Federal Court  Cour fédérale

Date: 20140530

Docket: T-2274-12

Citation: 2014 FC 527

Ottawa, Ontario, May 30, 2014

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CHIEF R. DONALD MARACLE IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE MOHAWKS OF THE BAY OF QUINTE, CHIEF WILLIAM MONTOUR IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE SIX NATIONS OF THE GRAND RIVER, CHIEF JOEL ABRAM IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE ONEIDA NATION OF THE THAMES, AND CHIEF HAZEL FOX-RECOLLET IN HER PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF WIKWEMIKONG UNCEDED INDIAN RESERVE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review the Applicants (referred collectively as the First Nations) seek to set aside a screening decision made by the Canadian Human Rights Commission (Commission) on November 20, 2012 that dismissed their complaint of discrimination under paragraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H (Act).

[2] The Applicants represent four of the five largest First Nations in Ontario. Their complaint to the Commission alleged that federal funding for core programs and services is discriminatory because it differentiates adversely based on Band size. The particulars of the concern are set out in paragraphs 10 and 11 of the Applicants' Memorandum of Fact and Law:

> 10. As described in the complaint, the FLFNF Study confirmed that there are many cases where the five largest First Nations receive substantially less funding per capita than smaller First Nations. Concentrating on four areas (education funding, major capital funding, minor capital finding [sic], and infrastructure funding), the study concluded that while factors such as economies of scale and urban proximity might justify a portion of this difference, there remain significant gaps that cannot be explained by such factors.
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> 11. The complaint alleges that the distribution formulas which account for these funding gaps distinguish between members who belong to larger and smaller First Nations in a variety of ways. Some formulas explicitly provide that higher weightings be accorded to smaller populations, while funding in other areas is capped based on population. The complaint further alleges that some formulas do not, on their face, distinguish between larger and smaller First Nations, but nevertheless have a disparate impact on larger First Nations. In some cases, the impugned formulas are adversely affected by population growth rates, or exacerbate the way other formulas distinguish between larger and smaller First Nations.

[3] The Applicants' complaint to the Commission was initiated on January 27, 2010. Part of the relief requested called for the Commission to order the elimination of discriminatory features in Indian and Northern Affairs Canada's (INAC), now called Aboriginal Affairs and Northern Development Canada (AANDC), distribution formulae such that any per capita differences would be attributable solely to proven economies of scale and urban proximity. The remedial measures demanded were, however, not to operate to the disadvantage of smaller First Nations but only through increased funding to larger First Nations.

[4] On a preliminary review the Commission invited the parties to address an issue of jurisdiction under paragraph 41(1)(c) of the Act. The Commission's concern at that time was whether the complaint failed to identify a prohibited ground of discrimination.

[5] Notwithstanding the recommendation of the Commission's Investigator that the complaint be dismissed on jurisdictional grounds, the Commission decided to refer the matter for further investigation on the merits. The Commission's decision, made on November 24, 2010, was to the effect that the application of neutral funding criterion may still have an adverse discriminatory effect based on First Nations' membership or affiliation. This decision was challenged by the Respondent on judicial review. In a Judgment rendered on January 27, 2012, Justice Marie-Josée Bédard dismissed the Respondent's application on the following basis:

> [46] In this case, the respondents allege that the differential treatment that they receive in application of INAC's funding formulas derives from their membership in specific First Nations, which are all identifiable by their national or ethnic origin. I am not ready to conclude that it was unreasonable for the Commission to determine, at the pre-investigation stage, that it was not plain and obvious that the complaint falls beyond its jurisdiction. The respondents' complaint discloses a link, although a tenuous one,

between the disadvantageous effects of INAC's funding formulas (they receive less funding per capita) and the fact that they are members of specific First Nations identifiable by their national or ethnic origin. Is the alleged link sufficient to reasonably support a case of adverse effect discrimination? I am of the view that this determination is not obvious on the face of the complaint and will be best reached following an investigation. If, following the investigation, the Commission is not satisfied that the complaint discloses a sufficient link to a prohibited ground of discrimination, it can still dismiss a complaint for lack of jurisdiction.

