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 the 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 –

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

REPLY SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION

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OVERVIEW

1. This is the reply by the Canadian Human Rights Commission (the "Commission") to the written submissions of the Respondent, the Attorney General of Canada (representing Aboriginal Affairs and Northern Development Canada ("AANDC")).

2. The Commission reiterates its original submissions and will reply to five issues raised by the Respondent: (i) issues with respect to evidence and witnesses of the Commission, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations (together the "Complainants"); (ii) issues regarding the *prima facie* case of discrimination, including the cross-jurisdictional nature of the comparator group and

denial of services; (iii) issues with the national scope of the complaint before the Canadian Human Rights Tribunal (the "Tribunal"); (iv) issues dealing with consideration of Jordan's Principle; and (v) remedial issues.

3. Generally, the Commission submits that the Respondent's high-level review of the evidence does not demonstrate that the Commission's analysis of the evidence is flawed.

PART I: COMMISSION'S SUBMISSIONS

A) The Commission and Complainants' Evidence and Witnesses

4. The Respondent has raised four issues in its written submissions with respect to the Commission and Complainants' evidence and witnesses, all of which are addressed in turn below.

i) Provincial Witnesses are not Necessary to Prove *Prima Facie* Discrimination

5. The Respondent argues that the Tribunal should draw an adverse inference against the Commission and Complainants for not having called witnesses from the provinces or Yukon Territory to provide evidence as to how funding is provided off reserve.[1]

6. The Commission submits that this argument is flawed and cannot stand for the reasons that follow.

7. First, the evidence led by the Commission and Complainants, which was both comparative and non-comparative in nature, is sufficient to establish a *prima facie* case of discrimination. The Commission's initial written submissions make clear that the courts have found that while a comparator group analysis can be a useful evidentiary tool, it is not a necessary component for a finding of *prima facie* discrimination under section 5 of the *CHRA*.[2]

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[1] Written Submissions of the Respondent, Attorney General of Canada (representing Aboriginal Affairs and Northern Development Canada), dated October 3, 2014 at p. 36, paras. 144-146 ["Respondent's Written Submissions"].

[2] *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445, Joint Book of Authorities of the Commission, Complainants and Interveners ["Joint BOA"], Volume [Vol.] 5, Tab 87 at paras.

8. The premise upon which the Respondent's argument is based is that a comparative analysis is necessary in order to establish a *prima facie* case of discrimination, which is contrary to the relevant jurisprudence. In this way, the basis for the Respondent's argument is flawed. Evidence from provincial witnesses, the sole purpose of which would be to offer a comparison to the evidence led by the Commission and Complainants regarding child welfare services on reserve, is not necessary in order to establish discrimination under section 5 of the *CHRA* in this case.

9. Furthermore, many of the Commission and Complainants' witnesses testified about their experiences with the child welfare system both on and off reserve. For example, Elsie Flette, Chief Executive Officer of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), testified that the Authority was involved in providing and monitoring provincial funding to the agencies it serves.[3] Agencies in Manitoba have a "province wide mandate" and serve children both on and off reserve.[4]

10. As a result, First Nations child welfare agencies in Manitoba work with both provincial and federal funding and programs, and are in a position to compare and contrast the two based on their direct experience. Both Ms. Flette and Carolyn Bohdanovich, Director of Operations at West Region in Manitoba, testified about the disparities in child welfare funding and services on reserve as compared to off reserve.[5]

11. Similarly, Dr. Cindy Blackstock testified about her experience as a Social Worker both on and off reserve in British Columbia, and the discrepancies in child welfare funding and services on reserve as compared to off reserve.[6]

12. Therefore, to the extent that a comparative analysis may be a useful evidentiary tool for the Tribunal in determining whether AANDC's FNCFS Program and corresponding funding formulas are discriminatory, the Commission submits that there is ample

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283, 290; see also *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII), Joint BOA, Vol. 2, Tab 43.

[3] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 26-27.

[4] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 28-29; see also testimony of Carolyn Bohdanovich, Transcript Vol. 21 at p. 236.

[5] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 54-55, 131-133, 205-207; Vol. 21 at pp. 34-36; see also testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 26-27, 64-66.

