal Book, vol. 1, tab 4, pg. 187.
[40] *Federal Court Judgment*, at paras, 249-250, Appeal Book, vol. 1, tab 2, pg. 71.

of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises".[42]

48. The comparative concept of anti-discrimination law continues to infuse present jurisprudence. In *Withler v Canada*, the Court restated this point and emphasized that "[c]comparison plays a role throughout the [s. 15] analysis", noting that the role of comparison at the first step is to establish a "distinction", i.e. that a claimant is treated differently than others. Comparison is engaged when the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[43]

49. The applications judge referred in her reasons to the Supreme Court's rejection of the "mirror comparator group" analysis previously accepted in s. 15(1) cases as being determinative of the issue before her.[44] The Supreme Court's rejection is irrelevant in the case at bar because the appellant does not assert a mirror comparator group within the meaning of *Withler*. Instead, it accepts the very comparator proposed by the respondents – the funding of provincial versus federal service providers – but says that such a comparison does not engage s. 5(b) of the *Act*.[45]

50. The Supreme Court has also found that comparison is an essential feature of the analysis under human rights legislation. Discrimination must be based on "a comparison of the treatment received by a person with the treatment received by other persons."[46]

51. The essentially comparative nature of the *Act* has also been accepted in the Federal Courts. In *Canada (Human Rights Commission) v M.N.R.* ("*Wignall*"), the Court noted that "a court or tribunal cannot decide whether a person has been discriminated against without making comparisons to the treatment of other persons. Comparisons are

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41 *Tribunal decision*, at paras. 110-112 and 128, Appeal Book, vol. 1, tab 4, pgs. 186-7 and 192.

42 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; See also: *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para. 48; *Honda v Keays*, 2008 SCC 39.

43 *Withler v Canada (Attorney General)*, 2011 SCC 12, at paras. 41, 61 and 62.

44 *Federal Court Judgment*, at paras. 316-331, Appeal Book, vol. 1, tab 2, pgs. 86-90.

45 *Tribunal decision*, at paras. 1, 4-5, 21-22 and 102-106, Appeal Book, vol. 1, tab 4, pgs. 142-3, 149 and 182-186; *Federal Court Judgment*, at paras. 21, 38-39 and 105-107, Appeal Book, vol. 1, tab 2, pgs. 14, 18 and 35.

46 *Battlefords and District Co-operative Ltd. v Gibbs*, [1996] 3 SCR 566, at para. 29.

inevitable."[47]

52. The applications judge herself has recently confirmed that in order to determine whether there has been adverse differential treatment on the basis of a proscribed ground under the *Act* it is necessary to compare the situation of the complainant group with that of a different group.[48]

53. Contrary to these findings, the applications judge found s. 5(b) does not require a comparison.[49] This conclusion was based on the assumption that requiring a comparison would result in situations where individuals would be prevented from advancing a case of direct discrimination. In support of this, she cited a number of hypothetical examples of intentional discrimination.[50] However, these examples are inapt as the complaint in this case is not based on a claim of discriminatory intent, but rather on an explicit comparison of the funding of child welfare service providers. Moreover, there is nothing in the Tribunal's interpretation that precludes allegations of intentional discrimination, harassment or failure to accommodate from being brought forward.

Section 5(b) does not allow for comparisons between different service providers

54. In the context of s. 5(b), comparisons between different service providers are irrelevant and could lead to potentially absurd results where a service provider will have to remediate for something beyond its authority to either supervise or control. Therefore, it is not surprising to find no case law under the *Act* or any other human rights legislation where claimants have sought to compare two different service providers that serve two different publics.

55. A single public, and the prohibition of discrimination within that public, requires a single service provider. This was confirmed by the Supreme Court's statement in *University of British Columbia v Berg*[51] that every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the human rights legislation prohibits discrimination within that public.

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47 *Canada (Human Rights Commission) v M.N.R.*, 2003 FC 1280, at para. 22.
48 *Canada (Attorney General) v Walden*, 2010 FC 490, at para. 78.
49 *Federal Court Judgment*, at paras. 256-7, Appeal Book , vol. 1, tab 2, pgs. 72-73.
50 *Federal Court Judgment*, at paras. 256-7 and 261-2, Appeal Book, vol. 1, tab 2, pgs. 72-4.

56. In *Warren Gibson Ltd. v Canada (Human Rights Commission)*,[52] the Federal Court overturned a Tribunal decision which purported to compare the discipline imposed on a female employee of the respondent with that imposed on a male employee of a subcontractor of the respondent. The Court found the Tribunal had adopted an unreasonable comparison, given the substantive differences between the comparator's status and that of the complainant for purposes of determining whether the Company engaged in prohibited differentiation.

57. The importance of this judgment is the Court's use of the comparison analysis as a way of identifying the employer's lack of responsibility and control over the alleged comparator group. Given this approach to the *Act*, the Tribunal's decision was reasonable in determining that s. 5 (b) cannot be interpreted to give it the statutory authority to equalize differences in treatment as between different entities serving different publics.

