Tribunal File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

ATTORNEY GENERAL OF CANADA
(representing the Minister of Aboriginal Affairs and Northern Development Canada)

Respondent

-and-

AMNESTY INTERNATIONAL CANADA and CHIEFS OF ONTARIO

Interested Parties

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WRITTEN SUBMISSIONS OF AMNESTY INTERNATIONAL

OVERVIEW

1. The issues before the Tribunal in this case engage a number of Canada's binding legal obligations under international human rights law, both customary and conventional, as well as other international norms and standards relating to the treatment of Indigenous children. Canada's international obligations must be respected in the interpretation and application of sections 5(a), 5(b) and 53 of the *Canadian Human Rights Act* (the "*CHRA*"). Although international law always informs the exercise of domestic statutory interpretation, such an approach is particularly appropriate here given the well-established and important role that this Tribunal plays in implementing Canada's commitments under international human rights law.

2. It is critical that the Tribunal's consideration of this case respect the seriousness of the prohibition against both formal and substantive discrimination set out under international law, which has achieved the status of a peremptory norm. Under international law, discrimination against a group or individual because they are Indigenous is strictly prohibited; so too is discrimination against a group or individual because they are Indigenous and happen to live on reserve. International law also requires particular sensitivity to the potential for discrimination against vulnerable groups, which would include Indigenous children. It follows that providing unequal and inadequate funding for child welfare services to those First Nations children who live on reserve or in the Yukon, as compared to all other children in Canada, is anathema to the prohibition against discrimination.

3. Canada also has a series of obligations under international law with respect to the protection of children. Pursuant to those obligations, it must consider the best interests of First Nations children in all of its actions, including by preserving their family environment and protecting their cultural identity through the provision of appropriate child welfare services – all without discrimination. The removal of First Nations children from their families in disproportionate numbers because of unequal and inadequate federal funding – where other, less disruptive measures could ensure the protection of these children just as (or more) effectively – is wholly inconsistent with these international obligations. Such conduct is discriminatory, fails to preserve continuity in a

child's family environment, and jeopardizes their right to learn and maintain their unique languages, customs and traditions.

4. If this Tribunal determines that it is appropriate to make remedial order(s) under section 53 of the *CHRA*, then it is important to consider what measures are required to meet Canada's various international human rights obligations and to remedy breaches of those obligations. Where there is unequal or inadequate funding for First Nations children that amounts to discrimination, Canada must take positive measures, as well as special measures, to remedy any formal discrimination and to achieve the goal of *substantive* equality. These measures include, but are not limited to, the allocation of sufficient funding and resources to ensure the equitable and effective delivery of culturally competent programs and services.

5. In assessing whether Canada has breached its obligations under international law and its internal laws, Canada cannot rely on the constitutional division of powers, and/or its use of private parties in the performance of state functions as defences to its discriminatory conduct. The well established principle of ultimate federal responsibility for upholding Canada's international legal obligations augurs in favour of a broad definition of "provision of... services" in section 5 of the *CHRA*, as opposed to one which would deny claimants the human rights protections of the *CHRA* simply because entities apart from the federal government are also involved in providing the service in question. The same principle also affirms that discrimination under international law does not require finding an exact "mirror" comparator group; rather, a comparison may be drawn between a group receiving a service from the federal government (First Nations children living on reserve and in the Yukon) and children receiving the same service from a different entity, such as a provincial government.

6. Where individuals have suffered damage as a result of Canada's failure to meet its international legal obligations – whether with respect to prohibiting formal and substantive discrimination, ensuring the protection of children, or taking positive and special measures as necessary – Canada must provide timely and effective remedies. Those remedies include committing the financial and other resources necessary to ensure that Canada's international human rights obligations are met, and structuring the delivery of those resources so as to maximize effectiveness, ensure cultural appropriateness and

avoid delay as a result of jurisdictional disputes. In addition, compensation should be provided for those who have suffered as a result of any breaches, and mechanisms put in place to guard against future breaches. Effective implementation of these remedies may require independent monitoring and enforcement. In other words, Canada's international human rights obligations cannot be met simply by increasing the level of resources devoted to First Nations children, if the way in which those resources are structured and delivered does not achieve substantive equality and the durable protection of children's rights.

PART I - FACTS

7. On September 14, 2009, the Tribunal issued an order granting Amnesty Interested Party status in the hearing of the Complaint pursuant to section 50 of the *CHRA*. Amnesty was given the right to participate by way of final legal submissions, written and/or oral, to be presented at the conclusion of the evidence and after the legal submissions of the other parties.

8. On December 21, 2009, the Attorney General filed a preliminary motion to dismiss the complaint, which was heard by the Chairperson of the Tribunal on June 2 and June 3, 2010. Amnesty filed written submissions and participated in the hearing before the Tribunal. Amnesty also participated as a party in the subsequent judicial review proceedings before the Federal Court, and in the appeal of that decision before the Federal Court of Appeal.[1]

9. Although Amnesty did not participate in the evidentiary phase of the proceedings, it has remained apprised of the documents exchanged, witnesses called and evidence presented before the Tribunal. Based on its review of this record, Amnesty accepts the facts as set out in the written submissions of the Canadian Human Rights Commission, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Assembly of First Nations.

PART II - ISSUES

10. Amnesty will seek to assist the Tribunal by addressing the following issues:

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[1] ***First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)***, 2012 FC 445, aff'd 2013 FCA 75 ("***FNCFCSC***")

a) The interpretation and application of the *CHRA* must respect Canada's obligations under international law;

b) The *CHRA* must be interpreted and applied to respect the prohibition against formal and substantive discrimination in international human rights law;

c) The *CHRA* must be interpreted and applied to respect Canada's obligations to protect children;

d) Canada's international obligations must be met regardless of how a service is delivered; and

e) Canada's obligations include the requirement to take special and positive measures, and provide effective remedies

PART III - SUBMISSIONS

A. The interpretation and application of the *CHRA* must respect Canada's obligations under international law

11. The interpretation and application of sections 5(a), 5(b) and 53 of the *CHRA* to the facts of this case must take into account, and ultimately respect, Canada's obligations under international human rights law, particularly given the important role of the *CHRA* in discharging those obligations.