[47] The wording of section 41 of the Act clearly suggests that the Commission is vested with discretion when deciding to deal with a complaint. It is generally accepted that a reviewing Court should not interfere with the exercise of discretion merely because it may have had exercised this discretion differently than the Court would (*PPSC Enterprises Ltd. v Canada (Minister of National Revenue)*, 2007 FC 784 at para 21, 159 ACWS (3d) 299. This Court may only intervene when the Commission's decision is unreasonable, meaning when it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47). In *Dunsmuir*, at para 47, the Court also held that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions." In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, Justice Binnie, writing for the majority, clearly indicated that the reviewing Court should not substitute its own view of a preferable outcome:

> 59 Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

> [48] I am therefore of the view that it was reasonable for the Commission to conclude that it was not plain and obvious that the respondents' complaint falls beyond its jurisdiction. Accordingly, the application for judicial review is dismissed.

[6] At this point the Commission assigned the complaint to its Investigator. The Investigator considered the submissions from the parties along with a number of documents dealing with First Nations federal funding. Two studies that figured prominently in the Investigator's assessment were a 2008 PriceWaterhouseCooper Report entitled "A Comparative Analysis of Indian and Northern Affairs Canada Funding Study for the Five First Nations and all Other First Nations in Ontario" (the PWC Report) and a 2006 Community Well-Being Database published by INAC (the CWB Report). The PWC Report was heavily relied upon by the First Nations to prove the existence of funding disparities. The CWB Report was produced to the Investigator by INAC and only came to the attention of the First Nations when the Investigator's Report was circulated to the parties.

[7] The Investigator's Report was issued on July 24, 2012. It contained a detailed assessment of both the PWC Report and the CWB Report. Although the Investigator appears to have accepted the existence of the funding disparities identified in the PWC Report, she also found that the CWB data suggested that band size was not a useful indicator of prevailing socio-economic conditions. This point is addressed at paragraph 55 of her report:

> 55. If differential funding were occurring based on band size and resulting in adverse effects on large communities. band population could be a predictor of poor socio-economic conditions. The Community Well-Being Index, however, demonstrates that large communities are more likely to have better-than-average socio-economic conditions than smaller communities.

[8] The Investigator recommended that the complaint be dismissed on the basis that the evidence did not support the allegations that the First Nations were treated in an adverse differential manner. In the alternative, the Investigator found that the identified funding disparities could not be attributed to the national or ethnic origins of the First Nations. The Investigator's analysis is summarized in the following concluding paragraphs of her report:

> 68. In this case, it is not obvious that "size" is a fundamental feature or characteristic of national or ethnic origin. The complainants have been asked to provide some evidence that "size" is an aspect of the protected ground of national or ethnic origin. They have not done so. The PWC Study relied on by the complainants purportedly shows a difference in funding, however, it does not show how that difference in funding is directly or indirectly related to national or ethnic origin.
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> 69. If accepted, the argument advanced by the complainants would change the discrimination analysis such that a respondent would have to justify any adverse differential treatment rather than only adverse differential treatment that is linked - either directly or indirectly - to a prohibited ground of discrimination. This would not be consistent with the SCC decision in Meorin. In Meorin, the SCC did away with the distinction in the defences available to direct and indirect (adverse effect) discrimination. However, the SCC did not change the prima facie case of discrimination which requires that a complainant show that the differential treatment is linked, either directly or indirectly (adverse effect) to one or more grounds of discrimination.
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> 70. Protection against discrimination on the basis of national or ethnic origin does not mean that AANDC cannot make distinctions in funding between different First Nations so long as those distinctions are not based directly or indirectly or otherwise through adverse effect, on a "fundamental distinguishing feature" that is part of the national or ethnic origin of one or more First Nations. Typically those features relate to characteristics such as the identity, language, beliefs, customs or traditions of a First Nation.
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> …
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> 80. In this case, the information brought forward has shown that the funding policies take into account many different factors, some of which may favour large First Nations and some of which

> do not. It does not indicate that the differences are based on national or ethnic origin. Some of these factors take into account population, location (urban, remote, fly in communities), economy of scale, and historical funding patterns. However the evidence does not indicate that the factors used in the funding formulas differentiate between large First Nations and small First Nations according to their national or ethnic origin.
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> 81. It is not disputed that AANDC's policies treat some First Nations differently on the basis of their size for a variety of reasons, however the complainants have not demonstrated that the size of a community is linked to a prohibited ground. As such, notwithstanding the adverse differential treatment asserted by the complainants, the complaint does not warrant referral to the Tribunal.