58. The respondent employer could not control the disciplinary response of its subcontractor and therefore was not responsible for differential treatment. While it could control the discipline of its own employee, it was not required under the *Act* to simply mirror its disciplinary response with the more generous disciplinary response of its subcontractor.

59. The asserted claim in the case at bar is precisely the same: the federal government's funding must mirror that of a separate entity (a province) over which it has no control. Equality is potentially accomplished not just by raising funding to the level provided by a provincial comparator, but also by lowering the funding level of the province to that of the government.

60. Naturally, it is within the government's control to change the level of funding that it provides to First Nations; however, it does not have the corresponding authority to change the funding provided by the provinces. The result is that the equality analysis proposed by the applications judge can only result in increasing the level of funding to that provided by the provinces unless the provinces themselves decide to reduce the level of funding to their own population.

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[51] *University of British Columbia v Berg*, [1993] 2 SCR 353.
[52] *Warren Gibson Ltd. v Canada (Human Rights Commission)*, 2004 FC 1439, at paras. 21-24.

61. To "differentiate adversely" under s. 5(b) requires more than asserting that another service provider serving a different public provides a better service to a class of persons in that public. To make out a *prima facie* case of discrimination, it is necessary to establish that a complainant received adverse treatment and that it is reasonable to assume that his or her protected characteristic played a part in the adverse treatment.[53] It cannot be the case that a complainant's protected characteristic automatically plays a part in the treatment of a complaint whenever a service provider only provides a service to that protected group. Such an approach would make any treatment of that group of individuals by that service provider discriminatory whenever a different service provider provides a better service to an individual who is not a member of that protected group.

62. The applications judge gave examples in her adoption of the "might otherwise have treated" test to show that discriminatory intention might provide a link between the protected characteristic and the adverse treatment.[54] However, discriminatory intention is not being alleged here.[55] In the absence of such an allegation, it is irrelevant and illogical to ask how a service provider "might otherwise have treated" a complainant when the service provider does not either "treat" or have the capacity to "treat" someone from outside the claimant group. In the examples the applications judge has given – the shopkeeper, employer and government service provider – all have the capacity to provide (and in all likelihood will at some point provide) the service or employment (and therefore better service or employment) to people who do not share the protected personal characteristic. But in this case, where the respondent does not treat or have the capacity to treat off reserve individuals, the test becomes purely hypothetical and leads to potentially absurd results.[56]

63. For example, as noted by the Tribunal, First Nations also provide "race based services" to its members. The proffered analysis could result in one First Nation being potentially compared to another with respect to the level of funding and services that a nation provides to its members. How might a member of a Cree First Nation be otherwise

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[53] *Lincoln v Bay Ferries Ltd.*, 2004 FCA 204, at para. 22; *New Brunswick Human Rights Commission v Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40, at paras. 80-84.

[54] *Federal Court Judgment*, at paras. 256-262 and 296-297, Appeal Book, vol. 1, tab 2, pgs. 72-4 and 81.

[55] *Tribunal decision*, at paras. 21-22, Appeal Book, vol. 1, tab 4, pg. 149; *Federal Court Judgment*, at paras. 19-62, Appeal Book, vol. 1, tab 2, pgs. 13-23.

treated in the provision of services if they were a Mohawk? The question is absurd. Each First Nation could be compared to services rendered by the provinces and others. This approach would potentially encompass each First Nation and potentially bind it to provide a level of funding and services comparable to other First Nations and provinces. [57]

64. The applications judge uses other examples – sexual harassment and accommodation of disability – that are also unsuitable.[58] In the former example the comparison is hypothetical because the results of the comparison are assumed given the nature of the claim. In traditional accommodation cases it is not necessary to identify a specific comparator because the claim is for the disabled to take advantage of a service or employment in a manner that reasonably approximates what they would be able to take advantage of were they not disabled (e.g. access to a building). The comparator group – non-disabled individuals who are able to access the building – is assumed in the claim itself. That is not the same as the case at bar.

65. The approach taken by the applications judge is unprecedented and will have broad implications in the area of the provision of funding and programs for on-reserve First Nations. Her interpretation of s. 5 will require the Tribunal to use cross-jurisdictional claims and comparisons of different service providers to scrutinize the policy of not only the government but also of First Nations themselves through comparison with provincial programs as well as each other's programs. This approach is incorrect and interprets s. 5(b) in a manner that is unreasonable and beyond Parliamentary intent.

