Federal Court  Cour fédérale

Date: 20120127

Docket: T-8-11

Citation: 2012 FC 105

Ottawa, Ontario, January 27 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The respondents present themselves as four of the five largest First Nations in Ontario. On January 28, 2010, Mr. Patrick Macklem filed a complaint on their behalf before the Canadian Human Rights Commission (the Commission) pursuant to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the Act) alleging discrimination by Indian and Northern Affairs Canada (INAC) on the basis of national or ethnic origin.[1] The complaint alleges that the funding policies of INAC have an adverse effect on the largest First Nations as compared to smaller First Nations in Ontario. On November 24, 2010, the Commission decided to deal with the complaint. This is the decision being challenged in this application for judicial review brought by the Attorney General of Canada under section 18.1 of the *Federal Courts Act*, RCS 1985, c. F-7.

I. Background and decision under review

[2] The basis of the complaint lies in various funding formulas and policies (the funding formulas) used by INAC to allocate funds to First Nations. These funds support a wide range of social and economic programs, policies and initiatives in reserve communities (ex: Band government, Band support, economic development, education, environment, income support, infrastructure, lands and trusts, major capital, minor capital and self-government negotiations).

[3] In 2008, INAC, in cooperation with the five largest First Nations of Ontario, undertook a study for the purpose of examining INAC's funding formulas to determine whether funding inequities existed between the largest First Nations and other First Nations in Ontario. The study

[1] For the purpose of this proceeding, the name of the department will not be amended to reflect its actual name of Aboriginal Affairs and Northern Development Canada.

was conducted by PricewaterhouseCoopers LLP and concentrated on four main areas: education funding, major capital funding, minor capital funding and infrastructure funding.

[4] The respondents submit that the study identified many instances where the five largest First Nations receive substantially less funding per capita than smaller First Nations. They concede that the study shows that economies of scale and urban proximity may explain some differences in per capita funding between larger and smaller First Nations but they argue that, nevertheless, funding gaps in per capita funding remain in each of the four areas studied that cannot be explained or justified by any factor. Thus, the funding formulas distinguish in an arbitrary manner between members who belong to larger and smaller First Nations. The respondents further contend that each First Nation has a unique national or ethnic origin and that therefore a distinction on the basis of First Nation membership amounts to a distinction on the basis of national or ethnic origin, which is a prohibited ground of discrimination. Thus, the funding formulas which distinguish on the basis of the neutral criterion of First Nations' size have an adverse discriminatory effect on members who belong to larger First Nations; members of the larger First Nations will receive less funding per capita because of their membership in that particular First Nation.

[5] The respondents' complaint is based on section 5 of the Act which defines the concept of discriminatory practice:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

(*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	*a*) d'en priver un individu;
(*b*) to differentiate adversely in relation to any individual,	*b*) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

Since the complainants allege adverse effect discrimination, subsection 5(*b*) is relevant to this case.

[6] The prohibited grounds of discrimination, enumerated at section 3 of the Act, are: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

[7] The applicant objected to the Commission's jurisdiction to deal with the respondents' complaint on the basis that the matter of the complaint fell beyond its jurisdiction pursuant to paragraph 41(1)(*c*) of the Act, which reads as follows:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…	[…]
(c) the complaint is beyond the jurisdiction of the Commission;	*c*) la plainte n'est pas de sa compétence;

[8] The applicant argued before the Commission that the distinctions created by the funding formulas are not based on ethnic or national origin but rather on the size of the First Nations, which is not a prohibited ground of discrimination pursuant to section 3 of the Act.

[9] On June 17, 2010, the Resolution Services Division of the Commission issued a Section 40/41 Report endorsing INAC's position and recommending that the Commission decide not to deal with the complaint. The Section 40/41 Report concluded that the complaint did not disclose reasonable grounds for believing that the alleged discrimination was linked to a prohibited ground.