[6] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 103-105, 148-201; Vol. 2 at pp. 41-51, 66-70, 72-74.

evidence in the record of the disparities in child welfare funding and services on and off reserve upon which to base such an analysis.

13. Finally, the Commission submits that the Respondent is best placed to obtain information regarding the provinces' child welfare funding and services given the fact that it has entered into funding agreements with certain provinces, including Ontario, British Columbia and Alberta, for the provision of child welfare services to First Nations on reserve. Notwithstanding these relationships, the Respondent has been unable to obtain this information. For example, in response to the Auditor General of Canada's 2008 report, AANDC released the following statement:

> [AANDC] agrees with [the Auditor General's recommendation that AANDC undertake a comparative analysis] on the understanding that a comparative analysis can only be provided with the limited data we have access to and on a phased basis. This review will require a substantial amount of time and work with the provinces and First Nations. The information available in provincial annual reports is general and the funding provided under their children's services often includes programs beyond child and family services. Overall, these provincial reports do not contain the level of detail required to make the kind of comprehensive comparison expected by the Committee. Relationships must be strengthened with provincial partners as they are key in providing [AANDC] with the necessary information concerning the funding of their child welfare programs.[7] (emphasis added)

14. The Commission and Complainants, on the other hand, do not have funding or reporting relationships with the provinces, nor do they possess a degree of control over the provinces. Thus, it is submitted that the Commission and Complainants called the best evidence available with respect to the child welfare funding and services provided by the provinces off reserve, and that sufficient evidence was adduced to establish a *prima facie* case of discrimination.

[7] Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General, Canadian Human Rights Commission's Book of Documents ["CHRC BOD"], Exhibit ["Ex."] HR-03, Tab 16, p. 2 (pages unnumbered).

ii) Auditor General of Canada's Reports are the Best and Only Evidence

15. The Respondent also argues that the Tribunal ought to afford the federal and provincial Auditor General's reports on the First Nations Child and Family Services Program (the "FNCFS Program") minimal weight since the Commission and Complainants did not call the Auditor General(s) as a witness(es) to substantiate the reports.[8]

16. The Commission respectfully disagrees with this position. Section 18.1 of the *Auditor General Act*[9] states:

> **18.1** The Auditor General, or any person acting on behalf or under the direction of the Auditor General, is not a competent or compellable witness – in respect of any matter coming to the knowledge of the Auditor General or that person as a result of performing audit powers, duties or functions under this or any other Act of Parliament during an examination or inquiry – in any proceedings other than a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act.
>
> **18.1** En ce qui concerne les questions venues à leur connaissance dans l'exécution, au cours d'un examen ou d'une enquête, des attributions qui sont confiées au vérificateur général en matière de vérification en vertu de toute loi fédérale, ce dernier et les personnes qui agissent en son nom ou sous son autorité n'ont qualité pour témoigner ou ne peuvent y être contraints que dans les poursuites intentées pour une infraction visée à l'article 131 du Code criminel (parjure) se rapportant à une déclaration faite au titre de la présente loi. (emphasis added)

17. Section 18.1 makes clear that the Auditor General of Canada is not a competent or compellable witness. Therefore, she could not have testified about the audit of the FNCFS Program and funding formulas and subsequent findings that they were flawed and inequitable. The Commission submits that the fact that the Auditor General was not called as a witness in this case should have no impact on the weight those reports are given by the Tribunal since she could not be called (nor could she have willingly testified).

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[8] Respondent's Written Submissions, *supra*, at p. 41, para. 166.
[9] R.S.C. 1985, c. A-17, s. 18.1 ["*Auditor General Act*"].