Cross-jurisdictional claims do not fall within s. 5(b)

66. The applications judge appears to adopt the proposition that differential treatment under the *Act* can be established by comparing the actions of different service providers across federal and provincial jurisdictions. However, the absence of case law supporting cross-jurisdictional comparisons lends further credence and support to the Tribunal's interpretation of s. 5(b) and the reasonableness of its decision.[59] In this respect, it is important to remember the purpose clause, i.e. s. 2 of the *Act,* which states that the *Act* is

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[56] *Tribunal decision*, at para. 129, Appeal Book, vol. 1, tab 4, pg. 192.
[57] *Tribunal decision*, at para. 133 Appeal Book, vol. 1, tab 4, pg. 193.
[58] *Federal Court Judgment*, at paras. 291-292, Appeal Book, vol. 1, tab 2, pg. 80.

limited to matters "within the purview of matters coming within the legislative authority of Parliament". The Tribunal's approach accords with the principle that statutes enacted by a given order of government cannot exceed their inherent jurisdictional limitations.[60]

67. On occasion, courts have been called upon to assess claims under s. 15 of the *Charter* that involve cross-jurisdictional comparisons. Such claims are not based on jurisdictionally limited human rights legislation but are said to arise under a constitutional equality provision, which is not so limited. Nonetheless, as demonstrated below, cross-jurisdiction claims under s. 15 have not been successful.

68. In *R. v S.* [61], the Supreme Court dealt with a provision of the *Criminal Code* which permitted provincial attorneys-general to provide certain "alternative measures" for young offenders. Ontario had not done so. In determining that there was no s.15 violation because distinctions based on province of residence likely do not engage a "personal characteristic" similar to those enumerated in s. 15, the Court noted that the Canadian Constitution creates not only a boundary between the individual and the state, but also creates boundaries between the federal and provincial levels of government. The federal system of government itself demands that the values underlying s. 15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction. There can be no question, then, that unequal treatment that stems solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a s. 15(1) challenge on the basis only that it creates distinctions based upon province of residence.

69. Within the context of this case – given the reference to child welfare and given that the impugned funding involves an exercise of executive, rather than legislative, authority – the Court later goes on to point out that differential application of the law through federal-provincial cooperation is a legitimate means whereby governments can overcome the rigidity of the "watertight compartments" of the distribution of powers with respect to matters that are not easily categorized or dealt with by one level of government alone. As

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[59] *Tribunal decision*, at paras 16 and 130, Appeal Book, vol. 1, tab 4, pgs. 146 and 192.
[60] *Sullivan*, pgs. 459-461.
[61] *R. v S.*, [1990] 2 SCR 254.

a result, the impugned legislation does not amount to a distinction which is based upon a "personal characteristic" for the purposes of s. 15(1) of the *Charter*.[62]

70. In both *R. v S.* and *Haig v Canada*[63], the Supreme Court has recognized that difference and discrimination are two different concepts. The presence of a difference will not automatically entail discrimination. Differences – whether between provinces or between the federal and provincial governments – are an inherent and rational part of the political reality in the federal process.

71. Differences between funding programs, including eligibility requirements and the content of the benefits provided will arise between governments. This is an inherent part of the reality that Canada is a federal state. Professor Hogg has said that "federalism can be an exception to the guarantee of equality, to a limited extent." [64] His statement has been applied by this Honourable Court.[65]

72. The Supreme Court has also rejected the proposition that s. 15 of the *Charter* creates a guarantee of identical legislation across Canada – to read it so would use s. 15 to nullify ss. 91 and 92 of the *Constitution Act, 1867*.[66]

73. In *Penner v Danbrook*, the Saskatchewan Court of Appeal rejected a claim that the more restrictive definition of child in Saskatchewan's *Family Maintenance Act* violated s. 15 on the basis of marital status. After quoting from *R. v S.* and recognizing the distinction in this instance was not based solely on province of residence, the Court still found the principle stated in *R. v. S.* applies: the distinction was based solely on a provincial legislature and the federal Parliament exercising their respective legitimate jurisdictional powers in different ways. Since the division of powers is part of the constitutional scheme, unequal treatment stemming solely from legitimate exercise of those powers cannot be the subject of challenge only on the basis that it creates distinctions between some of those subject to the legislation.[67]

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[62] *R. v S., supra.*
[63] *Haig v Canada*, [1993] 2 S.C.R. 995.
[64] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf), Vol. 2 (Toronto: Carswell, 2007), at pgs. 55-59 and 55-83.
[65] *Chippewas of Nawash First Nation v Canada (Minister of Fisheries and Oceans)*, 2002 FCA 485, at para. 27.
[66] *Gosselin v Quebec* [2005] 1 S.C.R. 238 at para. 14.
[67] *Penner v Danbrook* [1992] 4 W.W.R. 385.

74. The s. 15(1) case law supports the appellant's position that anti-discrimination law in Canada is not intended to address differences arising from the legitimate exercise of legislative authority between two jurisdictions – whether as between two provincial governments or as between the federal government and a provincial government. This principle also applies where the impugned funding involves an exercise of funding authority pursuant to the federal spending power.

75. Given the Tribunal's observations concerning the limited scope of its statutory authority, the application of the principles set out in the case law above support the Tribunal's interpretation of s. 5(b). The issue before the Tribunal was whether the federal government's alleged failure to match provincial funding levels constitutes adverse differentiation. Simply because the federal government provides a different funding scheme, which may or may not differ from schemes implemented by a provincial government, at best only constitutes a difference in policy choices. Such differences in themselves cannot engage anti-discrimination laws. To do so would override the limits imposed by federalism.