[9] In accordance with its usual practice, the Commission sent the Investigator's Report to the parties for review and comment. The First Nations responded with a 10-page critique. They noted that the CWB Report had not been earlier disclosed to them and said that "this is the first opportunity afforded to the complainants to make submissions on the relevance of this evidence…". The First Nations then challenged the Investigator's reliance on the CWB Report in the following manner:

> 15. In the alternative, if the complainants do have to establish that they are more impoverished than other First Nations to claim that the differential per capita funding they receive adversely affects their members, CWB scores in no way indicate that the complainants "are not financially worse off" than smaller First Nations. The Database provides no scores whatsoever for three of the four complainants. The Investigation Report wrongly relied on CWB scores of <u>other</u> First Nations to conclude that these three complainants "are not financially worse off" than smaller First Nations. The evidence gathered may show that some First Nations "are not financially worse off" than other First Nations. But there was no evidence before the Investigator comparing the community well-being of these three complainants to that of smaller First Nations.
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> 16. The Database does provide a CWB score for one of the four complainants, Wikwemikong Unceded Indian Reserve.

> Whether Wikwemikong is financially better or worse off than other First Nations, however, cannot be determined solely by CWB scores unilaterally prepared by the respondent to this complaint. If they are relevant, the comparative social and economic conditions of First Nations are complex matters of fact requiring a full hearing for their proper determination.
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> 17. At the very least, if comparisons between the relative well-being of complainants and other First Nations are necessary to establish that the complainants are adversely affected by AANDC's funding arrangements, then such comparisons must relate directly to the services funded by AANDC's arrangements. CWB scores provided by the respondent do not rank the quality of services funded by AANDC at issue in this complaint, namely, educational, major and minor capital, infrastructure, and Band support services.

[10] It is noteworthy that the First Nations did not ask for more time to address the CWB Report evidence or the Investigator's use of it and no complaint of unfairness was raised before this application for judicial review was initiated.

[11] To ensure complete disclosure the Commission provided each party with the other's submission. At that point, the First Nations requested and received the right to make a further submission in response to INAC's submission. Once again no request was made to the Commission for more information or for more time to respond to the Investigator's Report.

[12] On November 20, 2012, the Commission dismissed the First Nations' complaint on the following basis:

> - the evidence gathered does not support the allegation that the complainants are treated in an adverse differential manner as compared to smaller First Nations, and further, if they are, this is not based on national or ethnic origin.

It is from this decision that this application arises.

I. Issues

[13] The issues as framed by the First Nations are the following:

(a) What is the appropriate standard of review?

(b) Did the Commission breach the duty of procedural fairness and natural justice by: denying the Applicants a reasonable opportunity to address crucial evidence; relying upon an Investigation Report which failed to properly consider essential and unchallenged evidence; or by failing to provide sufficient reasons for its decision?

(c) Did the Commission err in law by: ignoring or failing to properly consider the relevant factors required under subsection 44(3) of the CHRA; or by applying the incorrect test with respect to establishing a link between differential treatment and prohibited grounds?

II. Standard of Review

[14] I cannot improve upon the standard of review analysis carried out in this case by my colleague Justice Bédard. In the earlier proceeding it was the Respondent Minister who took exception to the Commission's pre-investigation decision to deal with the First Nation's complaint notwithstanding a staff recommendation that it not be entertained. It is now the turn of the First Nations to challenge the Commission's decision to dismiss the complaint at the post-investigation stage under subsection 44(3)(b)(i) of the Act. Justice Bédard held that insofar as such a decision involves a question of mixed fact and law it must be reviewed under the standard of reasonableness. For the issue of procedural fairness raised by the First Nations, I will apply the standard of correctness.

III. Procedural Fairness

[15] The First Nations contend that the Commission breached the duty of fairness by failing to reopen its investigation in the face of their criticism of the Investigator's analysis of the CWB Report. They argue that their opportunity to respond to that analysis directly to the Commission was not sufficient to remedy the Investigator's failure to disclose it before completing her report. In effect they say that they were entitled to the Investigator's full and thorough consideration of their concerns. According to this theory of fairness, the right to respond directly to the Commission at the end-stage of the screening process cannot cure a defective investigation – at least insofar as it pertains to obviously crucial evidence.