18. Given the foregoing, the Auditor General's reports are not just the only evidence available, but they are also the best evidence. Section 7 of the *Auditor General Act* states that the Auditor General's reports are filed annually with the House of Commons in order to "call attention to anything that [s/he] considers to be of significance and of a nature that should be brought to the attention of the House of Commons".[10] This demonstrates the importance of the Auditor General's findings after conducting an audit of a program. The purpose of her reports is to highlight issues of significance to Parliament. In addition, the courts often refer to reports by the Auditor General of Canada in support of their findings.[11]

19. Moreover, the Respondent publicly accepted and agreed with the findings of the Auditor General's 2008 and 2011 reports at the time they were released. In 2008, the Auditor General reported to the House of Commons the findings of her review of the FNCFS Program and on reserve funding formulas.[12] The report includes the following statement from the Respondent: "[AANDC] agrees with all recommendations."[13] Likewise, AANDC responded to the Auditor General's follow-up report in 2011,[14] agreeing with the recommendations contained therein.[15] In the review process that followed the tabling of the Reports, the Respondent never raised any concerns or objections.

iii) The *Wen:De* Reports

20. The Respondent also contends that the Tribunal ought to give little weight to reports collectively known as the "*Wen:De* reports",[16] as well as the testimony of Dr. John Loxley and Dr. Nicolas Trocmé (two of the authors of these reports and expert

[10] *Auditor General Act*, *supra*, s. 7.
[11] *Harris v. Canada*, [2000] 4 FCR 37 (FCA) at footnote 5; see also *Canada (Minister of Fisheries and Oceans) v. Haché*, 2005 FCA 418 at para. 12; see also *Aucoin v. The Queen*, 2001 FCT 800.
[12] Auditor General of Canada's Report to the House of Commons, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada (2008), Ex. HR-03, Tab 11 ["OAG Report 2008"].
[13] OAG Report, Ex. HR-03, Tab 11 at p. 6.
[14] Status Report of the Auditor General of Canada to the House of Commons, Chapter 4: Programs for First Nations on Reserves (2011), CHRC BOD, Ex. HR-05, Tab 53 ["OAG Status Report 2011"].
[15] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 8.
[16] Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report (2004),), Canadian Human Rights Commission's Book of Documents ["CHRC BOD"], Ex. HR-01, Tab 4; see also *Wen:De* We Are Coming to the light of Day (2005), CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* The Journey Continues (2005), CHRC BOD, Ex. HR-01, Tab 6.

witnesses before the Tribunal) because they did not provide detailed evidence comparing the levels of provincial and federal funding for child welfare.[17]

21. Again, the Commission submits that this argument is predicated on a flawed interpretation of the applicable law and evidence in this case. As described above, the Commission's position is that a comparative analysis is not necessary in order to establish a *prima facie* case of discrimination under section 5 of the *CHRA*.[18]

22. In addition, Dr. Loxley testified that while conducting research for the *Wen:De* reports, the authors surveyed provincial governments for information regarding their child welfare funding methodologies, but that they received a "spotty" response, and were thus unable to get "useable data" that would have enabled a direct comparison.[19] However, Dr. Loxley also testified that while the *Wen:De* reports were not based on a strict "disparity analysis", such an analysis was unnecessary because the basic premise for the reports – that provincial child welfare funding and services for children off reserve is greater than federal funding and services for First Nations children on reserve – was based on the findings of previous research that had been commissioned and approved by the Respondent (the National Policy Review).[20]

23. Therefore, the Commission submits that while the *Wen:De* reports do not contain a formal comparison of the levels of provincial and federal child welfare funding and services, this in no way diminishes the objective value of these reports, which were commissioned, reviewed and approved by the National Advisory Committee (of which the Respondent is a member).[21] Moreover, it should not prevent the Tribunal from giving the expert testimonies of Drs. Loxley and Trocmé the weight they deserve.

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[17] Respondent's Written Submissions, *supra*, at pp. 41-42, paras. 167-169.
[18] *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445, Joint BOA, Vol. 5, Tab 87 at paras. 283, 290; see also *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII), Joint BOA, Vol. 2, Tab 43.
[19] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 56-57, 82.
[20] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 83-84; see also National Policy Review, CHRC BOD, Ex. HR-01, Tab 3 ["NPR"]; see also letter from the Honourable Robert D. Nault to AFN National Chief Mr. Matthew Coon Come dated August 7, 2001, CHRC BOD, Ex. HR-06, Tab 76.
[21] Testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 9, 12-13.

