

FEDERAL COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

**MEMORANDUM OF FACT AND LAW OF
THE INTERVENER, AMNESTY INTERNATIONAL CANADA**

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MEMORANDUM OF FACT AND LAW OF AMNESTY INTERNATIONAL

OVERVIEW

1. This appeal raises important questions about Canada's obligations under international and domestic law to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve.
2. By way of order dated January 29, 2014, Justice Stratas of this Court granted Amnesty International ("Amnesty") and the First Nations Child and Family Caring Society (the "Caring Society") leave to intervene in this appeal. In accordance with that order, Amnesty will not adduce any evidence on this appeal, and will accept the facts as found by the Applications Judge. Those factual findings include the determination that Jeremy Beadle, a severely disabled First Nations teenager living on reserve, would have had access to a higher degree of in-home health care funding if he were living off reserve (and thus subject to provincial legislation and policy).
3. Amnesty will limit its submissions on this appeal to the issue of how Canada's international human rights law obligations assist in determining whether the May 27, 2011 decision of the AANDC Manager (the "Manager's Decision") was incorrect or unreasonable.¹
4. Although these binding obligations arise under a variety of international human rights instruments, their content can be simply put: Canada must consider the best interests of the child, provide for child health care, protect a child's family environment, and allow a child to maintain his/her cultural connections – all without discrimination of any kind. Children cannot be afforded a lesser degree of rights protection because they belong to a First Nation and live on reserve; in fact, international law stresses that Indigenous children need *additional* protection given their unique circumstances.
5. The result of the Manager's Decision in this case represents a breach of Canada's international obligations and, in particular, its firm commitment to the principle of non-discrimination. The fact that First Nations children living on reserve fall within the jurisdiction of the federal government, while children living off reserve are the responsibility of the provinces, does not change this conclusion.

¹ Amnesty takes no position on the appropriate standard of review. For ease of reading, these submissions will only refer to the reasonableness standard from this point forward, but the same conclusions would apply, *a fortiori*, if the applicable standard of review is correctness.

6. Amnesty submits that the stark inconsistency between the result in Jeremy's case and Canada's commitments under international law supports the conclusion that the Manager's Decision is unreasonable in three different ways. First, international human rights law informs the judicial review of the Manager's Decision, and a decision that deals directly with children's rights without taking account of Canada's international obligations in this area is unreasonable. Second, Canada's international obligations inform the interpretation of the *Charter* as it applies to the Manager's Decision, and affirm that s. 15 is unjustifiably breached where a First Nation child receives less health care funding because he/she lives on a reserve. Finally, international law forms part of the context in which Jordan's Principle must be interpreted, and supports the view that it is a mechanism designed to ensure First Nations children receive equal access to the benefits and protections enjoyed by other Canadians, rather than a means of merely resolving disputes between different levels of government over 'who pays' for a certain level of services.

7. Ultimately, whether this Court elects to analyze the issues in this case by directly referencing international law, by reference to the *Charter*, by reference to Jordan's Principle, or any combination thereof, the result of the Manager's Decision is so inimical to Canada's international human rights obligations that it must be considered unreasonable.

PART I - FACTS

8. Amnesty accepts the facts as found by the Applications Judge, including the finding that a person living off reserve in Nova Scotia with multiple handicaps is entitled to receive home care services according to his/her needs – including at a level beyond \$2,200/month in "exceptional cases" – whereas "a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits."²

PART II - ISSUES

9. Amnesty's submissions will seek to assist the Court by addressing whether the Manager's Decision was reasonable in light of: (i) the relevance of Canada's international legal obligations to assessing the Manager's Decision; (ii) the content of those obligations; (iii) whether it makes any difference how the discharge of those obligations is structured; and (iv) how those obligations impact the assessment of the Manager's Decision in this case.