[16] I accept that the duty of fairness may be breached when the Commission's Investigator fails to gather or consider crucial evidence. Serious investigatory omissions may not be curable by extending an opportunity to a party to simply bring them to the attention of the Commission. That is so because in the exercise of its screening jurisdiction the Commission must have "an adequate and fair basis" to determine whether there was "sufficient evidence to warrant appointment of a tribunal": see *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at para 48, [1994] FCJ No 181 (FCTD) aff'd [1996] FCJ 385, 205 NR 383 (FCA) [*Slattery*]. The situation is different, however, where the affected party receives a comprehensive investigation report and is given an opportunity to critique its contents.

[17] I do not read the *Slattery* decision as broadly as the Applicants urged. The problem addressed in that case had to do with the thoroughness of the Commission's investigation and, in

particular, with the Investigator's failure to interview certain witnesses. Justice Marc Nadon dealt with this problem in the following way:

> 69 The fact that the investigator did not interview each and every witness that the applicant would have liked her to and the fact that the conclusion reached by the investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where the applicant has the opportunity to fill in gaps left by the investigator in subsequent submissions of her own. In the absence of guiding regulations, the investigator, much like the CHRC, must be master of his own procedure, and judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient. In the case at bar I find that the investigator did not fail to address any fundamental aspect of the applicant's complaint, as it was worded, nor were any other, more minor but relevant points inadequately dealt with that could not be dealt with in the applicant's responding submissions.

[18] It is clear to me that paras 56 and 57 of the *Slattery* decision are directed at the problem of thoroughness as it pertains to gaps or omissions in the record and not to the adequacy of the Investigator's analysis of the evidence. Substantive weaknesses in the Investigator's Report go to the reasonableness of the Commission's ultimate decision and not to the issue of procedural fairness at the investigation stage. This point is made even clearer in the appeal decision from *Slattery*, above, where Justice James Hugessen stated:

> 1 HUGESSEN J.:— We are all of the view that the Commission fully complied with its duty of fairness to the complainant when it gave her the investigator's report, provided her with full opportunity to respond to it, and considered that response before reaching its decision. The discretion of the Commission to dismiss a complaint pursuant to subparagraph 44(3)(b)(i) is cast in terms even broader than those which were considered by the Supreme Court of Canada in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)* where the content of the duty of fairness in such cases was described as follows by Sopinka J. for the majority:

> I agree with the reasons of Marceau J. that the Commission had a duty to inform the parties of the substance of the evidence obtained by the investigator and which was put before the Commission. Furthermore, it was incumbent on the Commission to give the parties the opportunity to respond to this evidence and make all relevant representations in relation thereto.
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> The Commission was entitled to consider the investigator's report, such other underlying material as it, in its discretion, considered necessary and the representations of the parties. The Commission was then obliged to make its own decision based on this information.
> [at page 902]
>
> 2 In our view, the defects which the complainant alleges in the preparation of the investigator's report could not serve to vitiate the Commission's decision as long as these requirements were met.

[19] The Applicants rely on two decisions of this Court that indicate that the Commission may be required to alert the parties to evidence that may not have come to their attention before an investigation is closed: see *Cerescorp Company v Marshall*, 2011 FC 468 at paras 77-82, [2011] FCJ No 576 [*Cerescorp*] and *Egan v Canada*, 2008 FC 649 at para 16, [2008] FCJ No 816 [*Egan*]. To the extent that these decisions suggest that the Commission may be required to reopen an otherwise thorough investigation, I am not disposed to follow them.

[20] The First Nations argue that they "were denied any reasonable opportunity to review and make submissions on the proper interpretation, relevance, or underlying data in the well-being evidence which was ultimately crucial to the Commission's decision" (see para 38 of the Applicant's Memorandum of Fact and Law). In the face of what actually took place that argument is untenable. If an aggrieved party needs more time to respond or believes that a

matter requires further investigation, it has a responsibility to make those concerns known to the Commission. If a party chooses to respond solely to the substance of an investigation report, it may well be taken to acquiesce to the adequacy of the investigation process. This obligation to make the decision-maker aware of fairness concerns was recently expressed by Justice David Stratas in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at paras 67-68, [2014] FCJ No 236.