iv) Public Servant Testimonies, Reports and Admissions Against Interest

24. The Respondent also argues that the documents from its own disclosure which are relied on by the Commission and Complainants do not represent admissions against interest, but rather the personal views of individual employees of AANDC.[22]

25. The Commission respectfully disagrees with this argument. The Respondent's witnesses, who are the authors of many of the documents in question, are public servants. According to the *Public Service Employment Act*,[23] public servants exercise their delegated authority within a framework that ensures that they are accountable for its proper use to the Public Service Commission, which is in turn accountable to Parliament.[24] As well, the *Public Servants Disclosure Protection Act*[25] states that "public servants owe a duty of loyalty to their employer."[26] According to section 3 of the *Crown Liability and Proceedings Act*,[27] as Crown agents, public servants can also bind the Crown in liability.

26. Public servants are the experts on the federal government programs for which they are responsible. They are expected to strive for excellence and to serve the public with integrity, and can, and do speak for the federal government with respect to the actual operations of the programs they design, monitor and oversee. Of note, the Respondent called public servants to testify before the Tribunal and describe the FNCFS Program; it did not call the Minister of AANDC. If public servants' statements and observations on the programs they are responsible for cannot be used as evidence of how those programs actually work, it is difficult to see who else could provide such information.

27. Therefore, the Commission submits that the reports and other documents in question, many of which were authored by the Respondent's own witnesses, constitute admissions against interest. The common law has recognized an exception to the hearsay rule for

[22] Respondent's Written Submissions, *supra*, at pp. 40-41, paras. 163-164.
[23] S.C. 2003, c. 22 ["*PSEA*"].
[24] *PSEA*, *supra*, Preamble.
[25] S.C. 2005, c. 46 ["*PSDPA*"].
[26] *PSDPA*, *supra*, Preamble.
[27] R.S.C., 1985, c. C-50, s. 3.

declarations against pecuniary or proprietary interests. The classic exception is defined in *The Law of Evidence in Canada* as follows:

> The written or oral declarations of a person, since deceased, which were against his pecuniary or proprietary interest at the time that he made them are admissible as evidence of the facts contained in the declarations, provided that he had complete knowledge of the facts he stated.[28]

28. The rationale for this exception to the hearsay rule is the "circumstantial guarantee of truth" that underlies such statements.[29] There is a presumption that when a person asserts a statement against his or her pecuniary interest, it is not likely to be false, as a monetary disadvantage can ensue from such a declaration.

29. The Commission submits that many of the documents put into evidence before the Tribunal are admissions against interest by individuals that are employed (many in high-ranking positions) by the Respondent.

30. In addition, there exists a presumption of regularity that acts committed by public servants acting in their official capacity were regular.[30] In the absence of evidence to the contrary, one can assume that the documents in question were prepared, completed and approved by the proper authorities.

31. In light of the foregoing, the Commission submits that the documents in question are admissions against interests that remain uncontested since the Respondent did not call a witness(es) to refute them. Thus, these documents should be given great probative value.

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[28] J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada*, 2d ed (Canada: Butterworths Canada Ltd., 1999). at p. 201 ["*The Law of Evidence*"]; see also *Warman v. Kulbashian*, 2006 CHRT 11 at para. 110.
[29] *Ibid*.
[30] *The Law of Evidence*, *supra*, paras. 4.52 and following.

B) The *Prima Facie* Case of Discrimination

i) Cross-Jurisdictional Comparator

32. While the Commission submits that a comparative analysis is not necessary in order to establish *prima facie* discrimination, it will respond to two arguments brought forward by the Respondent with respect to the appropriate comparator group in this case. First, the Respondent argues that comparison between federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*. Second, it argues that the evidence before the Tribunal suggests that First Nations resident off reserve are also overrepresented in the child welfare system, suffer similar levels of removal as those resident on reserve and that therefore it is not possible to ascribe the high rates of First Nation children to insufficient federal funding.[31]

33. The Commission respectfully disagrees with these arguments for the reasons that follow.

34. With respect to the argument that a comparison between federal and provincial/territorial governments is invalid under the *CHRA*, the Commission reiterates that a comparative analysis is not necessary in order to establish *prima facie* discrimination. Moreover, the Tribunal's inquiry should not necessarily focus on comparator groups, but rather on "whether there is discrimination, period."[32]