Section 67 and its repeal are not relevant to the interpretation of s. 5(b)

76. The repeal of s. 67 of the *Act* is not a relevant factor to consider in reviewing the reasonableness of the Tribunal's decision. Section 67 of the *Act* provided that nothing in the *Act* affected any provisions under the *Indian Act*, or other provisions made under that legislation.

77. The complaint was brought before the repeal of s. 67. The impugned funding policy is not the result of either the *Indian Act* or its regulations. As the Tribunal noted, the repeal of s. 67 by itself does not change the legal environment in which the *Act* operates and does not invite an interpretation of s. 5(b) using a results based analysis – nor does it preclude the possibility that a remedy to a claim may lie elsewhere.[68] The applications judge's reliance on the repeal of s. 67 in her judgment constitutes reversible error.

[68] *Tribunal decision,* at para. 138, Appeal Book, vol. 1, tab 4, pgs. 195-6.

Canada's international obligations do not affect the interpretation of s. 5(b)

78. The applications judge states that her interpretation of s. 5(b) accords more fully with Canada's international obligations than does that of the Tribunal and is thus to be "preferred".[69] In doing so, she failed to give respectful attention to the reasons the Tribunal offered in support of its decision. The Tribunal's consideration of Canada's international law obligations resulted in a decision that falls within a range of "possible acceptable outcomes" to which deference is owed.

79. International law does not provide the applications judge with a basis for disregarding the Tribunal's home statute. Instead, the well-established rules regarding the role of international law in relation to statutory interpretation apply.[70] The reasons of the Tribunal demonstrate that it was fully aware of and applied these rules.[71]

80. The Supreme Court has confirmed the existence of the presumption that domestic legislation conforms to binding international law, whether customary or conventional.[72] However, this presumption is rebuttable. If a court concludes that the domestic law at issue evidences a clear legislative intent to the contrary, the presumption of conformity is rebutted and domestic law must prevail and be applied. [73]

81. The Tribunal's interpretation accords with the constitutional division of powers and the intention of Parliament; it must therefore prevail over any resulting non-conformity with international legal obligations.

82. There is nothing in international law that requires Canada to adopt the same funding structures as the provinces and the Yukon. As the Supreme Court noted in *R. v Hape*, respect for state sovereignty is a rule of customary international law and has an internal dimension, which includes "the power of each state freely and autonomously...to organize itself." [74]

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69 *Federal Court Judgment*, at para. 355, Appeal Book, vol. 1, tab 2, pg. 92.
70 *Sullivan*, pgs. 537-559.
71 *Tribunal decision*, para. 112, Appeal Book, vol. 1, tab 4, pg. 187.
72 *R v Hape*, 2007 SCC 26, at para. 53-54; *Bouzari v The Islamic Republic of Iran*, (2004) 243 DLR (4th) 406, at para.64 (with respect to conventional international law); at para. 65 (with respect to customary international law); leave to appeal to SCC dismissed at [2004] SCCA 410.
73 *R. v Hape, supra*, at para. 53; *Bouzari, supra*, at para. 66; also see: *Sullivan*, at pg. 548.
74 *Hape, supra*, at para. 42.

83. International law cannot be used to give a meaning that is inconsistent with the clear provisions of an Act of Parliament.[75] It provides no justification for the Tribunal or the courts to ignore the fact that Canada is a federal state and that Parliament did not confer upon the Tribunal the power to permit comparison between federal and provincial service providers in the context of alleged discrimination

84. The Supreme Court has on several occasions stated that one of the principles animating the whole of the Constitution is federalism, which recognizes the diversity within Confederation and allows federal and provincial governments to develop their societies within their respective spheres of jurisdiction.[76] The Tribunal was cognizant that the constitutional division of powers was a relevant consideration and noted that this additional layer of complexity made the proposed comparison suggested by the respondents even more illogical.[77]

85. The Tribunal's interpretation of s. 5(b) is not inconsistent with or in conflict with the international convention cited by the respondents.[78] While these conventions give rise to international legal obligations, they do not lay down, nor should they be interpreted to support, a particular scheme for addressing alleged discrimination, or the provision of child and family welfare services by a state. Rather, discretion is left to states to determine how best to address their obligations.