> 67 I note that Maritime Broadcasting's procedural fairness submissions in this Court run counter to a well-established line of jurisprudence and, thus, must be rejected. An applicant must raise an alleged procedural violation at the earliest practical opportunity: *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at paragraph 220, aff'd 2007 FCA 199; In *Re Human Rights Tribunal and Atomic Energy of Canada*, [1986] 1 F.C. 103 (C.A.) at page 113. The earliest practical opportunity is where "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.": *Benitez, supra* at paragraph 220; see also D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998) at paragraph 3:6000. A party "cannot wait until it has lost before crying foul": *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paragraph 66.
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> 68 Had Maritime Broadcasting objected or had it asked the Board for the right to make additional submissions before the Board released its original decision, the Board might have been able to assist it. However, having failed to object or ask to make further submissions, it must be taken to have been satisfied with the matter: *Bowater, supra* at paragraph 55, a decision relied upon by the Board when it reconsidered its original decision. Accordingly, Maritime Broadcasting has waived any rights to raise the matter on judicial review.

[21] In this case, the First Nations did not object to the process that was followed nor did they seek more time to respond to the Investigator's treatment of the CWB Report and its data. Beyond pointing out to the Commission that they had not previously seen the CWB Report and were not privy to the underlying CWB data, no fairness concern was raised. Instead the First

Nations challenged the substance of the Investigator's analysis of this evidence with particular emphasis on the comparative weakness of the CWB data. In my view, it is not open to the First Nations to limit their attack in this way and then complain about procedural unfairness when their substantive arguments were found wanting.

[22] The First Nations argue that the Commission's investigation was procedurally unfair because "little attention" was paid to the PWC Report and because the Commission's reasons were insufficient. In my view these are concerns that are relevant to the reasonableness of the Commission's decision and not to the fairness of the process that was followed. The Investigator and, by implication, the Commission considered the PWC Report in considerable detail and provided reasons for dismissing the complaint. Taking issue with the quality of the review and the reasoning applied to the evidence does not raise a point of procedural fairness: see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at paras 20-21, [2011] SCJ No 62.

IV. Is the Decision Reasonable

[23] In assessing the reasonableness of the Commission's decision, it is important to observe that reservations about the viability of the First Nations complaint and their inability to clearly articulate a theory of discrimination appear throughout the record. In the Commission's section 40/41 Report the following concern was expressed:

> 30. The Complainant has not provided information with respect to the differences and the similarities between the larger First Nations and the smaller First Nations mentioned in the complaint. Therefore, there is no information on how the

> differences and similarities are linked to national or ethnic origin.
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> 31. The Complainant has not provided reasonable grounds for believing that the alleged adverse differentiation is based on the national or ethnic origin of the First Nations named in the complaint. Therefore, the complaint does not appear to be based on a prohibited ground under the Act.
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> b) *Link to a Prohibited Ground*
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> 32. Insofar as the complaint does not appear to be based on a prohibited ground under the Act, it also lacks a link to a prohibited ground.

Notwithstanding the above concerns, the Commission allowed the complaint to move to the investigation stage on the basis that it was not plain and obvious that the Commission lacked jurisdiction or that discrimination could not be established. Justice Bédard appears not to have been particularly impressed with the complaint. Although she found the Commission's decision to proceed with an investigation to be reasonable, there were, she said, "compelling arguments to support [the Minister's] position".

[24] The Investigator also had some difficulty understanding the particulars of the First Nation's concern and requested clarification:

> In accordance with the principles of procedural fairness the respondent must be given enough specifics to be able to respond to the complaint. Therefore, specific acts of discrimination must be alleged, along with specific adverse effects. You state that the PriceWaterhouseCoopers LLP study (the study) is a "cornerstone" of your complaint, and that additional evidence is not required. However, in order to establish a link to a ground of the CHRA, we will also need direct information to demonstrate the disadvantage is attributed to the ground of national or ethnic origin. Relying on the Study, you allege that the arbitrary nature of AANDC's funding policies constitutes discrimination as they distinguish between members who belong to larger and smaller First Nations

> in arbitrary and unjustifiable ways. However, it appears the complaint may have broadened so as to include "First Nations across Canada" in relation to Aboriginal Affairs and Northern Development Canada's alleged "chronic underfunding of First Nations across Canada". Again, there is no linkage between the broad categories of funding alleged to be discriminatory and how funding practices impact on your clients in particular.