35. The Commission submits that to the extent that a comparative analysis may be a useful evidentiary tool for the Tribunal in determining whether AANDC's FNCFS Program and corresponding funding formulas are discriminatory, the proper comparator is provincial residents off reserve. Indeed, this is the Respondent's choice of comparator for the FNCFS Program itself, the purpose of which is to provide services on reserve that are "reasonably comparable to those available to other provincial residents".[33]

36. In the present case, if the Tribunal were to compare First Nations on reserve with First Nations off reserve, given the fluid nature of the population and the movement of people

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[31] Respondent's Written Submissions, *supra*, at pp. 44-45, paras. 179-184.
[32] *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII), Joint BOA, Vol. 2, Tab 43 at para. 18.
[33] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.

on and off reserve, such a comparison would not be helpful. Moreover, the evidence demonstrates that there can be "provincial" children resident on reserve and "federal" children living off reserve. In essence, the Respondent argues that the Tribunal should compare First Nations children to themselves, which the Commission submits is inappropriate.

37. It is evident that First Nation peoples continue to experience the intergenerational effects and trauma associated with the legacy of Indian Residential Schools, the effect of which knows no border and can manifest wherever First Nations people are found. The fact First Nation peoples both on and off reserve remain disadvantaged as compared to non-First Nations children does not alleviate the Respondent's duty to ensure that the FNCFS Program and corresponding funding formulas are designed and applied in a non-discriminatory manner.

38. In *R. v.* Drybones,[34] the Supreme Court of Canada held:

> […] In *Plessy v. Ferguson,* the Court had held that under the "separate but equal" doctrine equality of treatment is accorded when the races are provided substantially equal facilities even though these facilities be separate. In *Brown v. Board of Education,* the Court held the "separate but equal" doctrine to be totally invalid.
>
> The social situations in *Brown v. Board of Education* and in the instant case are, of course, very different, but the basic philosophic concept is the same. The Canadian Bill of Rights is not fulfilled if it merely equates Indians with Indians in terms of equality before the law, but can have validity and meaning only when subject to the single exception set out in s. 2 it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian but as between all Canadians whether Indian or non-Indian.[35]

39. To compare First Nations on reserve to First Nations off reserve would be comparing "as between Indian and non Indian" instead of between all Canadians "whether Indian or

[34] [1970] S.C.R. 282 ["*Drybones*"].
[35] *Drybones*, *supra*, p. 300.

non-Indian".[36] In *R. v. Drybones*, the Supreme Court allowed a comparison between Aboriginal peoples and all other Canadians. Therefore, the Commission submits that to the extent that a comparative analysis may be a useful evidentiary tool for the Tribunal, the appropriate comparator in this case is likewise First Nation peoples and all other Canadians.

40. While the Respondent argues that it offers a number of other programs and services that work together to ensure the comparability of child welfare services on and off reserve,[37] it did not provide substantial evidence on any of these other programs. In support of this argument, the Respondent relies on the testimony of Sheilagh Murphy. However, in her testimony Ms. Murphy admitted that she was not an expert on these other programs, none of which are child welfare programs specifically, and that there could be differences between the programs provided by the Respondent on reserve and the provinces off reserve.[38]

41. Of note, the Federal Court recently found in *Pictou Landing Band Council and Maurina Beadle v. AG of Canada*[39] that one of the programs relied on by the Respondent in this case – the Assisted Living Program – is inequitable.

42. Thus, the Commission submits that the Respondent led no evidence that these other programs address the inequities in the FNCFS Program.