12. Canada has long recognized that the values and principles enshrined in its international legal obligations are a "relevant and persuasive" source of law for the purpose of interpreting domestic statutes.[2] International law is particularly important to consider when interpreting and applying quasi-constitutional domestic human rights legislation like the *CHRA*, since such statutes are an essential means through which Canada is expected to, and does, implement its international human rights obligations. The role domestic human rights tribunals are designed to play in this regard is clear from the expansive language in the instruments themselves, and the purposive interpretation they are to be given. It has also been affirmed by United Nations ("UN") treaty bodies,[3]

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[2] ***Reference re Public Service Employee Relations Act (Alberta)***, [1987] 1 SCR 313 (per Dickson CJ, dissenting on other grounds) at 348; ***R v Hape***, 2007 SCC 26, [2007] 2 SCR 292 ("***Hape***") at paras. 35-39, 53-56; ***Divito v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 47 at paras. 22-28 ("***Divito***"); ***R v Sharpe***, [2001] 1 SCR 45 at paras. 175, 178

[3] Committee on the Rights of the Child, ***General Comment No. 2****: The role of independent national human rights institutions in the protection and promotion of the rights of the child,* U.N. Doc. CRC/GC/2002/2 (2002) at paras. 1 and 9; Committee on the Rights of the Child, ***General Comment No. 5****: General*

relied upon by the Government of Canada in its representations to those treaty bodies,[4] and acknowledged by this Tribunal in its jurisprudence.[5]

13. Canada's obligations under international human rights law come from a variety of sources, which often overlap.[6] They are set out in binding treaties that Canada has ratified or acceded to, including the *Convention on the Rights of the Child* ("*CRC*")[7] – the most widely ratified human rights treaty in history[8] – the *International Covenant on Civil and Political Rights* ("*ICCPR*"),[9] the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*"),[10] and the *International Convention on the Elimination of All Forms of Racial Discrimination* ("*CERD*").[11] They are also found in the principles of customary international law, which form part of the Canadian common law under the doctrine of adoption.[12] Finally, Canada's international obligations are set out in declaratory instruments, such as the *Universal Declaration on Human Rights* ("*UDHR*")[13] and the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*"),[14] which encapsulate and reflect elements of customary and

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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. 65; Committee on Economic, Social and Cultural Rights, ***General Comment No. 10**: The role of national human rights institutions in the protection of economic, social and cultural rights*, U.N. Doc. E/C.12/1998/25 (1998), at paras. 3 and 4; Committee on Economic, Social and Cultural Rights, ***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 para. 40

[4] Government of Canada, ***Core document forming part of the reports of States Parties: Canada*** (1998), at paras. 95, 130, 138

[5] ***Nealy v. Johnston***, 1989 CanLII 151 (CHRT), at p. 37; ***Brown v. Canada (Royal Canadian Mounted Police)***, (2004) CanLII 30 (CHRT) at para. 81

[6] ***Divito***, at paras. 22-28; ***FNCFCSC***, at para. 353; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, at paras. 69-71; ***Canada (Human Rights Commission) v. Taylor***, [1990] 3 S.C.R. 892 at paras. 36-37, 43-44.

[7] ***Convention on the Rights of the Child***, 44/25 of 20 November 1989, (entered into force 2 September, 1990) ("***CRC***").

[8] ***R. v. Sharpe***, 2001 SCC 2 at para. 177

[9] ***International Covenant on Civil and Political Rights***, 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***")

[10] ***International Covenant on Economic, Social and Cultural Rights***, 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***")

[11] ***International Convention on the Elimination of All Forms of Racial Discrimination***, 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), ("***CERD***")

[12] ***Hape*** at para. 39

[13] General Assembly, ***Universal Declaration of Human Rights***, 10 December 1948, 217 A (III) ("***UDHR***")

[14] UN General Assembly, ***United Nations Declaration on the Rights of Indigenous Peoples*** : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 ("***UN Declaration***")

conventional law and its progressive interpretation. The *UN Declaration* – a consensus human rights instrument that no country in the world currently opposes, and which Canada formally endorsed on November 12, 2010 – is of particular relevance given the subject matter of this case, and has been cited by courts in considering the services delivered to First Nations people.[15]

14. Also relevant are the views of the UN treaty bodies charged with interpreting a particular human rights treaty. The International Court of Justice has explained that it "ascribe[s] great weight to the interpretation adopted" by these independent bodies[16], and Canadian courts have relied on them in determining the content and scope of Canada's international obligations.[17]

15. Courts[18] and human rights tribunals[19] – including this Tribunal[20] – have referred to and relied upon a broad range of relevant international legal sources to interpret and apply domestic human rights legislation. The same approach should be adopted here. In light of the impact of international law on the interpretation of domestic statutes in general, and the close relationship between human rights legislation like the *CHRA* and Canada's international human rights obligations in particular, there is no doubt that – as one provincial human rights tribunal put it – "international instruments can prove to be

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[15] ***Simon v. Canada (Attorney General)***, 2013 FC 1117 at para. 121; ***FNCFCSC*** 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

[16] ***Republic of Guinea v Democratic Republic of the Congo***, Judgment of 30 November 2010, ICJ Reports 2010 at paras. 66-68

[17] ***Divito***, at para. 26; ***FNCFCSC*** at para. 155.

[18] See footnote 1, supra

[19] ***Yuill v. Canadian Union of Public Employees***, 2011 HRTO 126 at para. 11; ***Commission des droits de la personne et des droits de la jeunesse c. Laverdière***, 2008 QCTDP 15 at para. 16; ***Commission des droits de la personne et des droits de la jeunesse v Maksteel Québec Inc***, 1997 CanLII 49 (QC TDP) at paras. 12-18

[20] ***Day v. Canada (Department of National Defence)***, 2002 CanLII 45923 (CHRT) at para. 37; ***Nealy v. Johnston***, (1989) C.H.R.R. D/10 (CHRT) at p. 35-37; ***Stanley v. Canada (Royal Canadian Mounted Police)*** (1987), (1987) CanLII 98 (CHRT) at p. 80, 86; ***Bailey and Canada (Minister of National Revenue)***, 1980 CanLII 5 (CHRT) at p. 62

reliable tools for interpreting our domestic standards, particularly in the area of human rights."[21]

16. One important means by which international human rights obligations influence statutory interpretation is through the presumption of conformity. That presumption has two key aspects. First, the legislature is presumed to act in compliance with Canada's international obligations, such that "where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations." Second, the legislature is presumed to comply with the "values and principles" of international law, which "form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them."[22]

17. The presumption of conformity may only be rebutted where there is "an unequivocal legislative intent to default on an international obligation."[23] No such intention can be found in anywhere in the language of the *CHRA*.

18. Accordingly, in determining major issues raised in this case – what constitutes the denial of a service under section 5(a), whether there has been adverse differentiation under section 5(b), and, if either has been established, what remedies should be granted under section 53 of the *CHRA* – Canada's international obligations must be respected. As can be seen from the decision of the Federal Court (upheld by the Federal Court of Appeal) on Canada's motion to dismiss in this matter, and consistent with the presumption of conformity, any interpretation and application of the *CHRA* that fails to respect those obligations cannot be justified.[24]

B. The *CHRA* must be interpreted and applied to respect the prohibition against formal and substantive discrimination

19. Discrimination against children because of their Indigenous identity, their place of residency, or a combination of these factors, is clearly prohibited under international law.