[25] In a lengthy reply, Professor Patrick Macklem sought to link Band membership to national or ethnic origins. He concluded this part of his analysis as follows:

> The funding formulas at issue in this complaint employ population size as an ostensibly neutral criterion, but, in its application, this criterion causes benefits to be withheld from particular groups of individuals on the basis of First Nation membership. It does not matter that AANDC's intention was not to discriminate on the basis of national or ethnic origin or that the size criterion is a standard being applied equally among First Nations. The clear effect of its funding allocations is to adversely differentiate on the basis of national or ethnic origin. The size criterion has the effect of providing disproportionate funding to certain classes of individuals (smaller First Nations) identifiable by national or ethnic origin than other classes of individuals (larger First Nations) identifiable by national or ethnic origin.
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> Adverse effects discrimination is a basic principle of human rights law: that of adverse effects discrimination. Height is not a prohibited ground of discrimination, but height requirements for employment have adverse effects on female applicants and thus engage a prohibited ground of discrimination. Weight is not a prohibited ground of discrimination, but weight requirements for employment have adverse effects on female applicants and thus engage a prohibited ground of discrimination. So too with size. The size of a racial group is not a prohibited ground but the size of a racial group as a funding determinant can have adverse effects on particular racial groups. If a government provided more education funding to Caucasians in Vancouver than to other racial groups because of the relatively small size of Vancouver's Caucasian population, this would amount to a *prima facie* case of discrimination on the basis of race. Similarly, the size of a First Nation is not a prohibited ground of discrimination, but population size as a finding determinant has adverse effects on classes of individuals identifiable by their national or ethnic origin and thus

> links these effects to a prohibited ground of discrimination.
> [Footnotes omitted]

[26] Subsequently, Professor Macklem acknowledged that more information was required for meaningful analysis of the First Nations' complaint but argued that it was up to the Minister to provide convincing evidence that the unexplained funding gaps serve a rational and legitimate purpose (see Application Record, Volume 1, p 207).

[27] The Applicants relied heavily on a report prepared by the PWC report. The PWC report was commissioned jointly by INAC and the five Bands who are the parties to this proceeding. Its purpose was to examine funding differences that exist as between large First Nations and other First Nations in Ontario that might lead to inequities. The specific objects of the study were:

- Quantify the gaps in per-capita' funding levels between the average amount the Five Large First Nations receive and the average amount all other First Nations in Ontario receive for the five development areas with the largest gaps;
- Investigate the underlying INAC formulas and policies that are used to allocate funds to First Nations in Ontario; and
- Comment on the formulas and policies in light of the differences in funding levels between the five largest First Nations and other First Nations in Ontario.

[28] The authors of the PWC report clearly recognized the methodological limitations that applied to their work. They noted that the examination of relative hardship is difficult because it is governed by many variables such as location, proximity to markets, critical mass and economies of scale, demographic factors, well-being considerations and infrastructure differences. As far as I can tell, the study did not closely examine the historical rationale for the

funding formulae that it considered nor did it examine the five specific programs in the context of other streams of band income.

[29] The PWC report did identify a number of differences in the funding of education, major and minor capital projects, infrastructure and band support and offered the following summary of its conclusions:

> This document has illustrated that there are many cases where the Five Large First Nations have received substantially less funding per capita than smaller First Nations. In many of these circumstances the rationale for lower funding is not apparent and there is a strong likelihood that these differences are creating an inequity between these and other First Nations. Moreover, in at least one case, the formula was set over 20 years ago and changes in the number of bands and population growth have served to further widen the gap between the Five Large First Nations and other First Nations.
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> We believe that it is important that INAC consider these findings and work with the Five Large First Nations to address the issues raised.