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[36] *Drybones*, *supra*, p. 300.
[37] Respondent's Written Submissions, *supra*, at pp. 17-22, paras. 70-89.
[38] Testimony of Sheilagh Murphy, Transcript Vol. 56 at pp. 17-18.
[39] *Pictou Landing Band Council and Maurina Beadle v AG of Canada*, 2013 FC 342.

ii) Denial of Service(s)

43. The Respondent also argues that the Commission and Complainants have not provided sufficient evidence with respect to denial of services to First Nations children and families on reserve.[40]

44. The Commission submits that this statement is inaccurate for the reasons that follow.

45. First, the Commission led evidence and clearly stated in its initial written submissions that the FNCFS Program, and Directive 20-1 specifically, denies First Nation peoples on reserve the prevention services and in-home supports they require since only a nominal amount of funding is provided for prevention services under an agency's fixed operations funding, which is inadequate.[41]

46. Second, the Commission also argued in its initial written submissions that the lack of funding under Directive 20-1 in particular prevents First Nations child welfare agencies from delivering the full continuum of services offered by the provinces to other Canadians off reserve.[42] In selecting which expenses are ineligible, the Respondent forces Agencies to find alternative funding for some services even under EPFA,[43] this amounts to a denial of service since these services would be otherwise funded by the provinces.

47. The evidentiary record before the Tribunal is replete with references to "gaps" in services on reserve.[44] In fact, the Respondent's own evidence clearly demonstrates that they are aware of the gaps in services available to First Nations on and off reserve in British Columbia.[45] Another example of denial of services is in Ontario, where the Respondent has refused to amend Schedules to Ontario's "Memorandum of Agreement Respecting

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[40] Respondent's Written Submissions, *supra*, at pp. 35-36, para. 141.
[41] Written Submissions of the Canadian Human Rights Commission, dated August 25, 2014 at paras. 83 and following, 439 and following ["Commission's Written Submissions"].
[42] Commission's Written Submissions, *supra*, at p. 94, para. 321.
[43] Transcript, Testimony of Raymond Shingoose, Volume 31, pp 56-57, 142-143.
[44] JP Dispute Resolution Report (2009), Exhibit Tab 302, CHRC BOD, Volume 13, pp 12-15;
[45] British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 4.

Welfare Programs for Indians" (the "1965 Agreement") so as to avoid having to cost-share certain programs and services that are offered by the province off reserve.[46]

48. Finally, in its initial written submissions, the Commission noted that the evidence demonstrated that disputes between levels of government and also between various government departments "about who should fund services" can result in delay, disruption and or denial of a service for a First Nations child on reserve.[47]

49. Thus, the evidence clearly demonstrates and supports the Commission's submissions that the Respondent's FNCFS Program and funding formulas result in inequitable levels – and in some cases a complete denial – of child welfare services for First Nations children ordinarily resident on reserve. As a result, the Commission submits that a *prima facie* case of discrimination has been established.

C) National Scope of the Complaint

50. The Respondent also argues that evidence from each jurisdiction was required in order to establish discrimination.[48]

51. The Commission respectfully disagrees with this argument. Even a superficial review of the evidence before the Tribunal shows that the complaint before the Tribunal is national in nature and deals specifically with the FNCFS Program and corresponding funding formulas, which have been implemented on a national level. Notwithstanding the fact that the funding and services at issue involve cooperation between the federal and provincial governments and the First Nation communities, as the Commission has already articulated in its initial submissions, the *Constitution Act, 1867*[49] makes clear that the federal government has exclusive legislative authority over "Indians and lands reserved for Indians".[50]

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[46] Commission's Written Submissions, *supra*, at pp. 61-62, paras. 208-210.
[47] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 39.
[48] Respondent's Written Submissions, para 156.
[49] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App. II, No 5, Joint BOA, Vol. 1, Tab 7, s. 91(24) ["*Constitution Act, 1867*"].
[50] *Constitution Act, 1867*, *supra*, s. 91(24).

52. As indicated above, a comparator is not required to demonstrate a *prima facie* case of discrimination.[51] The Commission submits that the evidence led provided a fulsome picture of the disparities in funding and services First Nations people on reserve experience as compared to those provided off reserve by the provinces and territory.

53. Moreover, it is not a requirement for a finding of *prima facie* discrimination that evidence be called from every jurisdiction in the country. If adverse discrimination has been found to exist in 8 out of 10 provinces and territory, for example, it would be unreasonable and contrary to the principles of human rights law to conclude therefore that adverse differentiation does not exist anywhere. Even if one individual or group has demonstrated adverse differentiation, discrimination exists.