86. Further, none of the international conventions identified speak to the issue of comparator groups in the context of funding for social programs. As such, the arguments made by the respondents to the Court below in respect of international law were so remote and unrelated to the particular and specific issue that arises in this case, recourse to them is of no utility.[79]

87. Finally, as was held by the Tribunal, it would have been an error of law for the Tribunal to use the *UN Declaration on the Rights of Indigenous Peoples*, a non-binding international instrument that does not give rise to international legal obligations, to

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[75] *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002, FCA 89, at para. 36; *Tribunal decision*, at para. 112, Appeal Book, vol. 1, tab 4, pg. 187.
[76] *Reference Re Quebec Succession*, [1998] 2 SCR 217, at paras. 57-58; *R v S.*, *supra.*
[77] *Tribunal decision*, at para. 130, Appeal Book, vol. 1, tab 4, pg. 192.
[78] *Federal Court Judgment*, at paras. 349-350, Appeal Book, vol. 1, tab 2, pgs. 94-95.

override Canada's existing constitutional and domestic legal framework. As Canada noted in its Statement of Support, Canadian law defines the bounds of Canada's engagement with the Declaration.[80] The Declaration does not alter in any way the authority of the Tribunal to deal with discrimination complaints brought by or on behalf of Aboriginal people.

Canada did not adopt provincial funding formulas

88. The applications judge erred in finding the Tribunal's decision was unreasonable because it failed to consider the federal government's choice of provincial child welfare standards in its programming manual and funding policies as an appropriate comparator.[81]

89. The content of any obligation in the *Act* exists independently of the content of any government manual or policy. A practice either falls within the scope of the legislation or it does not. Any policy decision to provide for a different standard in a manual or policy does not extend – or narrow – any obligation the appellant may have under the *Act*.

90. This case is not about the adoption of provincial standards for child welfare services. It concerns alleged differences between the funding amounts the federal and provincial governments provide their respective constituents. Provincial and territorial governments ordinarily fund child welfare services for their residents except where the child is a "Registered Indian" living on a reserve.[82] According to the evidence, the federal government's response is to provide funding to provinces/territories, Bands or Tribal Councils, or directly to authorized First Nations child and family service agencies operating on reserves.[83] The funding is intended to support child welfare services in accordance with the legislation and standards of a given province of territory.[84] However, subscribing to the legislation and standards of a given province or territory does not necessarily include the adoption of the same funding level that a given province or

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79 *Schreiber v Canada (Attorney General)*, 2002 SCC 62, at paras. 50-51.

80 Canada's Statement of Support, November 12, 2010. *Available at* www.aandc-aandc.gc.ca/eng/13093742239861: Question 1, FAQ of the United Nations Declaration on the Rights of Indigenous Peoples, 2010. *Available at* www.aandc-aandc-eng/1309374807748.

81 *Federal Court Judgment*, at paras. 367-390, Appeal Book, vol. 1, tab 2, pgs. 99-104.

82 *Federal Court Judgment*, at para. 28, Appeal Book, vol. 1, tab 2, pg. 16.

83 *Tribunal decision*, at paras. 1, 21-22, 85 and 93, Appeal Book, vol. 1, tab 4, pg. 142, 149, 174-5 and 178; *Federal Court Judgment*, at para. 29, Appeal Book, vol. 1, tab 2, pg. 16.

84 *Federal Court Judgment*, at para. 32, Appeal Book, vol. 1, tab 2, pg. 17.

territory provides.

91. There is no delegation of federal authority to the provinces making the latter an agent or delegate of the former. The majority of the Supreme Court in the *NIL/TU,O* case specifically rejected the argument that federal funding transforms an entity delivering child welfare into a federal undertaking or delegates regulatory or legislative power from the federal to provincial government.[85] The comparison remains one involving two separate governments and their respective constituents. Clearly, in developing its own funding formula, Canada chose to depart from the standards of other jurisdictions by developing its formula based on its policies and mandate while respecting governmental authorities.

The applications judge's interpretation of s. 5(b) is incorrect

92. The applications judge's interpretation of s. 5(b) is in error. It would invite comparisons between different governments engaged in the legitimate exercise of their respective legislative authority, when the courts have already found that such differences do not constitute discrimination.

93. Contrary to the suggestion of the applications judge, the Tribunal's decision does not exclude First Nations individuals from the protection of the *Act* in complaining about services provided by the federal government. The decision simply reflects anti-discrimination law as it applies to all Canadians – that claims of differential treatment cannot be based on comparisons between two different service providers that serve distinct publics. The Tribunal's decision does not speak to other kinds of claims that may impugn the provision of government services to First Nations individuals which, depending on the circumstances, may or may not engage s. 5 of the *Act*.

94. For example, the Tribunal decision does not prevent complaints of discrimination where the allegation is that the Federal Government provides a better level of service to one group of First Nations individuals than it does to another group of First Nations individuals, based on race, national or ethnic origin, religion, age, sex, disability, marital

[85] *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45, at paras. 24, 34 and 40.

status, family status or any other grounds under the *Act*. It also does not prevent complaints of adverse differentiation against First Nations individuals in the provision of services where the federal government alone is responsible for providing those services to all Canadians.

Issue 2: The applications judge erred in determining procedural fairness had been breached

A. The respondents were not reasonably prejudiced by the consideration of extrinsic evidence

95. In order for there to have been a breach of procedural fairness, the respondents must have been "reasonably prejudiced" in the Tribunal's consideration of "extrinsic evidence".[86] The applications judge's finding that the respondents satisfied this standard is clearly wrong, when the facts specific to this case are examined.