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[21] ***Commission des droits de la personne et des droits de la jeunesse c. Laverdière***, 2008 QCTDP 15 (CanLII) at para. 16.

[22] ***Hape***, at para. 53. See also ***FNCFCSC*** at paras. 351-354

[23] *Ibid.* Professor Sullivan adopts the similar standard of whether "it is plain that the legislature intended to enact a provision that is inconsistent with international law": see ***Sullivan on the Construction of Statutes***, 5th ed. (Toronto: Butterworths, 2008) at p. 549

[24] ***FNCFCSC*** at paras. 351-354.

Sections 5(a) and 5(b) of the *CHRA* must be interpreted and applied in manner that reflects and respects the seriousness and scope of the prohibition of discrimination under international law. Indeed, any interpretation of the *CHRA* that does not hold the provision of services to First Nations children to the requirement of formal and substantive equality would mean that the standard for discrimination under that statute – a regime designed, at least in part, to reflect and implement Canada's international human rights obligations – does not meet the basic standard for human rights established under customary and conventional international law.

20. The prohibition against racial discrimination has achieved the status of a peremptory norm in international law.[25] It has also been codified and incorporated into a wide variety of international legal instruments, including the *CRC*,[26] *ICCPR*,[27] *ICESCR*,[28] and *CERD*,[29] as well as the *UDHR*[30] and the *UN Declaration*.[31]

21. Under international law, "discrimination" occurs when an individual or group is subject to "any distinction, exclusion, restriction or preference that is directly or indirectly" based on an enumerated or analogous ground (which the various instruments have expanded in various ways) and "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing" of rights protected under domestic or international law.[32] Discrimination may be direct/formal (inequality caused by unequal treatment) or indirect/substantive (inequality caused by the equal treatment for groups with relative differences).[33] Both forms are prohibited.[34]

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[25] J. Crawford, ***Brownlie's Principles of Public International Law***, 8th ed. (Oxford: Oxford University Press, 2012) ("***Brownlie's***") at 594-596

[26] ***CRC***, at Article 2.

[27] ***ICCPR***, Articles 2.1 and 24.1

[28] ***ICESCR***, Article 2.2

[29] ***CERD***, Articles 1.1 and 2

[30] ***UDHR***, at articles 2 and 7

[31] ***UN Declaration***, Article 2

[32] ***CESCR No. 20*** at para. 7. For similar language, see: ***CERD***, Art 1.1; Human Rights Committee, ***General Comment No. 18***: *Non-discrimination*, 4 October 1990 (Vol. I) (Supp) ("***HRC No. 18***"), at paras. 6-7. As will be seen in Part C of these submissions, a number of rights protected under international law are engaged in this case, including the right to stay within a family environment, cultural rights, and the right to an adequate standard of child welfare services.

[33] UN Committee on the Elimination of Racial Discrimination (CERD), ***General Recommendation No. 32***: *The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32 ("***CERD No. 32***"), at paras. 7-8

22. The *CRC, ICCPR, ICESCR, CERD, UDHR*, and *UN Declaration* all explicitly prohibit discrimination against a group or individual on the basis of race or ethnicity. On its face, this must include discrimination on the basis of Indigenous identity, and treaty bodies have confirmed that this is the case.[35] Discrimination that arises because a First Nations person lives on a reserve is equally impermissible.[36] 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."[37] Where the treatment discriminates both on the basis of First Nations identity *and* because of residency, this constitutes multiple violations of the prohibition of discrimination.

23. Discrimination against any individual or group is strictly prohibited under international law, but special attention must be given by States parties to ensure that discrimination against children – and, in particular, against children from vulnerable groups who have suffered a history of discrimination – does not occur (and, when it does, that special measures are taken to remedy that discrimination, as discussed further in Part III.E of these submissions, below). The Committee on the Rights of the Child, which is the treaty body responsible for the *CRC*, emphasized this point in discussing the treaty's prohibition of discrimination in the context of access to child welfare services:

> States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions. **Potential discrimination in access to quality services for young children is a particular concern, especially where health, education, welfare and other services are not universally available and are provided through a combination of**

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[34] See, for example: ***HRC No. 18,*** at paras. 8, 10; ***CESCR No. 20***, at para. 8; ***CERD No. 32*** at paras. 7-10; UN Committee on the Rights of the Child (CRC), ***General comment No. 14*** *(2013) on the right of the child to have his or her best interests taken a s a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14 (***"CRC No. 14"***), at para. 41

[35] Committee on the Rights of the Child, ***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 para. 23; Committee on the Elminiation of Racial Discimination, *General Recommendation No. 23: Indigenous Peoples,* U.N. Doc. A/52/18, annex V at 122 (1997) (***"CERD No. 23"***), at para. 4(b).

[36] 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 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

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

> **State, private and charitable organizations**. As a first step, the Committee encourages States parties to monitor the availability of and access to quality services that contribute to young children's survival and development, including through systematic data collection, disaggregated in terms of major variables related to children's and families' background and circumstances. **As a second step, actions may be required that guarantee that all children have an equal opportunity to benefit from available services. More generally, States parties should raise awareness about discrimination against young children in general, and against vulnerable groups in particular.**[38]

24. First Nations children in Canada are precisely this type of vulnerable group. Canada's historical treatment of First Nations children, and the continuing effects of that treatment on First Nations people today, was the subject of detailed evidence led in these proceedings, and is generally beyond debate. As the Supreme Court recently put it, "courts **must** take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."[39]

25. Against this backdrop, Canada's international obligations demand that domestic institutions like this Tribunal, which are charged with identifying and remedying discrimination, do so with heightened alacrity, and a keen eye to achieving substantive equality, in cases involving discrimination against First Nations children.

26. The fact that the federal government provides unequal and inadequate funding for child welfare services to First Nations children living on reserve and in the Yukon, as compared to that which other levels of government provide to all other children, is anathema to the prohibition against discrimination under international law. Simply put, it is not permissible to treat two groups inequitably strictly on the basis, or as a consequence, of the fact that one group is Indigenous. That is why the Committee on the Rights of the Child has called on Canada to "[t]ake immediate steps to ensure that in law

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[38] Committee on the Rights of the Child, ***General Comment No. 7**: Implementing child rights in early childhood*, U.N. Doc CRC/C/GC/7 (2005) at para. 12 [emphasis added].