[10] The respondents replied to the Section 40/41 Report and their submissions led the Commission to decide, on January 24, 2010, to deal with the complaint. Indeed, the text of Commission's decision was taken directly from a passage of the respondents' reply to the Section 40/41 Report:

> On the issue of whether the complainant has provided reasonable grounds for believing that the alleged adverse differentiation between Aboriginal nations or groups is based on national or ethnic origin, the Commission is persuaded by the following, set out in the complainant's September 7, 2010 submission, that the Commission should not, at this preliminary stage, decide not to deal with the Complaint:
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> . . .
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> *In the language of adverse effects, size of First Nation is an ostensibly neutral criterion being applied in a way that causes benefits to be withheld from particular groups of individuals on the basis of their personal characteristics, in particular their First Nation membership or affiliation. . . . The clear effect of its funding allocations is to adversely differentiate based on that very ground. This is because an aboriginal person in Ontario, as elsewhere in Canada, is part of a particular First Nation group because of his or her national or ethnic origin. The size criterion being used in INAC's*

funding allocations therefore provides certain groups of individuals sharing common national or ethnic origin (the various smaller Ontario First Nations) with disproportionate benefits. It concomitantly - and arbitrarily - causes equal benefits to be withheld from other groups of individuals sharing common national or ethnic origin (the five largest First Nations in Ontario). Put another way, a member of one of the Complainant First Nations receives less social services funding than a member of one of Ontario's smaller First Nations only because of his or her First Nation affiliation, which is, at the same time, only because of his or her national or ethnic origin.

The Complainant First Nations also meet the tests for national or ethnic origin recognized by the CHRT in Rivers, supra. . . .

The specific national or ethnic differences between the First Nations implicated in this complaint are, at the present stage of the proceeding, largely allegations of fact. Despite the RSD's references to lack of substantive evidence on the issue, that is exactly how it should be, The present pre-screening phase is not an appropriate time for detailed and, even expert evidence as to the distinguishing social, cultural, and historical features between the groups, such as was heard by the CHRT during the course of a formal hearing in Rivers. . . .The issue here and now is not whether there is substantial evidence distinguishing the First Nations, but whether the claim that their members are of distinct national or ethnic origin is reasonable and, if believed, could lead to a finding of discrimination under the Act. In our submission, the allegations are reasonably based and the Complainant First Nations should be given the opportunity of proving them through the evidentiary processes of a Commission proceeding and, potentially, a hearing before the CHRT.

Conclusion

For the foregoing reasons and with respect, the RSD's recommendation to the Commission is in error. It is not plain and obvious that the complaint is beyond the Commission's jurisdiction generally. Specifically, it is not plain and obvious that members of the Complainant First Nations are not being discriminated on grounds of their national or ethnic origin.

[Emphasis added]

II. Issue

[11] The only issue raised in this judicial review proceeding is whether the Commission erred in deciding to deal with the complaint.

III. Standard of review

[12] This hearing was held before the Supreme Court of Canada issued its judgment in *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2011 SCC 53 [*Mowat*]. On November 21, 2011, I issued a direction whereby I offered both parties the opportunity to make additional submissions on the issue of the applicable standard of review in light of *Mowat,* and both parties have done so.

[13] The applicant contends that the case law as to the appropriate standard of review for decisions by the Commission pursuant to paragraph 41(1)(*c*) of the Act is unsettled. However, the applicant argues that, in this case, the Commission's decision bore on a question of law pertaining to the jurisdiction of the Commission. As such, it should be reviewed on a standard of correctness. The applicant cites *Canada (Attorney General) v Watkin*, 2007 FC 745, 313 FTR 318, aff'd 2008 FCA 170 at para 23, 378 NR 268 and *Hicks v Canada (Attorney General)*, 2008 FC 1059 at paras 9, 21, 334 FTR 260 [*Hicks*] in support of this position.

[14] The applicant further argues that *Mowat* militates in favor of the correctness standard of review as it reaffirms that the correctness standard applies to true questions of jurisdiction or *vires*. In the applicant's view, the question of whether a prohibited ground is engaged by a complaint

constitutes a true question of jurisdiction as it determines whether the Commission may deal with the complaint.