Some of the specific concerns contained in the PWC report include the following:

> EDUCATION FUNDING
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> - In some instances, the per-capita gaps seen in the total budgets are justifiable and do not impinge on the Five Large First Nations' ability to deliver education or disadvantage them by way of their size. For example, it was shown that part of the gap in Tuition Agreements funding is the product of higher students rates charged out by the province. Because these are flow-through costs, they do not limit the number of students a First Nations may send, nor do they impact the quality of education as all provincial schools are legally mandated to operate at a minimum provincial standard by way of the Ontario Education Act.
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>   In other cases, it has been shown that INAC policies and funding formulas do contain elements that may

disadvantage larger First Nations by assuming unrealistic economies of scale and by providing a disproportionately high amount of funds to smaller First Nations relative to their student bases. Examples of these elements include the system allocation for council-operated schools in the Instructional Services Formula and the High Cost Special Education for council-operated schools, respectively.

…

MAJOR CAPTIAL FUNDING

- The per-capita gap in budgeted allocations for Major Capital between the Five Large First Nations and all other First Nations in Ontario is most prominent in water, sewage and wastewater systems development, the same areas in which the Five Large First Nations have indicated a pressing need for capital dollars. Over the 2003/04 to 2006/07 period the cumulative difference in funding was $62.4 million. Water, sewage and wastewater accounted for approximately 64% of this difference.

  Total differences in funding levels are the product of a variety of factors. First, some differences are expected as a result of higher costs for materials and labour in more remote communities. INAC's Cost Reference Manual provides specific price indices to compensate First Nations for such increased costs. Differences in the number of approved projects or the project approval rates further contribute to the observed gap. If the Five Large First Nations were submitting fewer project submissions in spite of clear capital needs, this may signal a lack of administrative capacity to adequately participate in INAC's capital allocations process. Alternatively, if it can be shown that the decisions made by the Regional Management Investment Board led to higher project rejection rates for the Five Large First Nations, further inquiry into their decision making criteria is warranted to ensure that the needs of the Five Large First Nations are reflected in INAC's capital allocation priorities going forward. [Footnotes omitted]

MINOR CAPITAL FUNDING

- Regional Directive CM-CAP-02 was created in 1988 based on the distribution of population by First Nations at that time. The increase in the number of smaller First Nations,

combined with the more rapid population growth among the Five Large First Nations has meant that the distribution of funding to the larger First Nations has become more inequitable than originally intended. While it may be possible that larger First Nations require less funding per-capita than smaller First Nations due to scale economies, the formula needs to be reconsidered.

INFRASTRUCTURE FUNDING

- The per-capita gap in Infrastructure funding is the result of two aspects of INAC's formula for allocating Operations and Maintenance funds. First, the maintenance for assets that each First Nations manages is subsidized at different rates, depending where the First Nation is located. The policy for maintenance prices is highly detailed and was updated in 2005 to reflect changes in local prices and access to special services.

  However, with regard to the operations and maintenance of schools, electrical systems, roads and bridges and water systems, most of the per-capita gaps observed in the 2005/06 budget are the result of different levels of assets under management. Such differences can be traced back to gaps in capital funding through the Major Capital development areas. Thus, lower per-capita funding in Major Capital has been shown to lead to a concurrent gap in infrastructure funding.

  The non-Five Large First Nations receive $550 per school aged person, 53% more than the Five Large First Nations. This large difference merits further investigation, particularly in light of the low school attendance rates among youth on the Five Large First Nations, and the lower per-student funding.

  The Five Large First Nations receive $84 less per capita for the operations and maintenance of roads and bridges per on Territory status member. Ideally, this analysis would examine the number of kilometres of each road type and the number of bridges each First Nation manages in order to fully appreciate the differences in operations and maintenance funding.

  After removing the effects of the city indices, zone indices and the asset factors the Five Large First Nations receive $129 less for the operations and maintenance of water

systems per on Territory status member. Because the unit costs for water systems are the same for all First Nations in Ontario, the infrastructure spending data suggest that the Five Large First Nations have less water systems capital assets.

BAND SUPPORT FUNDING

- The current INAC policy on Band Support Funding is based on population and Basic Services, amongst other factors. In some instances population based formula caps allocations according to a First Nation's size. Where this is the case, it appears that the policy does not recognize the increased costs of First Nations governance for large First Nations in Ontario. Were the cap removed on the Council Component, the Five Large First Nations would receive an increase in their maximum allotment of Band Support Funding of approximately $1.9 million.