[39] ***R v Ipeelee***, 2012 SCC 13 at para. 60 [emphasis added]. See also ***FNCFCSC***, at para. 334 ("…[N]o one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society.")

and in practice, Aboriginal children have full access to all government services and receive resources without discrimination."[40]

C. The *CHRA* must be interpreted and applied to respect Canada's obligations to protect children

27. The prohibition against discrimination comes into even sharper focus when considered alongside some of Canada's additional obligations under the *CRC, ICCPR, ICESCR, CERD*, and *UN Declaration*, which can be summarized as follows: Canada must consider the best interests of Indigenous children in all of its actions, including by preserving their family environment and protecting their cultural identity through the provision of appropriate child welfare services – all without discrimination.

28. The *CHRA* should be interpreted in a manner that gives full effect to these obligations by finding a breach of section 5 in cases where Canada fails to meet them.

i. Acting in the best interests of the child

29. In matters concerning children, Canada must abide by the overarching "best interests of the child" principle enshrined in the *CRC*. Article 3.1 of the *CRC* 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." According to the Committee on the Rights of the Child, government, parliament and the judiciary must take active measures to implement this principle, and systematically consider it in every decision and action.[41]

30. The best interests of the child principle is fundamentally irreconcilable with any conduct that discriminates against some First Nations children, such as those living on reserve, by affording them a lesser degree of protection– or no protection at all – for rights protected under domestic or international law.

ii. Preserving a child's family environment

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[40] Committee on the Rights of the Child, ***Concluding Observations***: Consideration of Canada's Third and Fourth Reports on the Convention on the Rights of the Child by the UN Committee on the Rights of the Child, CRC/C/CAN/CO/3-4 (17 September – 5 October, 2012) ("***CRC Concluding Observations***") at para. 33(d).

[41] ***CRC No. 5***, at para. 12

31. Canada's treaty commitments require that the government act to preserve a child's family environment, unless the best interests of the child require otherwise. The removal of First Nations children from their homes in circumstances where it is *not* in the best interests of the child violates this international obligation. Where First Nations children on reserve and in the Yukon are removed in greater numbers than all other children due to differences in the degree and structure of funding and resources, there is an additional violation of the principle of non-discrimination.

32. The obligation to protect a child's family environment is reflected throughout the *CRC* (see, for example, articles 5, 7.1, 8.1 and 18.1), but is set out most clearly in article 9.1:

> **States Parties shall ensure that a child shall not be separated from his or her parents against their will**, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.[42]

33. The corollary of the obligation to protect a child's family environment is the obligation to provide the necessary support to parents in order to ensure that the child's other rights under international law are respected. To this end, article 18.2 of the *CRC* requires that

> For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

34. Even where a child suffers harm from his/her parents, the *CRC* requires that, where appropriate, States parties take measures to support that child's parents or guardians so that the family environment may be preserved or re-established. Article 19 states:

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[42] [Emphasis added]

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> Such protective measures should, as appropriate, include **effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention** and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.[43]

35. Similarly, article 27 of the *CRC* requires that where a child's family environment fails to meet "a standard of living adequate for the child's physical, mental, spiritual, moral and social development", States parties "shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." Rather than remove children from a substandard family environment, the obligation is to first try and assist parents in order to improve that environment.

36. The Committee on the Rights of the Child has explained what the *CRC* requires in the context of preserving the family environment for Indigenous children, concluding as follows:

> Article 5 of the Convention requires States parties to respect the rights, responsibilities and duties of parents or where applicable, the members of the extended family or community to provide, in a manner consistent with the evolving capacities of all children, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention. **States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities in accordance with articles 3, 5, 18, 25 and 27(3) of the Convention.**
>
> States parties should, in cooperation with indigenous families and communities, collect data on the family situation of indigenous children, including children in foster care and adoption processes. Such information

[43] [Emphasis added]

> should be used to design policies relating to the family environment and alternative care of indigenous children in a culturally sensitive way. **Maintaining 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**.[44]

37. One of the main rationales for protecting a child's family environment can be seen in the pre-amble to the *CRC*, which states:

> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,
>
> Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…

38. Canada's obligation to protect a child's family environment is found in other treaties as well. Article 23.1 of 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." In the same vein, article 10.1 of 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."

39. The obligation to protect a child's family environment is also echoed in the *UDHR* – a fundamental constitutive document of the UN that was passed by the General Assembly in 1948 and is widely considered to have become part of customary international law. Article 16(3) states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State", and article 25(2) provides that "[m]otherhood and childhood are entitled to special care and assistance."

40. As these treaties and declarations make clear, the removal of First Nations children from their family environment in disproportionate numbers – in circumstances

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[44] ***CRC No. 11***, at paras. 46-47 (emphasis added)

where other, less disruptive measures could ensure their protection just as (or more) effectively, and where these removals are the consequence of the agencies providing services having received unequal and inadequate funding – is wholly inconsistent with Canada's international obligations to preserve a child's family environment without discrimination.

iii. Protecting a child's cultural rights

41. Canada's commitment to protect a child's family environment is related to another obligation it has under international law: the requirement to protect a child's cultural rights. In the area of child welfare, this requires Canada to ensure that First Nations children are dealt with in a culturally competent manner that does not compromise their ability to develop and maintain unique languages, customs, traditions and cultural identities.

42. Article 30 of the *CRC* speaks specifically to the issue of cultural rights in the context of Indigenous children:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or 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.

43. In discussing the obligations of States Parties in this regard, the Committee on the Rights of the Child has explained that the protection of an Indigenous child's right to culture is connected to the preservation of that child's family environment:

> Furthermore, States should always ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20 (3) of the Convention **pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background. In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.** Specifically, if an indigenous child is placed in care outside their community, the State party should take **special**

> **measures to ensure that the child can maintain his or her cultural identity**.[45]

44. Protecting a child's unique culture through "continuity" in their family environment is also an important component of determining what constitutes the best interests of the child:

> Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests… The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.
>
> Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, **due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests**.[46]

45. More generally, protecting a child's cultural rights requires ensuring that services are delivered in a culturally competent manner by people with the proper experience and training. The Committee on the Rights of the Child has explained that "[p]rofessionals working with indigenous children should be trained on how consideration should be given to cultural aspects of children's rights." This would include training on "the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child."[47]

46. As with the obligation to protect a child's family environment, the obligation to protect the cultural rights of Indigenous children also appears in other treaties and declaratory instruments. The *UN Declaration* sets out several rights relating to this issue, including the right of Indigenous peoples:

a) "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (article 5);

b) "not to be subjected to forced assimilation or destruction of their culture" and the requirement that States parties prevent and provide redress for

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[45] ***CRC No. 11***, at para. 48 [emphasis added].
[46] ***CRC No. 14***, at paras. 55-56 [emphasis added].
[47] ***CRC No. 11***, at paras. 33, 80.