96. First, it is questionable whether the material that was considered can truly be considered "extrinsic". The Tribunal provided a list of the documents it considered on the motion to dismiss.[87] This included not only evidence filed on the motion record but evidence filed on the merits of the complaint. Based on the number of pages the Tribunal stated it considered, the applications judge found the Tribunal likely considered the documents filed on the merits of the complaint when determining the motion to dismiss.[88]

97. This is not evidence that was unknown to the parties. Rather, it was evidence that the parties themselves had exchanged and filed with the Tribunal. Indeed, a vast number of the items mentioned in "Appendix A" originated from the respondents themselves, such as statements of particulars and will-say statements.[89]

98. Jurisprudence dealing with extrinsic evidence, including those cited by the applications judge, often contains two crucial elements that are not present in this case. One is that the parties are prejudiced because they are unable to address or correct evidence unfavourable to their position and the other is that this unaddressed evidence forms part of the reason

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[86] *Federal Court Judgment*, at para. 195, Appeal Book, vol. 1, tab 2, pg. 56.
[87] *Tribunal's decision, at "Appendix A"*, Appeal Book, vol. 1, tab 4, at pg. 199-206.
[88] *Federal Court Judgment*, at paras. 191and 197, Appeal Book, vol. 1, tab 2, pgs. 55 and 57.

for the adverse decision.[90]

99. In this case, the respondents did not argue that there was evidence filed on the merits that was unfavourable to them, which they would have sought to correct.

100. Furthermore, there is no indication that any of the "extrinsic" evidence played any part in the Tribunal's decision.

101. The "extrinsic" evidence is significant only in relation to the facts of this case, not the law. However, the question before the Tribunal on the interpretation of s. 5(b) was primarily a legal question. This is recognized by the Commission when the complaint was referred directly to the Tribunal without an investigation.[91] Furthermore, the overwhelming legal nature of the Tribunal's decision on s. 5(b) is evident when it is reviewed.

102. There are two key facts that are pertinent to the s. 5(b) issue: 1) the provincial and territorial governments fund child welfare service providers off-reserve and 2) the federal government funds child welfare service providers on-reserve. All of the legal questions dealt with by the Tribunal are based on these two undisputed facts.

103. These facts are not in dispute. Indeed, these are the facts advanced by the respondents themselves.[92] Rather, it is the legal significance of these facts to the interpretation of s. 5(b) that is in issue.

104. The applications judge seeks to support her findings by stating that the "extrinsic" evidence considered "likely" dealt with the "comparator" issue, as it had been raised as an issue since the outset of the complaint. This ignores, however, the fact that only two key facts are truly crucial to the Tribunal's findings and these were advanced by the respondents.

105. On this issue, the applications judge correctly gave the Tribunal's decision no deference

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89 *Tribunal's decision, at "Appendix A"*, Appeal Book, vol. 1, tab 4, at pg. 199-206.

90 *Kane v Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at pg. 1113-7 and *Khan v University of Ottawa*, 148 D.L.R. (4th) 577, at paras. 8-10

91 *Decision of the Commission, October 14, 2008*, Appeal Book, vol.1, tab 5, pg. 243.

and looked to whether the process followed was fair in the circumstances.[93] However, the applications judge made a palpable and overriding error when finding the respondents were reasonably prejudiced by the Tribunal's consideration of extrinsic material.

106. In any event, even if there was a breach of procedural fairness, the decision dismissing the complaint would still follow as a matter of course based on the interpretation of s. 5(b). Recently, this Court stated that even if there had been a flaw in the proceedings, it would not quash the underlying administrative decision where the end result is not in question:

> Given this, even if I were persuaded that some flaw existed in the course of the proceedings before the Commission, I would exercise my discretion against quashing the Commission's decision: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. No purpose would be served in remitting it back to the Commission: based on this evidentiary record, the completeness of which has not been placed in doubt, a decision to dismiss the complaint under sections 41 and 44 of the Act would have to follow as a matter of course.[94]

107. If the Court in this case finds the applications judge should have upheld the Tribunal's decision on s. 5(b), the legal findings will result in a dismissal of the complaint. Therefore, no purpose is achieved by returning the matter back when there is a foregone conclusion on the validity of the complaint.

B. The Tribunal was not obligated to give reasons on s. 5(a)

108. The applications judge erred in concluding that the Tribunal was required to address the application of s. 5(a) of the *Act*. The findings in this respect amount to a conclusion that the Tribunal erred in providing insufficient reasons. However, the issue of whether the complaint could have survived the motion to dismiss through consideration under s. 5(a) was not a matter that required reasons from the Tribunal.

109. In dealing with a similar situation, this Court in *Turner v Attorney General of Canada*, set

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[92] *Human rights complaint form*, Appeal Book, vol. 1, tab 5, pgs. 224-6; *Affidavit of Cindy Blackstock, at paras. 10-11*, Appeal Book, vol. 3, tab 5, pgs. 697-8; *Affidavit of Elsie Flette, at paras. 5 and 17*, Appeal Book, vol. 5, tab 5, pgs. 1520-1; *Affidavit of Tom Goff, at para. 8 and 10*, Appeal Book, vol. 5, tab 5, pg. 1570.