54. The Respondent appears to argue that the Tribunal should take an "all or nothing" approach to find a *prima facie* case of discrimination. The Commission submits that such an approach is flawed and contrary to human rights law.

D) Jordan's Principle is Within the Scope of the Complaint

55. The Respondent also argues that Jordan's Principle is beyond the scope of the complaint before the Tribunal since it is not a child welfare concept or part of AANDC's FNCFS Program.[52]

56. The Commission respectfully disagrees with this position. The complaint in this case, which was filed in 2007, explicitly refers to Jordan's Principle as an effective means of addressing the delays in service that result from jurisdictional disputes between and amongst federal and provincial governments:

> Jurisdictional disputes between and amongst federal and provincial governments are a substantial problem with 12 [First Nation Child and Family Service Agencies] experiencing 393 jurisdictional disputes this past year alone. These disputes result in First Nations children on reserve being denied or delayed receipt of services that are otherwise available to Canadian children. Additionally, these disputes draw from already taxed [First Nation Child and Family Service

[51] *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445, Joint BOA, Vol. 5, Tab 87 at paras. 290-294.
[52] Respondent's Written Submissions, *supra*, at pp. 52-54, paras. 216, 222.

> Agencies] human resources as [their] staff spend an average of 54 hours per incident resolving these disputes. Jordan's Principle, a child-first solution to resolving these disputes, has been developed and endorsed by over 230 individuals and organizations. This solution is cost neutral and would ensure that children's needs are met whilst still allowing for the resolution of the dispute. (emphasis added)

57. Whether Jordan's Principle is part of the FNCFS Program or not, it is a policy developed by the Respondent to address issues of jurisdiction which can result in delay, disruption and/or denial of a service for a First Nations child on reserve.[53] To the extent these jurisdictional disputes continue to exist, the Commission submits that they constitute adverse differential treatment of First Nations on reserve contrary to section 5 of the *Canadian Human Rights Act*.[54] Jordan's Principle, as a mechanism designed by the Respondent to resolve these disputes, forms part of the initial complaint of discrimination in this case, and is thus within the purview of the Tribunal's inquiry.

58. Moreover, the Respondent has had ample opportunity to raise any objections regarding the scope of the complaint, which it has known about since 2007. The Respondent failed to do so. Therefore, the Commission submits that it is open to the Tribunal, and entirely appropriate, for Jordan's Principle to be considered as part of the complaint in this case.

E) Remedial Issues

59. The Respondent argues that the evidence does not support a monetary award.[55] While the Commission takes no position on the specific financial remedies sought by the Complainants in this case, it submits the following general principles which may prove useful to the Tribunal in reaching its decision.

General Principles for Compensation

60. In *Chopra v. Canada (Attorney General)*,[56] the Federal Court of Appeal held that human rights legislation does not create a common law cause of action, and that if "one can only

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[53] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 39.
[54] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, Joint BOA, Vol. 1, Tab 2, s. 5 ["*CHRA*"].
[55] Respondent's Written Submissions, *supra*, at pp. 57-58, paras. 238 and following.
[56] 2007 FCA 268 ["*Chopra*"].

seek a remedy for a discriminatory practice from a tribunal appointed under the [*CHRA*], then it follows that the complainant is limited to the remedies which the Tribunal has the power to grant […].”[57]

61. Thus, the remedies available to the Tribunal under section 53 of the *CHRA* are not limited to compensation for “damages” as understood in common law. Remedies can include compensation for pain and suffering, or compensation for willful and reckless discrimination.

62. The Court went on to find that the discretion given to the Tribunal to award any or all of the losses suffered leaves it open to the Tribunal to impose a limit on losses caused by the discriminatory practice.[58] In the exercise of this discretion, there must be a causal link between the discriminatory practice and the loss claimed, and the Tribunal must exercise its discretion on a principled basis.[59] Therefore, there must be some evidence supporting the award.

63. The Commission submits that the principles articulated by the Court in that case are also applicable to compensation for pain and suffering and/or willful and reckless under the same provisions of the *CHRA*.

