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MEMORANDUM

TO: **First Nations Child Welfare Agencies**

FROM: **Devlin Gailus Barristers & Solicitors**

DATE: **April 23, 2012**

Re: ***Canada (Human Rights Commission) v. Canada (Attorney General)*** **2012 FC 445**

This memorandum is to provide First Nations Child Welfare Agencies with an update on the recent decision of the Federal Court in the First Nations Child and Family Caring Society discrimination complaint.

BACKGROUND

Section 5 of the *Canadian Human Rights Act*[1] (the "Act") states that 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.

The Complaint

The First Nations Child and Family Caring Society and the Assembly of First Nations (collectively, the "Complainants") filed a human rights complaint with the Canadian Human Rights Commission. The Complaints argue that the federal funding of child welfare services results in inequitable levels of services being provided to First Nations children on reserve as compared to other children living off reserve. As a result of this under-funding, child welfare services for on reserve children are either inadequate or

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

unavailable. The Complainants contend that this constitutes discrimination on the grounds of race and national or ethnic origin under s. 5 of the Act.

Canadian Human Rights Tribunal Decision

Before the case could be heard before the Canadian Human Rights Tribunal (the "Tribunal") on the merits, the federal government filed a motion have the complaint dismissed, arguing that the Tribunal did not have the jurisdiction to hear the matter. The federal government argued its child welfare funding could not be compared to that of the provinces.

The Tribunal held that there could be no 'adverse differential treatment' in the funding of First Nations children living on reserve as s. 5(b) of the Act does not permit a comparison between services provided by two different service providers (i.e. the federal government and the provincial government) to two different sets of recipients (i.e. on reserve and off reserve children). As a result, the Tribunal dismissed the complaint without a full hearing.

JUDICIAL REVIEW

The parties sought a judicial review of the Tribunal's decision. On April 18, 2012, the Federal Court set aside the Tribunal's decision and remitted the complaint back to a new panel for re-determination.

Summary of the Decision

1. The Tribunal did not act fairly when it considered evidence submitted for a hearing on the merits and did not restrict itself materials related only to the motion to dismiss the complaint.

2. The decision of the Tribunal was unreasonable as it failed to provide any reasons why it could not consider a complaint under s. 5(a) of the Act which makes it a discriminatory practice to deny a service on a prohibited ground of discrimination.

3. The Tribunal erred in interpreting s. 5(b) of the Act as requiring an identifiable comparator group in every case in order to establish adverse differential treatment.

4. The Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in establishing its funding policies.

Analysis

The Federal Court decided that while the Tribunal has the ability to determine its own processes, including motions to dismiss complaints brought in advance of a full

hearing,[2] it must abide by principles of procedural fairness. In this case, there was a breach in procedural fairness as the Tribunal considered extrinsic evidence without providing the parties with notice or an opportunity to respond.[3] That is, the Tribunal did not limit itself to the record generated by the motion to dismiss the complaint—it also considered materials filed in relation to the merits of the complaint[4] The Court held that the breach of procedural fairness reasonably prejudiced the Complainants and rendered the decision invalid. Nonetheless, the Court also found the Tribunal committed three different errors in its interpretation of section 5 of the Act.[5]

Firstly, the Tribunal provided no explanation why s. 5(a) of the Act was not considered when the complaint clearly alleged the denial of services otherwise available to children living off reserve. Instead, the Tribunal focused its analysis on s. 5(b). The Court found that the absence of reasons in this regard created an unacceptable lack of justification, transparency and intelligibility required of a reasonable decision.[6]

Secondly, the Tribunal erred in concluding that the meaning of 'differentiate adversely' under s. 5(b) requires a comparator group receiving the same services from the same service provider in every case to establish discrimination. This interpretation was found to be unacceptable, as it leads to absurd results.[7] While equality is an inherently comparative concept, in some cases the use of a comparator group may not lead to the substantive equality sought by the Act.[8]

The Court recognized that Fist Nations peoples occupy a unique position in Canada's constitutional and legal structure, as they are the only class of people identified by the government for legal purposes on the basis of race.[9] The Court concluded that it would be unreasonable if due to this unique situation, First Nations were placed in a legal 'no man's land'.[10] The result would be to deny the protection of the Act to individuals if they were unable to indentify a suitable comparator.[11]

Further, the Court found that Tribunal's interpretation could create an internal incoherence between s. 5(a) and s. 5(b) by imposing a higher evidentiary burden on those who suffer adverse differentiation than those who are denied a service altogether.[12] The Federal Court suggested that the plain word meaning of 'differentiate adversely' simply refers to treating someone differently because of their membership in a protected group.[13]

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[2] *Canada (Human Rights Commission) v. Canada (Attorney General)* 2012 FC 445 at para. 157.
[3] *Ibid*, at para. 168.
[4] *Ibid*, at para. 173.
[5] *Ibid*, at para. 204.
[6] *Ibid*, at para. 221.
[7] *Ibid*, at para. 251.
[8] *Ibid*, at paras. 292-293.
[9] *Ibid*, at para. 332.
[10] *Ibid*, at para. 337.
[11] *Ibid*, at para. 360.
[12] *Ibid*, at para. 277
[13] *Ibid*, at para. 254.

The Court noted that the interpretation of human rights legislation requires a large, purposive and liberal approach in a manner consistent with the legislation's overarching objectives. Further, interpretation of the Act must be consistent with Charter values, Parliament's decision to repeal s. 67 of the Act[14], as well as Canada's international obligations.[15]

Finally, the Federal Court held that the Tribunal erred when it failed to consider the significance of the federal government's own adoption of provincial child welfare standards in its funding polices. The Tribunal never addressed what, if any, implications this may have had in determining that child welfare services could not be compared to those provided by the province.[16] The Court concluded this was a matter that must be dealt with by the Tribunal.

As a result of these errors, the Court set aside the decision of the Tribunal. The matter was remitted back to a new panel for redetermination in accordance with its reasons. [17]

CONCLUSION

Although the matter was remitted to the Tribunal to address the jurisdictional issue, it seems likely that the complaint will be decided on its merits, given the strong language of the Federal Court.

While the Court's decision was not a finding that the federal government's actions are discriminatory, it is a significant decision in the interpretation and applicability of human rights legislation to First Nations living on reserve. The decision could open the door to similar challenges for funding of other services provided on reserve—like education, health and housing. The reasons in this decision confirm that the federal government will be unable to immunize itself with the argument that its funding policies cannot be compared to those of the provinces.

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[14] Section 67 the Act excluded people living on reserve from filing a complaint relating to any action arising from or pursuant to the *Indian Act*.
[15] UN Declaration of the Rights of Indigenous Peoples.
[16] *Ibid*, at para. 379
[17] *Ibid*, at para. 395