"[a]ny action which has the aim or effect of depriving [Indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities" (article 8);

c) "to practise and revitalize their cultural traditions and customs" (article 11);

d) "to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons" and the requirement of States parties to "take effective measures to ensure that this right is protected" (article 13);

e) "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard" (article 25);

f) "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions" (article 31);

g) "determine their own identity or membership in accordance with their customs and traditions" (article 33); and

h) "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices" (article 34)

47. The *ICCPR* addresses cultural rights in article 27, which provides that where "ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." (Indigenous peoples are considered entitled to the same protections afforded to "ethnic minorities" under article 27.[48])

48. The *ICESCR* and *CERD* also protect cultural rights. Article 15(1)(a) of the *ICESCR* recognizes "the right of everyone…to take part in cultural life" and requires States Parties to take necessary steps to ensure "the conservation… of science and culture." Article 5(e)(iv) of the *CERD* guarantees "the right of everyone, without

[48] ***Lovelace v Canada*** (1981), U.N. Doc. CCPR/C/13/D/24/1977 (HRC 1905) at 13.2-15; ***Länsman v Finland*** (1992), U.N. Doc. CCPR/C/52/D/511/1992 (HRC 1994) at 9.2-9.3; ***Poma Poma v Peru*** (2006), UN Doc. CCPR/C/95/D/1457/2006 (HRC 2009) at 7.2.

distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of... cultural rights, in particular... the right to equal participation in cultural activities." The Committee on the Elimination of Racial Discrimination, which is the treaty body for the *CERD*, has emphasized the importance of cultural rights for Indigenous peoples, noting that "the preservation of their culture and their historical identity has been and still is jeopardized."[49]

49. The same substantive obligations are reflected in article 27(1) of the *UDHR*, which provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

50. These treaties and declarations require that child welfare services for First Nations children living on reserve be delivered in a culturally competent manner that respects and promotes their protected cultural rights. The close connection between cultural rights and a child remaining with his/her parents or guardians further emphasizes the fact that the disproportionate removal of First Nations children from their family environments due to unequal funding constitutes a serious breach of Canada's obligations under international human rights law. Removing First Nations children from their family environment jeopardizes their ability to learn and maintain their unique languages, customs, traditions and beliefs. The risk of these protected cultural rights being compromised is particularly high where removal places First Nations children outside of their community.

iv. Providing adequate child welfare services

51. Canada's commitment to respect the prohibition against discrimination, the best interests of the child, a child's right to maintain his/her family environment, and a child's cultural rights all have direct implications for the manner in which Canada provides child welfare services to First Nations children. Several treaties and declarations reinforce this conclusion by speaking to Canada's obligation to provide adequate and appropriate social services without discrimination.

52. The *CRC* adverts to this obligation in several provisions. Article 19 requires States parties to take "protective measures" against child mistreatment, including "the establishment of social programmes to provide necessary support for the child and for

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[49] ***CERD No. 23***, at para. 3

those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment". Article 27 protects the right of children to "a standard of living adequate for the child's physical, mental, spiritual, moral and social development" and sets out that States parties "shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." Both articles are subject to the general non-discrimination provision in the *CRC*.

53. Article 5(1)(e) of the *CERD* also speaks to the requirement to provide adequate child welfare services without discrimination:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee 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:
>
> ...
>
> (iv) The right to public health, medical care, social security and social services

54. So too does article 24 of the *UN Declaration*, which affirms that "Indigenous individuals also have the right to access, without any discrimination, to all social and health services."

55. The importance of ensuring that adequate child welfare services are provided to First Nations communities without discrimination can be seen in the Committee on the Rights of the Child's Concluding Observations on Canada, which reviewed and addressed the child welfare services provided to First Nations communities. After expressing concern over the "significant overrepresentation" of First Nations children in out-of home care[50], the Committee determined that Canada should (i) "take urgent measures to address disparities in access to services by all children facing situations of

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[50] ***CRC Concluding Observations***, at paras. 32(a), 55(e)

vulnerability, including ethnic minorities"[51]; (ii) take "immediate steps to ensure that in law and in practice, Aboriginal children have full access to all government services and receive resources without discrimination"[52]; (iii), provide "culturally appropriate services" to parents or guardians of Indigenous children "to enable them to fulfill their parenting role"[53]; and (iv) take "immediate preventive measures to avoid the separation of children from their family environment by providing appropriate assistance and support services to parents and legal guardians".[54] These recommendations recognize the reality that providing adequate and appropriate child welfare services, without discrimination, can have a direct impact on the ability to protect the rights of First Nations children, including their right to maintain their family environment and their unique culture.

D. Canada's international obligations must be met regardless of how a service is delivered

56. The fact that child welfare services in Canada are delivered by various levels of government, in coordination with certain non-government entities, does not detract from Canada's requirement to meet its international obligations.

57. It is a key principle of customary[55] and conventional[56] international law that the state, as a federal entity, is ultimately responsible for meeting its international legal obligations, regardless of its internal laws, constitutional division of powers and/or reliance on private parties to perform state functions. In other forums, Canada itself has correctly characterized this principle as a "cornerstone rule" of international law.[57]

58. Applying the principle to the obligations set out in the *CRC,* the Committee on the Rights of the Child concluded as follows:

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[51] ***CRC Concluding Observations***, at paras. 33(b)
[52] ***CRC Concluding Observations***, at para. 33(a)
[53] ***CRC Concluding Observations***, at para. 54
[54] ***CRC Concluding Observations***, at para. 56
[55] 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);
[56] ***Vienna Convention on the Laws of Treaties***, 23 May 1969, Treaty Series, vol. 1155, p. 331 (entry into force 27 January 1980), Articles 27 and 46(1) (Canada is bound by the *Vienna Convention*)
[57] *In the matter of an* ***Arbitration under Chapter Eleven of NAFTA*** *between Clayton and the Government of Canada*, (December 9, 2011), Counter-Memorial (Public Version), at para. 271 [excerpt]

> The Committee has found it necessary to emphasize to many States that **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 jurisdiction, regardless of the State structure.**
>
> The Committee reiterates that in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. **In any process of devolution, States parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention.** The Governments of States parties must retain powers to require full compliance with the Convention by devolved administrations or local authorities and must establish permanent monitoring mechanisms to ensure that the Convention is respected and applied for all children within its jurisdiction without discrimination. Further, **there must be safeguards to ensure that decentralization or devolution does not lead to discrimination in the enjoyment of rights by children in different regions**.[58]

Similar points have been made by the treaty bodies responsible for the *ICCPR*, *ICESCR* and *CERD*.[59]

59. This principle has four important consequences in this case.

60. First, it augurs in favour of a broad definition of "provision of... services" in section 5 of the *CHRA* – particularly when considered together with the presumption of conformity and the important role that the *CHRA* plays in meeting Canada's international obligations. As explained above, the provision of services, such as child welfare services, directly engages Canada's international human rights obligations. To deny claimants the human rights protections of the *CHRA* because entities apart from the federal government are also involved in providing the service in question is wholly inconsistent with the principle that Canada is ultimately responsible for meeting its international legal obligations. (The impact of international law on the interpretation of

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[58] ***CRC No. 5***, at paras. 40-41; ***CRC No. 11***, at para. 78 [emphasis added].

