FEDERAL COURT

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Applicant

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

Respondents

A N D B E T W E E N:

Court File No. T-578-11

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

- and -

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

Respondents

A N D B E T W E E N:

Court File No. 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

The Purpose of the CHRA and its Interpretation

[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.

[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.

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.

[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.

[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.

[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.

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

[277]… 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":

[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".

The Role of Comparator Groups in a Discrimination Analysis

[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.

[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"…

[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…

The Supreme Court of Canada's Decision in Withler

[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.

[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.

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

[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.

The International Law Arguments

[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.

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

[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.

Conclusion

[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.