  In addition, formulae that are based on Basic Services have created a compound effect in some areas of Band Support Funding. Underfunding in Education, Minor Capital and Infrastructure decreases the total allocations for the Basic Overhead and Audit and Professional components of Band Support Funding. Indeed, correcting certain funding differences in the Education, Minor Capital and Infrastructure development areas would help increase the amount of total Band Support Funding the Five Large First Nations would receive.

  Because Band Support Funding is delivered to all First Nations through a national funding envelope, the calculated amounts in the formulas discussed in this study represent their respective maximum allotments. If the sum of all First Nations' maximum amounts exceeds the national envelope, each will receive a share funds in proportion to their calculated maximum. For this reason, changes to the specific funding formulae discussed above will not necessarily increase the Five Large First Nations' funding by the calculated amount but will increase their respective shares of the total national budget.

[30] The PWC report did not attribute any discriminatory intent to the funding disparities that were identified. Instead it attributed some of the problem to a failure to adjust funding to

account for demographic changes. In other cases, it was not possible to know whether a valid rationale for a funding differential had been or remained present.

[31] The First Nations assert at paragraph 3 of their Memorandum of Fact and Law that dismissing their complaint for the reasons given by the Investigator was inconsistent with the Commission's section 41 finding as upheld by Justice Bédard. This is a mischaracterization of the Commission's section 41 decision. All the Commission decided was that, in the absence of a substantive investigation, it was not plain and obvious that a link between the asserted disadvantages and a prohibited ground could not be made out. It was only the reasonableness of that threshold decision that Justice Bédard was required to consider and not whether such a link had been established.

[32] The First Nations argued to the Commission and on this application that, where band per capita funding inequities arise from the application of facially neutral criteria, a *prima facie* complaint of discrimination is made out. This point is said to be buttressed with the argument that band size can be a marker or proxy for national or ethnic origin.

[33] The Respondent answered by pointing out that bands are a legislative construct and may include members with different national or ethnic origins. The Respondent also argued that it is inapt to examine discrete funding streams in isolation of the entire range of federal supports. The programs discussed in the PWC Report were, according to the Respondent, never intended to be funded on a per capita basis. Instead, the funding formulae were designed to take into account many variables intended to address the funding needs of each band.

[34] The Investigator considered these arguments and recommended the dismissal of the complaint. Clearly she preferred the arguments advanced by the Respondent and concluded that the funding formulae "are based on many factors, some of which will favour large First Nations and some of which will not". She also found that the evidence did not show a link to a prohibited ground. This was not an unreasonable conclusion. It was based on a thorough analysis of the evidence presented and it is well supported by comprehensive reasons.

[35] It is apparent from my reading of the record that this complaint was fundamentally concerned with the adequacy of federal funding to First Nations. The First Nations were unable to articulate a plausible theory of discrimination to either the Commission or to the Court and, in the end, fell back on a demand that INAC explain its approach. They should not have been surprised when the Commission refused to take up that suggestion and dismissed the complaint.

[36] For the foregoing reasons, this application is dismissed. The First Nations were awarded their costs in the earlier application before Justice Bédard. The Respondent is entitled to the same treatment on this application. The Respondent's costs are to be assessed at the middle of Column III.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs payable to the Respondent at the middle of Column III.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2274-12
STYLE OF CAUSE:	CHIEF R. DONALD MARACLE IN HIS PERSONAL CAPACITY AND, IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE MOHAWKS OF THE BAY OF QUINTE, CHIEF WILLIAM MONTOUR IN HIS PERSONAL CAPACITY, AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE SIX NATIONS OF THE GRAND RIVER, CHIEF JOEL ABRAM IN HIS PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF THE ONEIDA NATION OF THE THAMES, AND CHIEF HAZEL FOX-RECOLLET IN HER PERSONAL CAPACITY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE MEMBERS OF WIKWEMIKONG UNCEDED INDIAN RESERVE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 28, 2014
JUDGMENT AND REASONS:	BARNES J.
DATED:	MAY 30, 2014

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