² *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ("Reasons on Application") at paras. 92 and 97

PART III - SUBMISSIONS

A. International law is relevant to assessing the Manager's Decision

10. Canada's international legal obligations can help this Court to assess whether the Manager's Decision was unreasonable. The Supreme Court has held that the "values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."³ For example, those values can help to show the central considerations to be taken into account in determining the reasonableness of a decision.⁴

11. In addition, the Manager's Decision raises issues regarding the interpretation and application of s. 15 of the *Charter* and Jordan's Principle. International law has an important role to play in both contexts. It is a "critical influence" for interpreting the content of *Charter* rights, including the fact that those rights "should be presumed to provide at least as great a level of protection as is found in international human rights documents that Canada has ratified."⁵ With respect to Jordan's Principle, Amnesty submits that international human rights law should inform the "contextual approach" to its interpretation and application, as it does with legislation.⁶ Indeed, the Canadian government has explicitly referred to Jordan's Principle as an example of an initiative taken to comply with the *Convention on the Rights of the Child* ("CRC"), by addressing the gaps between the health of Indigenous and of non-Indigenous children.⁷

B. Canada must meet its international obligations with respect to children without discrimination of any kind

12. Under international law, Canada is required to consider the best interests of the child in all of its actions, provide children with health care, protect a child's ability to stay with his/her family, and allow a child to maintain his/her culture and heritage. Perhaps most importantly,

³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at para. 70

⁴ *Baker* at para. 71

⁵ *Baker* at para. 70; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras. 22-28 (esp. at para. 23). See also *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 (per Dickson CJ, dissenting on other grounds) at 348

⁶ *Baker* at para. 70; Ruth Sullivan, ed., *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 542-544; *R. v. Hape*, [2007] 2 S.C.R. 292 ("*Hape*") at para. 53 ("[T]he legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.")
⁷ 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 Sept. 1990, accession by Canada 13 Dec. 1991) ("*CRC*"); Committee on the Rights of the Child, *Implementation of the Convention on the Rights of the Child, Written replies of Canada*, U.N. Doc. CRC/C/CAN/Q/3-4/Add.1 (2012) at para. 121

given the issues raised on this appeal, is Canada's additional obligation not to discriminate in providing and protecting these rights for First Nations children living on reserves.

i. The non-discrimination principle

13. The prohibition against racial discrimination is a peremptory norm in international law.⁸ It has been codified and incorporated into a wide variety of international instruments, including the *CRC*,⁹ the *International Covenant on Civil and Political Rights* (the "*ICCPR*"),¹⁰ the *International Covenant on Economic, Social and Cultural Rights* (the "*ICESCR*"),¹¹ the *International Convention on the Elimination of all forms of Racial Discrimination* ("*ICERD*"),¹² and the *UN Declaration on the Rights of Indigenous Peoples* (the "*UN Declaration*").¹³

14. Under international law, "discrimination" involves "any distinction, exclusion, restriction or preference that is directly or indirectly" based on an enumerated or analogous ground and "which has the purpose or effect or nullifying or impairing the recognition, enjoyment or exercise, on an equal footing" of the rights and freedoms guaranteed therein.¹⁴

15. All of these instruments explicitly prohibit discrimination against a child on the basis of race or ethnicity (e.g. the fact that they are Indigenous). Discrimination against a child because he/she lives on a reserve is equally impermissible.¹⁵ Where the treatment discriminates against a disabled child both on the basis of race/ethnicity and because he/she lives on a reserve, this constitutes multiple violations of the prohibition of discrimination. The law discriminates against Indigenous children if it requires them to choose between certain protected rights under international law – including cultural rights, the right to stay with his/her family, as well as

⁸ J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. at 594-596

⁹ *CRC* at Article 2

¹⁰ 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 Mar. 1976, accession by Canada 19 May 1976) ("*ICCPR*"), Articles 2.1 and 24.1

¹¹ 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 Jan. 1976, accession by Canada 19 May 1976) ("*ICESCR*"), Article 2.2

¹² 21 December 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 Jan. 1969, accession by Canada 14 Oct. 1970), ("*ICERD*"), Articles 1.1 and 2

¹³ GA Res. 61/295 (2007) ("*UN Declaration*"), Article 2

¹⁴ *CESCR No. 20* at para. 7. For similar language, see: *ICERD*, Art 1.1; Human Rights Committee ("*HRC*"), *CCPR General Comment No. 18: Non-discrimination*, 10 November 2012 at paras. 6-7