[15] The respondents, for their part, contend that the question of whether a distinction on the basis of the size of a First Nation amounts to adverse effect discrimination is a question of mixed fact and law. The question relates to the proper interpretation of the Act and such a question is entitled to deference by a reviewing court. They also acknowledged that the question of whether a complaint establishes a link to a prohibited ground of discrimination also attracts the reasonableness standard of review. On the other hand, they contend that the question of whether Band or First Nation membership equates to or is a marker for national or ethnic origin, is a true question of jurisdiction or *vires* which should be reviewed under the correctness standard of review. They add that this question is one that is of central importance to the legal system as a whole and that it raises constitutional issues.

[16] They argue, however, that *Mowat* emphasizes that the focus of analysis should remain on the nature of the issue that was before the Commission. In deciding to deal with the complaint, the Commission did not decide all of those above-mentioned issues; it simply determined that it was not plain and obvious that the complaint was beyond its jurisdiction and that it would undertake an investigation into the complaint. The respondents submit that, according to *Mowat*, the Commission was required to answer this question correctly.

[17] In my opinion, the question of whether a complaint falls beyond the Commission's jurisdiction involves an assessment of whether the complaint discloses a sufficient link to a

prohibited ground of discrimination which is a question of mixed fact and law. Therefore, and for the following reasons, I am of the view that the Commission's decision should be reviewed under the reasonableness standard of review.

[18] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, 1 SCR 190 [*Dunsmuir*], the Supreme Court held that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular group of questions. . ." (see also *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 53, [2009] 1 SCR 339).

[19] The wording of section 41 of the Act suggests the exercise of discretion by the Commission. Recent case law also suggests that the applicable standard of review of a decision by the Commission as to whether a complaint falls within its jurisdiction should be reviewed under the standard of reasonableness (*Comstock v Public Service Alliance of Canada*, 2007 FC 335 at paras 27, 30, 310 FTR 277 [*Comstock*]; *Hartjes v Canada (Attorney General)*, 2008 FC 830 at para 17, 334 FTR 277 [*Hartjes*]).

[20] On this matter, I espouse Justice Snider's comments in *Hartjes*:

> **17** *In Comstock v. Public Service Alliance of Canada*, 2007 FC 335, aff'd 2008 FCA 197, Justice Gibson was faced with a judicial review of a decision of the Commission, taken under s. 41(1)(c) of the Act. As in the case before me, the Applicant's complaints to the Commission had been dismissed on the ground that "... the complaints are beyond the jurisdiction of the Commission as no link to a prohibited ground of discrimination was established". In his decision, Justice Gibson carried out a careful analysis of the standard of review. Although this case was pre-*Dunsmuir*, I note that Justice Gibson undertook a pragmatic

> and functional analysis which is, in substance, no different than the second step identified by the majority in *Dunsmuir*. Justice Gibson concluded that that the decision was reviewable on a standard of reasonableness. On the basis of this jurisprudence, I am satisfied that the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a decision of the Commission under s. 41(1)(c) of the Act; that standard of review is reasonableness. I pause to note that Justice Gibson's decision was affirmed by the Court of Appeal in *Comstock v. Public Service Alliance of Canada*, 2008 FCA 197, with no comment on the standard of review adopted by Justice Gibson.
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> **19** In addition, a review of the four factors relevant to the standard of review analysis leads to the same conclusion. First, I observe that there is no privative clause in the CHRA; nor is there any statutory right of appeal. Second, a decision whether the allegations of a claimant are linked to or based on a prohibited ground of discrimination has a significant factual component to it, and involves the exercise of discretion. Third, while the purpose of the legislation is to give effect to the fundamental Canadian value of equality, the CHRA grants the Commission a remarkable degree of latitude when it is performing its screening functions. Finally, the Commission has considerable expertise in human rights matters and in balancing the competing interests of the parties to a complaint.
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> **20** Taking the relevant factors into account, I am satisfied that the Commission's determination as to whether allegations of a complainant are linked to or based on a prohibited ground of discrimination is reviewable under the reasonableness standard.

[21] I am also of the view that *Mowat*, above, supports the proposition that the reasonableness standard of review should be applied to the Commission's decision. In *Mowat*, the Court reiterated the principles enunciated in *Dunsmuir*, above, and stated at para 24 that "[i]n substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness should apply."