[59] Human Rights Committee, ***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; Committee on Economic, Social and Cultural Rights, ***Concluding Observations on the Government of Canada***, UN Doc. E/C.12/1/Add.31 (4 December 1998) at para. 52; Committee on Economic, Social and Cultural Rights, ***General Comment No. 9****: The Domestic Application of the Covenant*, U.N. Doc. E/C.12/1998/24 (1998) ("***CESCR No. 9***") at paras. 7-10; Committee on the Elimination of Racial Discrimination, ***General Recommendation No. 20****: Non-discriminatory implementation of rights and freedoms (Art. 5)*, UN Doc. A/51/18 (SUPP), Annex VIII (1 January 1996), at para. 5; ***CERD No. 32***, at para. 31

"services" was canvassed in greater detail in Amnesty's submissions on Canada's motion to dismiss, which Amnesty will not repeat again here, but adopts and relies upon for the purposes of these submissions.)

61. Second, the inability to rely on internal laws to avoid international obligations confirms that finding an exact "mirror" comparator group – that is, a group receiving services from the same level of government said to be engaging in discriminatory conduct – is not required to establish discrimination for the purposes of those obligations. Were it otherwise, states could shield themselves from all international responsibility to prevent formal and substantive discrimination simply by ensuring that different private parties or levels of government are responsible for the delivery of services to different groups. Such an absurd result finds no basis in international law, and was properly rejected by the Federal Court and Federal Court of Appeal on the motion to dismiss brought by Canada earlier in these proceedings.[60]

62. A third and related point is that when evaluating whether discrimination has occurred under international law, a comparison may be drawn between a group receiving a service from the federal government (First Nations children living on reserve and in the Yukon) and a group receiving the same service from a different entity, such as a provincial government (all other children, including First Nations children living off reserve). Again, for the purposes of Canada's obligations under international human rights law, the question of whether a service is delivered via federal or provincial organs, or a combination thereof, is irrelevant. Put differently, in evaluating compliance with international obligations, *there is only one service provider*: the entirety of the federal Canadian state.

63. Finally, the principle supports the conclusion that, in order to remedy any breaches of Canada's international obligations with respect to the delivery of child welfare services to First Nations children, a funding structure must be put in place that avoids jurisdictional or inter-departmental disputes, and focuses on meeting those obligations as fully and effectively as possible.

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[60] See ***FNCFCSC***.

E. Canada's obligations include the requirement to take special and positive measures, and provide effective remedies

64. If the Tribunal concludes that there has been a violation of section 5 in this case, then it must determine the appropriate remedial order(s) to be made under section 53 of the *CHRA*. In carrying out this exercise, it is important to consider what measures are required to meet Canada's various international human rights obligations, as well as what is required to provide an effective remedy for breaches of those obligations. Against this backdrop, Amnesty submits that the remedies sought by the complainants are fully consistent with international human rights law.

65. Turning first to the measures required to meet Canada's international obligations, the relevant treaties and declarations all refer to the need to take action to achieve substantive equality. Thus, where there is discrimination due to the unequal and inadequate level of financial and other resources being provided to First Nations children, there is an obligation to end this discrimination and take the positive measures necessary to address the situation of disadvantage that has been created, including providing increased funding and resources for child welfare services delivered to those children. Indeed, given the history of discrimination against First Nations peoples, the deep challenges that they continue to face today, and the unique cultural considerations engaged in the context of caring for Indigenous children, meeting Canada's international obligations requires taking additional measures (sometimes referred to as "special measures") in order to achieve substantive equality quickly and effectively.

66. With respect to the *CRC*, article 4 states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." The Committee on the Rights of the Child has affirmed that this obligation includes taking positive measures to achieve substantive equality:

> **The right to non-discrimination is not a passive obligation**, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also **requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to**

> **enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality**.[61]

67. Indigenous children are a group that requires such positive measures, and indeed special measures, including taking steps to identify potential discrimination, and the allocation of resources to remedy that discrimination. As the Committee explained:

> As previously stated in the Committee's general comment No. 5 on general measures of implementation, **the non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures**...
>
> The Committee, through its extensive review of State party reports, notes that **indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children**. In particular, **States parties are urged to consider the application of special measures in order to ensure that indigenous children have access to culturally appropriate services in the areas** of health, nutrition, education, recreation and sports, **social services**, housing, sanitation and juvenile justice.
>
> Among the positive measures required to be undertaken by States parties is disaggregated data collection and the development of indicators for the purposes of identifying existing and potential areas of discrimination of indigenous children. **The identification of gaps and barriers to the enjoyment of the rights of indigenous children is essential in order to implement appropriate positive measures through legislation, resource allocation, policies and programmes**.[62]

68. Canada's other treaty commitments also include the obligation to take positive and special measures to give effect to protected rights and freedoms.

69. Article 2 of the *ICESCR* sets out that a State party must "take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means..." In interpreting this provision, the Committee on Economic, Social and Cultural Rights, which is the relevant treaty body, specified that the "means" used by a State "should be appropriate in the sense of producing results which are consistent with the full discharge

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[61] ***CRC No. 14***, at para. 41 [emphasis added].
[62] ***CRC No. 11***, at paras. 24-26 [emphasis added].

of its obligations by the State party"[63], and that it may include financial means.[64] The Committee has also addressed the need for special measures: "In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination."[65]

70. Article 2 of the *CERD* requires states to undertake to use "all appropriate means" to eliminate racial discrimination, including, "when the circumstances so warrant... special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." The Committee on the Elimination of Racial Discrimination has concluded that the *CERD* also includes a "general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis...", but that the reference to "special measures" in article 2 denotes additional measures specifically designed to eliminate circumstances of substantive discrimination.[66]

71. The obligation to take positive and special measures is also included under article 2.2 of the *ICCPR*. That provision requires States parties to take "measures as may be necessary to give effect to the rights recognized in the present Covenant", and the Human Rights Committee (the relevant treaty body) has confirmed that this includes taking "special" and "positive" measures, particularly when dealing with the rights of children and the cultural rights of minority populations.[67]

72. Finally, the *UN Declaration* includes an obligation to provide "effective mechanisms" to address discrimination, as well as the "prevention of and redress for any action which was the aim or effect of depriving [Indigenous peoples] of their integrity as

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[63] ***CESCR No. 9***, at para 5.