¹⁵ The Committee on Economic, Social and Cultural Rights ("*CESCR*") has stated that a "flexible approach" should be taken to the ground of "other status" in the *ICESCR*, and that "[t]he exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence": see *CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/20 (2009) ("*CESCR No. 20*"), at paras. 27 and 34. See also *CESCR, General Comment No. 19: The right to social security*, U.N. Doc. E/C.12/GC/19 (2008) at para. 64

specific land and citizenship rights associated with his/her reserve – and other protected rights, such as access to services like health care. Such choices are not required for non-Indigenous children. Moreover, as the Supreme Court has recognized, the decision to live on reserve “goes to a personal characteristic essential to a band member’s identity, which is no less constructively immutable than religion or citizenship.”¹⁶

ii. The Convention on the Rights of the Child

16. The *CRC* is a binding treaty ratified by Canada. It is a cornerstone of the international human rights law regime, which the Supreme Court has recognized as “the most universally accepted human rights instrument in history.”¹⁷

17. The foundation of the *CRC* is the “best interests of the child” principle in article 3.1, which sets out that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁸ According to the Committee on the Rights of the Child (the UN treaty body responsible for interpreting and monitoring compliance with the *CRC*), government, parliament and the judiciary must take active measures to implement the principle, and systematically consider it in every decision and action.¹⁹

18. Article 23 of the *CRC* directly addresses the importance of providing health care services to disabled children, and requires that assistance for a disabled child:

...shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.²⁰

¹⁶ *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 14

¹⁷ *R. v. Sharpe*, 2001 SCC 2 at para. 177

¹⁸ As the Caring Society has noted, this principle is substantively equivalent to the “child first principle” recognized in Canadian law and adopted by the Canadian government through Jordan’s Principle. See *Factum of the Caring Society* at paras. 19-23.

¹⁹ Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003) (“*CRC No. 5*”) at para. 12

²⁰ See also *CRC*, Articles 27.1 and 27.3

19. The *CRC* also stresses the importance of preserving a child's family environment unless the best interests of the child require otherwise,²¹ as well as the importance of ensuring that a child "who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."²²

20. The *CRC*'s obligations carry special significance in the context of Indigenous children. The Committee on the Rights of the Child has observed that "[t]he specific references to Indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights".²³ The Committee went on to explain that "[m]aintaining the best interests of the child and the integrity of Indigenous families and communities should be primary considerations in development, social services, health and education programmes affecting Indigenous children."²⁴

iii. Other international human rights instruments

21. Of particular importance in the context of this appeal is the *UN Declaration* – a consensus human rights instrument that no country in the world currently opposes.²⁵ Canada formally endorsed the *UN Declaration* in November 2010, and its relevance has been accepted by courts (including this Court) in cases concerning services to First Nations.²⁶ The *UN Declaration* states that Indigenous peoples "have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of... health and social security", and emphasizes that "[p]articular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities." It

²¹ See e.g. *CRC*, Articles 5, 9.1, and preamble

²² *CRC*, Article 30. The importance of this right is highlighted in *General Comment No. 11: Indigenous Children and their Rights under the Convention*, U.N. Doc. CRC/C/GC/2009/11 (2009) ("*CRC No. 11*"), at paras. 16-22

²³ *CRC No. 11*, at para. 5

²⁴ *CRC No. 11*, at para. 46

²⁵ General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, U.N. Doc. A/67/273 (8 August 2012), at para. 6

²⁶ *Simon v. Canada (Attorney General)*, 2013 FC 1117 at para. 12; *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75, at paras. 353-354 ("international instruments such as the *UNDRIP* and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation... As a result, insofar as it may be possible, an interpretation that reflects these values and principles is preferred.") The Government of Canada has also recognized that the *UN Declaration* is a relevant source when interpreting the *Charter*: Committee on the Elimination of Racial Discrimination, 18th session, Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada, U.N. Doc. CERD/C/SR.2142 (March 2012), at para. 39

also provides that Indigenous peoples have “the right to access, without any discrimination, to all social and health services” and “an equal right to the enjoyment of the highest attainable standard of physical and mental health”.²⁷ Finally, the *UN Declaration* also protects Indigenous peoples’ cultural rights, including the right to “practise and revitalize their cultural traditions and customs”, in a number of provisions.²⁸

22. Canada’s obligations concerning child health care, family, and culture under the *CRC* and the *UN Declaration* are echoed in a number of binding treaties Canada has ratified.