[93] *Federal Court Judgment*, at para. 159, Appeal Book, vol. 1, tab 2, pg. 48.

out the principles to follow when determining if the absence of reasons on an issue amounts to a reviewable error.[95] In *Turner*, the Tribunal dismissed the complaint, which alleged discrimination on the basis of age and race, national and ethnic origin. This dismissal was upheld by the Federal Court, who rejected the appellant's argument that the Tribunal had an obligation to consider allegations on the ground of disability. There was no disagreement that the Tribunal's reasons were silent on this point.

110. The Federal Court's decision was overturned by this Court following a two-step analysis. First, the Court considered whether the "point or argument made before an administrative tribunal was of such importance as to require the tribunal to consider it is a matter to be dealt with."[96] If the first step is answered in the affirmative, the second step is to determine whether the Tribunal effectively dealt with the argument.[97]

111. This Court in *Turner* noted two important principles from the jurisprudence: 1) an administrative tribunal need not address each and every argument made and 2) an administrative tribunal must consider the important points in issue and its reasons must reflect consideration of the main relevant factors.[98] In this respect, the burden is on the applicant to demonstrate that any point or factor was of sufficient importance that the tribunal was legally bound to consider it.[99]

112. Unlike the situation in *Turner*, there is no clear indication on the record in this case that s. 5(a) was of such importance so as to oblige the Tribunal to address it. In *Turner*, the Court was able to point to specific instances in the complaint form, the oral arguments and the written submissions where the allegations of discrimination based on disability were specifically addressed.[100]

113. The record in the present case does not reflect similar references where the respondents raised an argument before the Tribunal that the complaint should continue under s. 5(a). The references in the record identified by the applications judge with respect to s. 5(a) are

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94 *Ayangma v Canada*, 2012 FCA 213, at para.58.
95 *Turner v Attorney General of Canada*, 2012 FCA 159.
96 *Turner*, *supra*, at para. 43.
97 *Turner*, *supra*, at para. 44.
98 *Turner*, *supra*, at paras. 40-41.
99 *Turner*, *supra*, at para. 41.
100 *Turner*, *supra*, at paras. 23-31.

ambiguous and indistinct.[101] Rather than citing any instances where the respondents specifically placed the s. 5(a) argument before the Tribunal, the applications judge relies on the fact the parties did not explicitly state the complaint and motion did not deal with s. 5(a). In essence, the applications judge found that silence on the issue meant it was before the Tribunal and that the Tribunal was obliged to speak to it.

114. The applications judge references evidence in the motion to dismiss to support the proposition that s. 5(a) was sufficiently before the Tribunal. However, the cited evidence only raises s. 5(a) through supposition.[102] Furthermore, these references must be looked at in context of the motion to dismiss as a whole. In her decision, the applications judge states that the motion to dismiss consists of approximately 2000 pages.[103] From these 2000 pages (with the majority being devoted to the respondents' affidavit evidence) the applications judge is only able to identify a couple of references respecting issues that correlated with the wording in s. 5(a). This clearly does not support a finding that this issue was central or important in the motion to dismiss.

115. If the respondents thought that their complaint should proceed under section 5(a) it was their obligation to properly raise it with the Tribunal. It was not the Tribunal's obligation to raise argument in an attempt to find a way to allow the complaint to continue. This burden rested with the respondents alone.

116. The question for the applications judge was not whether there was any possible mention of an argument on s. 5(a). Rather, the question was the importance or significance of this issue on the motion to dismiss. The evidence cited by the applications judge, especially when considered in the context of the motion as a whole, is not sufficient to demonstrate this issue was significant enough to create an obligation on the Tribunal to issue reasons with respect to it. As noted by this Court in *Turner*, "an administrative tribunal need not address each and every argument made."[104]

117. In any event, the consideration of s. 5(a) would not have changed the outcome of the

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[101] *Federal Court Judgment*, at paras. 215-218, Appeal Book, vol. 1, tab 2, pgs. 62-3.
[102] *Federal Court Judgment*, at paras. 209-213 Appeal Book, vol. 1, tab 2, pgs. 60-61.
[103] *Federal Court Judgment*, at para. 190 , Appeal Book, vol. 1, tab 2, pg. 55.
[104] *Turner*, *supra*, at para. 40.

motion to dismiss, because this provision was not engaged by the complaint.[105] The "service" at issue in this case is the funding, not the service itself, that is provided by Canada. The allegation is that the funding provided to First Nations children on-reserve is less than the funding provided by the provinces to children off-reserve. This is clearly an allegation of adverse differentiation. Claims of adverse differentiation are governed by s. 5(b). It is not an allegation that no funding is provided by Canada to First Nations children living on-reserve.