[64] Committee on Economic, Social and Cultural Rights, ***General Comment No. 3****: The nature of States parties obligations*, U.N. Doc. E/1991/23 (1990), at para. 7

[65] ***CESCR No. 20***, at para. 9

[66] ***CERD No. 32***, at paras. 14, 28-35

[67] See Human Rights Committee, ***General Comment No. 17****: Rights of the child (Art. 24)*, U.N. Doc. A/44/40 (29 September 1989), as published in U.N. Doc. HRI/GEN/1/Rev.7, at paras. 1 and 4; Human Rights Committee, ***General Comment No. 23****: Rights of Minorities*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (26 April 1994) at paras. 6.1, 6.2 and 7

distinct peoples, or of their cultural values or ethnic identities."[68] The *UN Declaration* also specifies the need to take positive and special measures to ensure Indigenous peoples enjoy improving economic and social conditions.[69] In addition, the *UN Declaration* calls on all states to pay "[p]articular attention… to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities"[70] and to "take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[71]

73. Turning next to the issue of remedies, it is a key principle of customary and conventional international law that where a state has failed to meet its international legal obligations – whether with respect to prohibiting formal and substantive discrimination, ensuring the protection of children, or taking positive and special measures as necessary – it must provide a timely and effective remedy.[72] With respect to the unequal and inadequate funding of child welfare services being provided to First Nations children living on reserve, a number of remedies find support under international law.

74. First, particularly given the need to take positive and special measures, a requirement to provide the financial and other resources necessary to satisfy all relevant obligations under human rights law – including the obligation to achieve substantive equality in the delivery of child welfare services – must form part of any remedy. Increasing the level of financial and other resources is not a complete cure, however. Where the breach of an international obligation raises structural or systemic issues – such as longstanding discriminatory policies or practices in the delivery of funding to Indigenous children – the underlying violations must be addressed at the structural or systemic level.[73]

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[68] ***UN Declaration***, article 8.2(a)
[69] ***UN Declaration***, article 21
[70] ***UN Declaration***, article 22.1
[71] ***UN Declaration***, article 22.2
[72] See ILC 2001 **Articles on Responsibility of States for Internationally Wrongful Acts** (appended to GA Res 56/83, 12 December 2001), Part Two ("***ILC Articles on Responsibility***"); ***CRC No. 5***, at para. 24; ***ICCPR***, Article 2.3; ***CESCR No. 9***, at paras. 2-3; ***CERD***, article 6; ***Universal Declaration***, article 8
[73] General Assembly, ***Special Rapporteur on Violence Against Women***, A/66/215 (1 August, 2011) at para. 71; General Assembly, ***Report of the Special Rapporteur on the human right to safe drinking water and sanitation***, U.N. Doc. A/HRC/27/55 (30 June 2014) at para. 78.

75. A related point is that the delivery of these resources must be structured in a way that prioritizes the protection of First Nations children's rights, without delay due to jurisdictional or inter-departmental disputes over the provision of funding. This is a natural corollary of the requirement to provide an *effective* remedy, the child-first principle that binds Canada under the *CRC*, the recognized need for "urgent" and "immediate" action to address the impact of discrimination against Indigenous children,[74] and the principle that Canada's internal laws do not detract from its responsibility to fully meet its international obligations. In other words, Canada's international human rights obligations cannot be met simply by increasing the level of resources devoted to First Nations children, if the way in which those resources are structured and delivered does not achieve substantive equality and the durable protection of children's rights.

76. The need for a remedy that addresses both the degree and structure of funding finds further support in Jordan's Principle (as defined by the Caring Society), which is entirely consistent with Canada's obligations under international human rights law. Amnesty notes that a narrow, restrictive interpretation of Jordan's Principle that would limit the nature of funding disputes where the Principle applies, or the circumstances in which First Nations children would receive its benefit, does not accord with Canada's international obligations and ought to be rejected, as it recently was by the Federal Court in *Pictou Landing Band Council v Canada (Attorney General).*[75]

77. In addition to increasing resources and implementing the necessary structural changes, remedies for breaches of international obligations also normally include providing compensation to victims who have suffered damages as a result of those breaches.[76] Where discriminatory conduct is at issue, compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.[77]

78. Finally, particularly in cases where there are multiple ongoing violations of international obligations, an effective remedy should include assurances and guarantees,

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[74] ***CRC Concluding Observations***, at paras. 33, 56.
[75] 2013 FC 342, at paras. 86. Amnesty was granted leave to intervene in the appeal of this decision before the Attorney General discontinued the appeal.
[76] ***Brownlie's***, at p. 571; ***ILC Articles on Responsibility***, article 36
[77] ***B.J. v. Denmark***, CERD/C/56/D/17/1999 (CERD 2000)

both by words and by conduct, that the breaches in question will not be repeated.[78] The form that such assurances and guarantees take will depend on the nature and severity of the wrongful conduct, and the context in which the remedy is being sought.[79] Depending on the circumstances, states may be required to take concrete, positive steps to establish a system to ensure international obligations are respected in the future.[80] This may include establishing independent institutions to monitor and oversee the obligations in issue. It is notable that inconsidering children's rights in general, the Committee on the Rights of the Child has called on the federal government to establish an independent mechanism "to ensure comprehensive and systematic monitoring of all children's rights".[81] Similarly, the establishment of a comprehensive and systemic monitoring mechanism for assuring non-repetition of breaches of the rights of First Nations children, as called for by the complainant, would be entirely appropriate in this case.

79. With respect to Canada's need to implement structural changes that address the discrimination on a systemic level, the broad parameters and ultimate objectives of such a remedy are matters that can and should be determined by human rights tribunals. However, the details of what structural or systemic changes are necessary and how they ought to be implemented engages a number of considerations relating to the unique cultural needs that the impacted communities are best placed to consider. Accordingly, it may be appropriate to order participatory structural injunctions, which "require the State to adopt a plan to correct a structural violation with the meaningful participation of beneficiaries and report back to the court on progress made."[82]

80. To ensure the effective implementation of these remedies, this Tribunal may need to assume a continuing supervisory role to ensure effective enforcement (particularly

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[78] ***ILC Articles on Responsibility***, article 30

[79] ***Loayza Tamayo Case***, Reparations (art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998), at paras. 83-87, 123-124.