23. The *ICCPR* sets out that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”, and protects the right of “ethnic, religious or linguistic minorities” to “enjoy their own culture, to profess and practise their own religion, or to use their own language.”²⁹

24. Similarly, the *ICESCR* requires that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children”. It goes on to recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and “to take part in cultural life”.³⁰

25. The *ICERD* engages these same issues, and guarantees “the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) economic, social and cultural rights, in particular... the right to public health, medical care, social security and social services [and] the right to equal participation in cultural activities.”³¹

26. As with the *CRC*, all these instruments include the requirement to take “positive” and “financial” measures, particularly in respect of the health care of disabled children³², and the enjoyment of all these rights are subject to an overriding obligation of non-discrimination.³³

²⁷ *U.N. Declaration*, Articles 22 and 24

²⁸ *U.N. Declaration*, Articles 5, 8, 11 (quoted), 12, 14, 15 and 31

²⁹ *ICCPR*, Articles 23.1 and 27

³⁰ *ICESCR*, Articles 10.1, 12.1 and 15(1)(a)

³¹ *ICERD*, Article 5. Discrimination based on “indigenous origin or identity” is prohibited: see CERD, *General Recommendation No. 23: Indigenous Peoples*, U.N. Doc. A/52/18, annex V at 122 (1997), at para. 4(b)

³² See HRC, *General Comment No. 17: Rights of the child (Art. 24)*, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994), at paras. 1 and 4; HRC, *General Comment No. 23: Rights of Minorities*, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), at paras. 6.1 and 7; CESCR, *General Comment No. 3: The nature of States parties obligations*, U.N. Doc. E/1991/23

C. **International obligations are the ultimate responsibility of the federal government**

27. The appellant urges this Court to maintain a “distinction” between the “compulsory regulation of assistance for residents living off reserve” by a province (which it contends was at issue in the *Boudreau* decision), and the federal government’s “exercise of spending and contracting with [Pictou Landing], which imposes voluntary obligations.”³⁴

28. From the perspective of Canada’s international legal obligations – and when interpreting the *Charter* and Jordan’s Principle in light of those obligations – the distinction between health care services provided directly by a province, and those provided by the federal government through a contractual arrangement with a band council, is immaterial. Canada, as a federal state, is responsible for respecting its international treaties and commitments, and it cannot point to the delivery of services by third party providers under contract, or by other levels of government, to shirk that responsibility or avoid an evaluation of whether it is being carried out in accordance with the principle of non-discrimination. The ultimate responsibility of the federal state is a basic principle of customary international law,³⁵ which Canada has characterized as a “cornerstone rule”³⁶ and which forms part of the Canadian domestic common law.³⁷

29. The same principle is explicitly recognised in conventional international law, including the *Vienna Convention on the Laws of Treaties*,³⁸ which is binding on Canada. In the context of the *CRC*, the Committee on the Rights of the Child has confirmed that the “decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party’s Government to fulfil its obligations to all children within its

(1990), at para. 7; CESCR, *General comment No. 14: The right to the highest attainable standard of health*, E/C.12/2000/4 (2000), at para. 37; CESCR, *General Comment No. 5: Persons with disabilities* (Annex IV), E/1995/22(SUPP) (1994), at para. 9; *UN Declaration*, Art. 22(2) and 24

³³ See footnotes 9-13

³⁴ Appellant’s factum at paras. 85 and 86

³⁵ Malcolm N. Shaw, *International Law*, 5th Edition, Cambridge: Cambridge University Press, 2003 at pp. 125 and 702 (citing *Polish Nationals in Danzig Case* [1932] PCIJ, Series A/B, No. 44, pp. 21, 24 and the *Georges Pinson* case, 5 RIAA, p. 327)

³⁶ *In the matter of an Arbitration under Chapter Eleven of NAFTA between Clayton and the Government of Canada*, Counter-Memorial (Public Version) at para. 271 [excerpt]

³⁷ *Hape* at para. 39

³⁸ 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331, Articles 27 and 46(1)

jurisdiction, regardless of the State structure.”³⁹ Similar points have been made by the UN treaty bodies responsible for the *ICCPR*,⁴⁰ *ICESCR*,⁴¹ and *ICERD*.⁴²

D. Canada’s international obligations confirm the Manager’s Decision is unreasonable

30. Taking the facts as found by the Applications Judge, the Manager’s Decision resulted in a difference between the health care services and funding available to Jeremy, and those available to a similarly situated individual living off reserve. It drew a distinction based on Jeremy’s race, ethnicity and status as a First Nations child living on reserve, with the effect of impairing his recognition, enjoyment and exercise, on an equal footing, of protected rights.