[22] While the Commission's determination related to its jurisdiction to deal with the respondents' complaint, this issue involved the interpretation of the Act and an assessment of allegations of fact; these issues are within the core function and expertise of the Commission and relate to the interpretation and application of its enabling statute. Therefore, I am of the view that the Commission's decision must be reviewed under the reasonableness standard of review.

[23] That standard was described as follows in *Dunsmuir*, above, para 47:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

IV. <u>The submissions of the parties</u>

[24] The applicant argues that the respondents take issue with distinctions that are based on the size of the First Nations, not national or ethnic origin. The applicant submits that the distinctions stemming from the funding formulas are based on the number of people that make up the First Nations and that the national or ethnic origin of a First Nation's members has no impact on the level of funding that this First Nation will receive. Size is not a prohibited ground under the Act.

Consequently, the complaint fails to disclose the necessary link to a prohibited ground of discrimination.

[25] In addition, the applicant contends that the complaint does not disclose the elements that, if proven, would satisfy a *prima facie* case of discrimination for the following reasons.

[26] First, he argues that the respondents' premise is that each First Nation has its own national or ethnic origin. The applicant asserts that the words "First Nations" in the context of the respondents' case must be understood as referring to "Bands" under the *Indian Act*, RCS 1985, c I-5 (the Indian Act) since INAC's funding is provided to "Bands", not to "First Nations". The applicant submits that First Nation composition is not an indication of the national or ethnic origin of its members. Bands are established according to political rather than ethnic considerations. They also divide, sub-divide or amalgamate for political or administrative purposes. The applicant further contends that a Band (or a First Nation) can be composed of people of different national or ethnic origins. Therefore, two First Nations are not necessarily mutually exclusive with respect to national or ethnic origin. Similarly, two First Nations can have a majority of their members belonging to the same national or ethnic origin. Accordingly, a distinction between two First Nations does not necessarily constitute a distinction on the basis of national or ethnic origin.

[27] Second, the applicant contends that a finding of adverse effect discrimination can only be made where an apparently neutral distinction has an unequal impact on a group that shares a protected characteristic. The applicant submits that the respondents filed their complaint collectively and that therefore they must share the protected characteristic that they invoke. Yet, the

complainants do not share national or ethnic origin and their only shared characteristic is being part of the group composed of the largest First Nations in Ontario. The same can be said for the smaller First Nations. The applicant adds that, even if each First Nation was to be recognized as having its own national or ethnic origin, the only shared characteristic among each group – the complainants and the comparator group – is size.

[28] Finally, the applicant submits that there cannot be a finding of adverse effect discrimination because the prohibited ground – national or ethnic origin – plays no role in the funding formula. The applicant cites the comments of Justice Abella in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161, in support of the proposition that a link or nexus between the prohibited ground and the adverse treatment is required. In the absence of such a link, the complaint cannot be said to contain the essential elements to make out a *prima facie* case of discrimination. The applicant also relies on *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56, at para 10, 2 BCLR (5th) 290, leave to appeal to SCC refused, 410 NR 383 (note), 298 BCAC 319.

[29] The respondents, for their part, submit that it was reasonable for the Commission to conclude, at the pre-investigation stage, that: (1) allocating funds to First Nations on the basis of size can amount to a distinction on the basis of First Nation membership and (2) because First Nation membership is a marker for national or ethnic origin, a distinction between First Nations, be it on size or on another neutral criterion, can also amount to discrimination on the basis of national or ethnic origin.

[30] The respondents' position is based on the proposition that members of each First Nation share a common and distinct national or ethnic origin. They submit that First Nation membership equates to a marker for national origin as a matter of law. I do not find it necessary, for the purpose of this judgment, to expand on this argument.

[31] The respondents further content that First Nation membership is also a marker of national or ethnic origin as a matter of fact; members of each of the respondents' First Nations share a common and distinct national or ethnic origin. More specifically, the respondents allege that members of each First Nation do share a common national or ethnic identity that is embedded in the distinctive legal traditions and customary laws of their First Nation. They argue that members of each First Nation, by blood, marriage or adoption, share ancestry with an aboriginal community initially demarcated by the establishment of a reserve or the making of a treaty.