[80] ***LaGrand (Germany v. United States of America)***, [2001] I.C.J. 3 at paras. 123-125

[81] ***CRC Concluding Observations***, at paras. 22-23 (citing a previous concern in CRC/C/15/Add.215, para. 14, 2003)

[82] UN Special Rapporteur on the human right to safe drinking water and sanitation, [DOC NAME?], UN Doc A/HRC/27/55 at para. 78. This approach has also been applied by courts in various other countries when making orders with major socio-economic implications, including courts in India, Colombia, South Africa and the United States: see C. Rodriguez-Garavito, ***Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America***, [2011] Texas Law Review Vol. 89 at 1671-72

with respect to any ongoing participatory structural injunction process) and provide the necessary assurances of non-repetition.[83]

81. Amnesty submits that this Tribunal should carefully consider the need for ongoing supervision and independent safeguards as part of any remedial order(s) made, and the effective enforcement of those orders. Such measures are particularly appropriate given the importance, range and complexity of steps required to ensure compliance with Canada's international human rights obligations in this case, and Canada's demonstrated refusal to take those steps, despite being aware of the consequences for First Nations children living on reserve.[84]

PART IV - ORDER REQUESTED

82. Amnesty respectfully requests that this matter be decided in accordance with Canada's international obligations. 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 28, 2014

for Justin Safayeni
Stockwoods LLP

Counsel for Amnesty International Canada

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[83] *Ibid.*

[84] See, for example, Dr. Blackstock, Examination in Chief, February 26, 2013 (Vol. 2, p. 28); and First Nations Child and Family Services - Joint National Policy Review - Final Report, 2000 (Commission's Book of Documents, Tab 3, p. 14).

SCHEDULE "A" – AUTHORITIES

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1. *Bailey and Canada (Minister of National Revenue)*, 1980 CanLII 5 (CHRT)
2. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (excerpt)
3. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (excerpt)
4. *Commission des droits de la personne et des droits de la jeunesse c. Laverdière*, 2008 CTDP 15
5. *Commission des droits de la personne et des droits de la jeunesse v Maksteel Québec Inc,* 1997 CanLII 49 (QC TDP)
6. *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203
7. *Day v. Canada (Department of National Defence)*, 2002 CanLII 45923 (CHRT)
8. *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (excerpt)
9. *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445
10. *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2013 FCA 75
11. *Nealy v. Johnston*, (1989) C.H.R.R. D/10 (CHRT)
12. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 (excerpt)
13. *R v Hape*, [2007] 2 SCR 292 (excerpt)
14. *R v Ipeelee*, 2012 SCC 13
15. *R v Sharpe*, [2001] 1 SCR 45 (excerpt)
16. *Simon v. Canada (Attorney General)*, 2013 FC 1117
17. *Stanley v. Canada (Royal Canadian Mounted Police) (1987)*, (1987) CanLII 98 (CHRT)
18. *Yuill v. Canadian Union of Public Employees*, 2011 HRTO

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19. Convention on the Rights of the Child, 44/25 of 20 November 1989, (entered into force 2 September, 1990)

20. International Covenant on Civil and Political Rights, 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)

21. International Covenant on Economic, Social and Cultural Rights, 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)

22. International Convention on the Elimination of All Forms of Racial Discrimination, 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)

23. Vienna Convention on the Laws of Treaties, 23 May 1969, Treaty Series, vol. 1155, p. 331 (entry into force 27 January 1980)

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24. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

25. United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295

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1. B.J. v. Denmark, CERD/C/56/D/17/1999 (CERD 2000)

2. Committee on Economic, Social and Cultural Rights, Concluding Observations on the Government of Canada, UN Doc. E/C.12/1/Add.31 (4 December 1998)

3. Committee on Economic, Social and Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24 (1998)

4. Committee on Economic, Social and Cultural Rights, General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights, U.N. Doc. E/C.12/1998/25 (1998)

5. Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security, U.N. Doc. E/C.12/GC/19 (2008)

6. Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, U.N. Doc. E/C.12/GC/20 (2009)

7. Committee on the Elimination of Racial Discrimination, General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), UN Doc. A/51/18 (SUPP), Annex VIII (1 January 1996)

8. Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, U.N. Doc. A/52/18, Annex V at 122 (1997)

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12. Committee on the Rights of the Child, General Comment No. 2: The role of independent national human rights institutions in the protection and promotion of the rights of the child, U.N. Doc. CRC/GC/2002/2 (2002)

13. Committee on the Rights of the Child, General Comment No. 5: Committee on the Rights of the Child, General measures of implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (2003)

14. Committee on the Rights of the Child, General Comment No. 7: Implementing child rights in early childhood, U.N. Doc CRC/C/GC/7 (2005)

15. Committee on the Rights of the Child, General Comment No. 11: Indigenous Children and their Rights under the Convention, U.N. Doc. CRC/C/GC/2009/11 (2009)

16. Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken a s a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14

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18. General Assembly, Special Rapporteur on Violence Against Women, A/66/215 (1 August, 2011)

19. Government of Canada, Core document forming part of the reports of States Parties: Canada (1998)

20. Human Rights Committee, General Comment No. 17: Rights of the child (Art. 24), U.N. Doc. A/44/40 (29 September 1989)

21. Human Rights Committee, General Comment No. 18: Non-discrimination, 4 October 1990 (Vol. I) (Supp)

22. Human Rights Committee, General Comment No. 23: Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (26 April 1994)

23. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)

24. In the matter of an Arbitration under Chapter Eleven of NAFTA between Clayton and the Government of Canada, (December 9, 2011), Counter-Memorial (Public Version)

25. LaGrand (Germany v. United States of America), [2001] I.C.J. 3

26. Länsman v Finland (1992), U.N. Doc. CCPR/C/52/D/511/1992 (HRC 1994)

27. Loayza Tamayo Case, Reparations (art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998)

28. Lovelace v Canada (1981), U.N. Doc. CCPR/C/13/D/24/1977 (HRC 1905)

29. Poma Poma v Peru (2009), UN Doc. CCPR/C/95/D/1457/2006 (HRC 2009)

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SCHEDULE "B" – STATUES

Canadian Human Rights Act, R.S.C., 1985, c. H-6

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,on a prohibited ground of discrimination.

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

First Nations Child and Family Caring Society of Canada, et al Complainants	-and	Canadian Human Rights Commission Commission	and	Attorney General of Canada Respondent	and	Amnesty International Canada, et al Interested Parties	Court File No: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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