31. That result is a marked departure from Canada’s international obligations under the *CRC*, *ICCPR*, *ICESCR*, *ICERD*, and the *UN Declaration* to consider the best interests of the child, provide a child with health care, protect a child’s family environment, and allow a child to maintain his/her cultural identity – all without discrimination. More specifically, the inconsistency between the Manager’s Decision and Canada’s international obligations supports the conclusion that the decision was unreasonable in at least three different ways.

32. First, the Manager’s Decision fails to take account of Canada’s international obligations regarding non-discrimination and the protection of children’s rights, and effected a result wholly inimical to those obligations. On this basis alone, Amnesty submits that the Manager’s Decision is unreasonable. Decisions dealing with the rights of children – particularly children in Jeremy’s situation, who are among the most vulnerable in society – must recognize and respect the relevant values set out in Canada’s international human rights law obligations.

33. Second, the Manager’s Decision is unreasonable because it represents an unjustified breach of s. 15 of the *Charter*, particularly as interpreted in light of Canada’s binding international human rights obligations. As discussed, those instruments prohibit Canada from discriminating against First Nations children living on reserve in the provision and protection of specific rights relating to their health care, family, and culture. The Manager’s Decision fails to

³⁹ *CRC No. 5*, at paras. 40-41; *CRC No. 11*, at para. 78

⁴⁰ HRC, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) at para. 4

⁴¹ CESCR, *Concluding Observations on the Government of Canada*, UN Doc. E/C.12/1/Add.31 (4 December 1998) at para. 52; CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24 (1998) at paras. 7-10.

⁴² CERD, *General Recommendation: The guarantee of human rights free from racial discrimination*, U.N. Doc. A/51/18, annex VIII at 124 (1996) at para. 5

respect this obligation and, from an international law perspective, created a discriminatory result with respect to First Nations children in Jeremy's situation, who live on reserve.

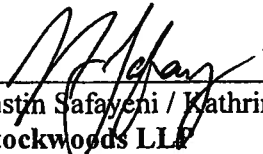
34. Finally, Amnesty submits that the Manager's Decision is inconsistent with a proper interpretation of Jordan's Principle. In deciding between the competing views of Jordan's Principle put forward on this appeal, this Court should consider the international context in which the Principle was passed – a context that includes all of the aforementioned binding human rights instruments directly addressing children's rights, and the overarching principle of non-discrimination. Having regard to that context, Amnesty submits that the preferred interpretation of Jordan's Principle should be the one adopted by the Applications Judge: it is a "child-first principle" designed to "prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of their Aboriginal status."⁴³ In other words, the preferred interpretation of Jordan's Principle is that which reflects the substance of Canada's international legal obligations and, in particular, the fundamental obligation that children's rights be provided and protected without discrimination of any kind.

PART IV - ORDER REQUESTED

35. Amnesty respectfully requests that this appeal be decided in accordance with Canada's international obligations, and that the appeal therefore be dismissed. Pursuant to the Order of Justice Stratas dated January 29, 2014, Amnesty does not seek any costs, and costs should not be ordered against it, as it is pursuing a public interest mandate in these proceedings.⁴⁴

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 20, 2014


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⁴³ Reasons on Application at para. 18

⁴⁴ *Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, 2014 FCA 21 at para. 34