[32] The respondents cite *Mandla v Dowell Lee*, [1983] 2 AC 548 at 562, 1 All ER 1062, a decision of the House of Lords, and *King-Ansell v Police*, [1979] 2 NZLR 531, a decision of the New Zealand Court of Appeal, which propound the conditions necessary to establish the existence of a distinct "ethnic group". They submit that these conditions were cited with approval by the tribunal in *Squamish Indian Band v Canada*, 2001 FCT 480, 207 FTR 1. They argue that in order to meet the conditions set out in these cases, they need to introduce some evidence and that this can only be done if the Commission investigates the complaint.

[33] The respondents further contend that their complaint is a classic case of adverse effect discrimination: INAC's funding formulas allocate benefits on the basis of a neutral criterion – size

of First Nations – which creates discriminatory consequences for classes of people on the basis of their membership in a particular First Nation. Since each First Nation has its own national or ethnic origin, the effect of the funding formulas is to adversely differentiate between First Nations on a prohibited ground of discrimination.

[34] The respondents also contend that to establish a *prima facie* case of adverse effect discrimination, it is sufficient that the complaint show that the neutral criterion – size of First Nations – withholds a benefit or imposes a burden on an individual or group of individuals that are identifiable by their national or ethnic origin.

V. Discussion

[35] The applicant asks that the respondents' complaint be dismissed at the pre-investigation stage.

[36] For the purposes of this judgment, it is relevant to situate the Commission's decision within the context of the entire discrimination complaint process set out in the Act.

[37] The discrimination complaint process is set out in the Act. Section 40 of the Act provides that an individual or a group of individuals may file a complaint with the Commission if they have reasonable ground to believe that a person is engaging or has engaged in a discriminatory practice.

[38] Once a complaint is filed, the Commission, which acts as a gate-keeper to the Canadian Human Rights Tribunal (the Tribunal), must first decide whether to deal with the complaint and

investigate the allegations. If the Commission decides to deal with a complaint, it will determine, following an investigation, whether the allegations warrant a full inquiry by the Tribunal. The Commission's mandate has been authoritatively enunciated by Justice La Forest in *Cooper v Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at para 49, 140 DLR (4th) 193 :

> **49** A complaint of a discriminatory practice may, under s. 40, be initiated by an individual, a group, or the Commission itself. On receiving a complaint the Commission appoints an investigator to investigate and prepare a report of its findings for the Commission (ss. 43 and 44(1)). On receiving the investigator's report, the Commission may, after inviting comments on the report by the parties involved, take steps to appoint a tribunal to inquire into the complaint if having regard to all the circumstances of the complaint it believes an inquiry is warranted (ss. 44(3)(a)). Alternatively the Commission can dismiss the complaint, appoint a conciliator, or refer the complainant to the appropriate authority (ss. 44(3)(b), 47(1) and 44(2) respectively).
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> **50** If the Commission decides that a tribunal should be appointed, then, pursuant to the Commission's request, the President of the Human Rights Tribunal Panel appoints a tribunal (s. 49). This tribunal then proceeds to inquire into the complaint and to offer each party the opportunity to appear in person or through counsel before the tribunal (s. 50). At the conclusion of its inquiry the tribunal either dismisses the complaint pursuant to s. 53(1) or, if it finds the complaint to be substantiated, it may invoke one of the various remedies found in s. 53 of the Act…
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> . . .
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> **52** . . . Looking at the Act as a whole it is evident that the role of the Commission is to deal with the intake of complaints and to screen them for proper disposition. . .
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> **53** The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. <u>When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of</u>

> the Commission's role, then, is that of assessing the sufficiency of the evidence before it. . .
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> [Emphasis added]