Conclusion

118. The crux of this appeal lies in the question of whether different funding levels between provincial and federal governments properly form the basis of a complaint under s. 5(b) of the *Act*. The Tribunal, after conducting an in-depth analysis, found it did not. There is nothing unreasonable in the Tribunal's finding that s. 5(b) of the *Act* required a comparison to be made and that this comparison was of two or more individuals receiving the same service from the same service provider. This form of comparison is at the heart of differential treatment and the goal of ensuring that an entity does not treat one individual differently than another on the basis of a prohibited ground. The comparison advanced by the respondents as the basis for its claim of discrimination simply does not satisfy this requirement. As such, the complaint was not within the scope of s. 5(b) of the *Act*.

119. The Tribunal also fully complied with the requirements of procedural fairness. The respondents were not reasonably prejudiced by the consideration of material filed with respect to the merits of the complaint. Finally, the applications judge imposed an unduly strict requirement on the Tribunal to give reasons for a matter not squarely before it on the motion to dismiss.

120. In the absence of reviewable errors by the Tribunal, the applications judge had no proper basis to intervene.

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[105] *Turner*, *supra*, at para. 45.

PART IV – ORDER SOUGHT

121. Canada respectfully requests this appeal be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 31st day of August, 2012 in Halifax, Nova Scotia.

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PART V – List of Authorities

Legislation

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

Interpretation Act, R.S.C. 1985, c. I-21, s. 12

Jurisprudence

Voice Construction Ltd. v Construction and General Workers' Union Local 92, 2004 SCC 23

Law Society of New Brunswick v Ryan, 2003 SCC 20

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62

Canada (Canada Revenue Agency) v Telfer, 2009 FCA 23

Dr. Q. v College of Physicians and Surgeons of British Columbia, 2003 SCC 19

Starson v Swayze, 2003 SCC 32

Henthorne v British Columbia Ferry Services Inc., 2011 BCCA 476

R. v Sharpe, 2001 SCC 2

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), 2004 SCC 4

Bell ExpressVu v The Queen, 2002 SCC 42

Canada Trustco Mortgage Co. v Canada, 2005 SCC 54

Alberta Union of Provincial Employees v Lethbridge Community College, 2004 SCC 28

Canada (Information Commissioner) v Canada (Minister of National Defence), 2011 SCC 25

Canada (Attorney General) v Mossop, [1993] 1 S.C.R. 554

Schreiber v Canada (Attorney General), 2002 SCC 62

Quebec (Attorney General) v Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831

R. v Clay, [2003] 3 S.C.R. 735

Gould v Yukon Order of Pioneers, [1996] 1 S.C.R. 571

Public Service Alliance of Canada v Canada Revenue Agency, 2012 FCA 7

Watkin v Canada (Attorney General), 2008 FCA 170

Celgene Corp. v Canada (Attorney General), 2011 SCC 1

Andrews v Law Society of British Columbia, [1989] 1 SCR 143

McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4

Honda v Keays, 2008 SCC 39

Withler v Canada (Attorney General), 2011 SCC 12

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

Canada (Human Rights Commission) v M.N.R., 2003 FC 1280

Canada (Attorney General) v Walden, 2010 FC 490

University of British Columbia v Berg, [1993] 2 SCR 353

Warren Gibson Ltd. v Canada (Human Rights Commission), 2004 FC 1439

Lincoln v Bay Ferries Ltd., 2004 FCA 204

New Brunswick Human Rights Commission v Province of New Brunswick (Department of Social Development), 2010 NBCA 40

R. v S., [1990] 2 SCR 254

Haig v Canada, [1993] 2 S.C.R. 995

Chippewas of Nawash First Nation v Canada (Minister of Fisheries and Oceans), 2002 FCA 485

Gosselin v Quebec [2005] 1 S.C.R. 238

Penner v Danbrook [1992] 4 W.W.R. 385

R v Hape, 2007 SCC 26

Bouzari v The Islamic Republic of Iran, (2004) 243 DLR (4th) 406

Rahaman v Canada (Minister of Citizenship and Immigration), 2002 FCA 89

Reference Re Quebec Succession, [1998] 2 SCR 217

Schreiber v Canada (Attorney General), 2002 SCC 62

NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union, 2010 SCC 45

Kane v Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105

Khan v University of Ottawa, 148 D.L.R. (4th) 577

Ayangma v Canada, 2012 FCA 213

Turner v Attorney General of Canada, 2012 FCA 159

Secondary sources

David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997)

Evans J.M., "The Role of Appellate Court in Administrative Law", (2007) 20 Can. J. Admin L. & Prac. 1

R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed.)

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf), Vol. 2 (Toronto: Carswell, 2007)

Canada's Statement of Support, November 12, 2010. *Available at* www.aandc-aandc.gc.ca/eng/1309374239861: Question 1, FAQ of the United Nations Declaration on the Rights of Indigenous Peoples, 2010. *Available at* www.aandc-aandc-eng/1309374807748