64. According to subsection 50(3)(*c*) of the *CHRA*, the Tribunal may accept any evidence that it sees fit whether or not the evidence or information would be admissible in a court of law. In C*anadian Human Rights Commission v. Canada (Attorney General)*,[60] the Federal Court held that the Tribunal does not need testimony from all victims of discrimination in a given case to order compensation for pain and suffering.[61]

65. Consequently, the Tribunal is not obligated to hear or receive specific evidence from all the victims of discrimination in this case to order compensation for pain and suffering. Rather, the Tribunal can appreciate the evidence adduced to determine whether it justifies

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[57] *Chopra*, *supra*, at para. 36.
[58] *Chopra*, *supra*, at para. 40.
[59] *Chopra*, *supra*, at para. 37.
[60] 2010 FC 1135 [“*CHRC v. Canada*”], confirmed on appeal: *Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202.
[61] *CHRC v. Canada*, *supra*, paras. 72-73.

an award for pain and suffering, and the appropriate amount of that award. At issue, therefore, is the sufficiency of that evidence.

Who is entitled to compensation?

66. Section 53(2) of the *CHRA* states that the Tribunal may, at the conclusion of the inquiry, award compensation to victims, as opposed to complainants.

67. According to section 40(2) of the *CHRA*, if a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto. Therefore, the *CHRA* clearly contemplates that "victims" and "complainants" may be different persons.

68. In the case of a complaint of systemic discrimination, forcing all of the victims to appear before the Tribunal would result in lengthy hearings with potentially hundreds of witnesses. No administrative system could function under such a burden. Considering the number of First Nations children who are alleged to be the victims of discrimination in this case, it would be impossible and contrary to the principles of judicial economy to require that they all appear before the Tribunal.

69. Considering that Parliament clearly established a system where complainants and victims may be different individuals, the Commission submits that it is within the discretion of the Tribunal to award financial remedies (be it compensation for pain and suffering and/or willful and reckless) to the victims of the alleged discriminatory practice, and to define the said victims.

PART II: CONCLUSION

70. In light of the above, the Commission submits that the complaint should be substantiated and the requested remedy be issued.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 14, 2014

Philippe Dufresne / Daniel Poulin
Sarah Pentney / Samar Musallam

Canadian Human Rights Commission

PART III: LIST OF AUTHORITIES

Legislation

Auditor General Act, R.S.C. 1985, c. A-17, ss. 7, 18.1

Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 5, 53(2), Joint Book of Authorities of the Commission, Complainants and Interveners, Vol. 1, Tab 2

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App. II, No 5, s. 91(24), Joint Book of Authorities of the Commission, Complainants and Interveners, Vol. 1, Tab 7

Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50, s. 3

Public Servants Disclosure Protection Act, S.C. 2005, c. 46, Preamble

Public Service Employment Act, S.C. 2003, c. 22, Preamble

Caselaw

Aucoin v. The Queen, 2001 FCT 800

Canada (Attorney General) v. Canadian Human Rights Commission, 2013 FCA 75 (CanLII), Joint Book of Authorities of the Commission, Complainants and Interveners, Vol. 2, Tab 43

Canada (Minister of Fisheries and Oceans) v. Haché, 2005 FCA 418

Canada (Social Development) v. Canada (Human Rights Commission), 2011 FCA 202

Canadian Human Rights Commission v. Canada (Attorney General), 2010 FC 1135

Chopra v. Canada (Attorney General), 2007 FCA 268 (CanLII)

First Nation Child and Family Caring Society v. Canada (Attorney General), 2012 FC 445, Joint Book of Authorities of the Commission, Complainants and Interveners, Vol. 5, Tab 87

Fraser v. P.S.S.R.B., [1985] 2 SCR 455

Harris v. Canada, [2000] 4 FCR 37 (FCA)

Honda v. Keays, [2008] 2 S.C.R. 362

Pictou Landing Band Council and Maurina Beadle v AG of Canada, 2013 FC 342

R. v. Drybones, [1970] SCR 282

Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181

Warman v. Kulbashian, 2006 CHRT 11

Secondary Sources

J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada*, 2d ed (Canada: Butterworths Canada Ltd., 1999) at p. 201