[39] As stated above, the first decision that the Commission must make upon receiving a complaint is whether it will deal with it and investigate the allegations. Section 41 of the Act obliges the Commission to deal with all complaints that are filed unless it appears to it that the complaint falls within the exceptions set forth in section 41; one of those exceptions being that the complaint is beyond its jurisdiction. The approach that the Commission should adopt when deciding whether to deal with a complaint, and the approach that the reviewing court should keep in mind, was enunciated by Justice Rothstein in *Canada Post Corp v Canada (Canadian Human Rights Commission)* (1997), 130 FTR 241, 71 ACWS (3d) 935 (TD); aff'd (1999), 169 FTR 138, 245 NR 397 (FCA) [*Canada Post*], wherein he held that the Commission should decline to deal with a complaint only where it is plain and obvious that the matter is beyond its jurisdiction:

> **3** A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.
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> [Emphasis added]

[40] This approach has been endorsed by this Court in several judgments (*Comstock*, above, at paras 39-40, 43; *Hartjes*, above, at para 30, *Hicks*, above, at para 22; *Michon-Hamelin v Canada (Attorney General)*, 2007 FC 1258 at para 16 (available on CanLII) [*Michon-Hamelin*]) and I also endorse it. This approach is consistent with the Commission's primary role under the Act as a gate-keeper responsible for assessing the allegations of a complaint and determining whether they warrant an inquiry by the Tribunal. In deciding whether to deal with a complaint, the Commission is vested with a certain level of discretion but it must be wary of summarily dismissing a complaint since the decision is made at a very early stage and before any investigation. The question of whether a complaint falls within the Commission's jurisdiction may, in itself, require some investigation before it can be properly answered. It is worth noting that, at the end of the investigation process, the Commission can again, pursuant to subparagraph 44(3)(1)(b)(ii) of the Act, dismiss a complaint for lack of jurisdiction.

[41] A complainant is not required to present evidence at the pre-investigation stage but the complaint must nevertheless disclose a sufficient link to a prohibited ground of discrimination.

[42] As the respondents suggest, the "plain and obvious" test proposed by Justice Rothstein is very similar to the test for striking out a court pleading on the basis that it discloses no reasonable cause of action. The approach proposed in the context of such a motion by the Supreme Court of Canada in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 33, 74 DLR (4th) 321, may be of assistance to the Commission when it determines whether a complaint should be summarily dismissed without any investigation:

> Thus, the test in Canada . . . is . . . <u>assuming that the facts as stated can be proved</u>, is it "plain and obvious" that the plaintiff's statements

> of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present strong defence should prevent the plaintiff from proceeding with his or her cause. …
>
> [Emphasis added]

[43] This Court has endorsed a similar approach in *Michon-Hamelin*, above, at para 23, where Justice Mactavish held that at the pre-investigation stage, the factual allegations contained in the complaint should be taken as true. In my view, this is an appropriate approach. The decision of the Commission is of a preliminary nature and is based on arguments presented by the parties without any examination of evidence. A thorough analysis of the complainant's allegations and of the arguments of the opposing party, at the pre-investigation stage would be "to some extent, duplicative of the investigation yet to be carried" (*Canada Post*, above, at para 3). Furthermore, where a party alleging a lack of jurisdiction from the Commission raises arguments that involve both factual and legal arguments, it is, in my view, an indication that some investigation is required in order for the Commission to determine whether the allegations disclose a sufficient link to a prohibited ground.

[44] The respondents' complaint contains a significant factual component; their position is based on the proposition that each First Nation has a distinct national or ethnic origin and that, therefore, First Nation membership is a marker for national or ethnic origin. The applicant vigorously opposes this proposition and further raises compelling arguments to support his position that the complaint does not disclose elements that would be sufficient to establish a *prima facie* case of discrimination.

However, I am of the view that it is not the Commission's role, at the pre-investigation stage, and certainly not the Court's role, to weigh the evidence and arguments that each party put forward to support their respective positions. Rather, the issue is whether the respondents' allegations, assuming that facts can be proven, disclose a link to a prohibited ground of discrimination sufficient to trigger the Commission's jurisdiction to investigate the allegations.

[45] In *Hartjes*, above, at para 23, the Court recognized that there is a burden on the complainant to include sufficient information to persuade the Commission that there is a link "between complained-of acts and a prohibited ground", but held that this threshold is low.

[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.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in favour of the respondents.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v CHIEF R. DONALD MARACLE ET AL.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 25, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BÉDARD J.
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APPEARANCES:

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