SCHEDULE "A" – AUTHORITIES

TAB	International Treaties
1.	<i>International Covenant on Civil and Political Rights</i> , adopted December 16, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 Mar. 1976, accession by Canada 19 May 1976)
2.	<i>International Covenant on Economic, Social and Cultural Rights</i> , adopted December 16, 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 Jan. 1976, accession by Canada 19 May 1976)
3.	<i>International Covenant on Economic, Social and Cultural Rights, Concluding Observations on the Government of Canada</i> , UN Doc. E/C.12/1/Add.31 (4 December 1998)
4.	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> , adopted December 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 Jan. 1969, accession by Canada 14 Oct. 1970)
5.	<i>Convention on the Rights of the Child</i> , adopted November 20, 1989, UNGA Res. 44/25, annex, 44 Un.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990
6.	<i>Vienna Convention on the Laws of Treaties</i> 1155 U.N.T.S. 331, entered into force 27 January 1980, Articles 27 and 46(1)
Declarations and Resolutions	
7.	General Assembly, <i>Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General</i> , U.N. Doc. A/67/273 (8 August 2012)
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9.	Committee on the Rights of the Child, <i>Implementation of the Convention on the Rights of the Child, Written replies of Canada</i> , U.N. Doc. CRC/C/CAN/Q/3-4/Add. 1 (2012)
10.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 20: Non-discrimination in economic, social and cultural rights</i> , U.N. Doc. E/C.12/GC/20 (2009)
11.	U.N. Human Rights Committee, <i>CCPR General Comment No. 18: Non-discrimination</i> , 10 November 2012
12.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 19: The right to social security</i> , U.N. Doc. E/C.12/GC/19 (2008)

13.	Committee on the Rights of the Child, <i>General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child</i> , U.N. Doc. CRC/GC/2003/5 (2003)
14.	Committee on the Rights of the Child, <i>General Comment No. 11: Indigenous Children and their Rights under the Convention</i> , U.N. Doc. CRC/C/GC/2009/11 (2009)
15.	<i>Committee on the Elimination of Racial Discrimination (18th session), Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada</i> , U.N. Doc. CERD/C/SR.2142 (March 2012)
16.	<i>Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples</i> , U.N. Doc. A/52/18, annex V at 122 (1997)
17.	U.N. Human Rights Committee, <i>General Comment No. 17: Rights of the Child (Art. 24)</i> , U.N. Doc. HRI/GEN/1/Rev. 1 at 23 (1994)
18.	U.N. Human Rights Committee, <i>General Comment No. 23: Rights of Minorities</i> , U.N. Doc. HRI/GEN/1/Rev. 1 at 38 (1994)
19.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 3: The nature of States parties obligations</i> , U.N. Doc. E/1991/23 (1990)
20.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 14: The right to the highest attainable standard of health</i> , E/C.12/2000/4 (2000)
21.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 5: Persons with disabilities (Annex IV)</i> , E/1995/22(SUPP) (1994)
22.	U.N. Human Rights Committee, <i>General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant</i> , U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)
23.	Committee on Economic, Social and Cultural Rights, <i>General Comment No. 9: The Domestic Application of the Covenant</i> , U.N. Doc. E/C.12/1998/24 (1998)
24.	Committee on Economic, Social and Cultural Rights, <i>Concluding Observations on the Government of Canada</i> , UN Doc. E/C.12/1/Add.31 (4 December 1998)
25.	<i>Committee on the Elimination of Racial Discrimination (18th session), General Recommendation: The guarantee of human rights free from racial discrimination</i> , U.N. Doc. A/51/18, annex VIII at 124 (1996)
Case Law	
26.	<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 SCR 817
27.	<i>R. v. Hape</i> , [2007] 2 S.C.R. 292
28.	<i>Divito v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 47

29.	<i>Reference re Public Service Employee Relations Act (Alberta)</i> , [1987] 1 SCR 313
30.	<i>Corbière v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 SCR 203
31.	<i>R. v. Sharpe</i> , 2001 SCC 2
32.	<i>Simon v. Canada (Attorney General)</i> , 2013 FC 1117
33.	<i>First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)</i> , 2012 FC 445, aff'd 2013 FCA 75
34.	<i>Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle</i> , 2014 FCA 21
	Text
35.	Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5 th ed. (Markham: LexisNexis, 2008)
36.	J. Crawford, <i>Brownlie's Principles of Public International Law</i> , 8 th ed.
37.	Malcolm N. Shaw, <i>International Law</i> , 5 th ed., Cambridge: Cambridge University Press, 2003
	Submissions
38.	<i>In the matter of an Arbitration under Chapter Eleven of NAFTA between Clayton and the Government of Canada</i> , Counter-Memorial (Public Version)

SCHEDULE "B" - STATUES

CONSTITUTION ACT, 1982

ENGLISH

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)

FRENCH

Droits à l'égalité

Égalité devant la loi, égalité de
bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.