Court File No. A-158-13

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

MOTION RECORD OF THE PROPOSED INTERVENER FIRST NATIONS CHILD AND FAMILY CARING SOCIETY (VOLUME II of II)

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This is Exhibit "H" to the affidavit of Cindy Blackstock, sworn before me this 22nd day of November, 2013

A Commissioner for taking Affidavits etc.

Shannon Marie Kack, a Commissioner, etc., Province of Ontario, while a student-at-law. Expires September 13, 2016

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

2011 CHRT 4 (CanLII)

BETWEEN:

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 THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA)

Respondent

- and -

CHIEFS OF ONTARIO

- and -

AMNESTY INTERNATIONAL

Interested Parties

RULING

Shirish P. Chotalia, Q.C.,
Chairperson

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I. DECISION SUMMARY

[1] Indian and Northern Affairs Canada (INAC, the Crown, the respondent) provides funding to First Nations service providers who provide child welfare services (child welfare) to First Nations children residing on reserves. The First Nations Child and Family Caring Society of Canada (the Society or complainant) and the Assembly of First Nations (AFN or complainant) assert that INAC does more than fund. They say INAC provides child welfare directly or indirectly to these children. They say the funding is inadequate when compared to the funding that provinces provide to other children residing off reserve. They say this funding differentiates adversely against these First Nations children contrary to section 5(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA or Act*).

[2] The Crown brings a motion for a ruling that questions arising out of the complaint are not within the jurisdiction of the Canadian Human Rights Tribunal (the Tribunal). It argues principally that funding / transfer payments do not constitute the provision of "services„ within the meaning of the *CHRA*, and that INAC's funding cannot as a matter of law be compared to provincial funding. It says that these two questions may be dealt with now and without a full hearing wherein witnesses would testify and more evidence would be tendered.

[3] The *CHRA* does not require that the Tribunal hold a hearing with witnesses in every case. The onus is on the Crown in this motion to demonstrate that this is the case here. The Tribunal must be satisfied that the parties have had a full and ample opportunity to be heard and to present their evidence. The Tribunal will only entertain a motion to dismiss a complaint wherein more evidence could not conceivably be of any assistance: where the Crown has shown that the facts are clear, complete and uncontroverted, or where the Crown has shown that the issues involve pure questions of law. If the Crown meets this onus, the Tribunal may decide the substantive questions in a motion forum.

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[4] There are two principle questions that the Crown wishes me to answer in this motion:

i. Is INAC's funding program a "service„ within the meaning of s. 5(b) of the *Act*?

ii. Can two <u>different</u> service providers be compared to each other to find adverse differentiation, or for that matter, is a comparison even required?

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[5] On the services question, the Crown has not met its onus of demonstrating that the facts are clear, complete and uncontroverted. I cannot decide the question. On the comparator question, the Crown has met its onus. It has satisfied me that the "comparator„ question is a pure question of law. I can decide this question on the basis of the materials filed in this motion. I find that the *CHRA* does require a comparison to be made, but not the one proposed by the complainants. Two different service providers cannot be compared to each other. Accordingly, even if I were to find that INAC is a service provider as asserted by the complainants, the *CHRA* does not allow INAC as a service provider to be compared to the provinces as service providers. The complaint could not succeed, even if a further hearing were held on the services question. Accordingly the complaint must be dismissed. A summary of my reasons follow.

A. Services

[6] The Crown's motion has resulted in the following evidence being placed before me. In this case, the Crown, and the complainants, and two interveners, Chiefs of Ontario (The Ont. Chiefs) and Amnesty International (Amnesty), have filed the documents and the submissions as outlined in Appendix "A„. I have vetted the materials filed relevant to this motion, more than 10,000 pages. Ironically, this volume of materials appears to be grossly insufficient to address the scope and breadth of this complaint.

[7] INAC's funding is complex. INAC's funding supports 108 First Nations child welfare service providers to deliver child welfare to approximately 160,000 children and youth in approximately 447 of 663 First Nations. There may be at least 50 to 60 funding agreements and

memoranda relating to Directive 20-1 alone that are involved (not yet filed). There are provincial and territorial differences in funding schemes and differences in service models: e.g. self-managed reserves versus other First Nations reserves. What are the terms and conditions of these various funding agreements? What are the terms and conditions of each of the various memoranda of understanding? Does INAC control the type of child welfare delivered through any or each of the funding terms and conditions? Do these terms and conditions define the content of child welfare? As well, do INAC's auditing measures go beyond simply ensuring accountability of funds? Do INAC's auditing measures in fact constitute an action by INAC demonstrating that INAC is delivering child welfare? Again, even if the transfer payments are on the whole only transfer payments, is there a discrete subset of the program administration wherein INAC can be said to control the content of child welfare? The Crown has not met its onus. The material facts are not clear, complete and uncontroverted. This is due in part to the scope and breadth of this complaint that exceeds any complaint filed with the Tribunal to date. In this case, the Canadian Human Rights Commission (the Commission) did not conduct an investigation of the relevant facts before referring the complaint to the Tribunal for a hearing. Rather, it wrote that the "main arguments being adduced are legal and not factual in nature and are not settled in law„.

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[8] Irrespective of the Commission's referral decision, it is incumbent on the Tribunal to help the parties to diligently narrow the broad and complex factual issues, while identifying and determining any clear legal issues that arise in this complaint. As one means of achieving this objective, I offered the parties a Tribunal Member to work with them in process mediation to narrow the factual and legal issues. The parties did not reach agreement on material facts. The parties chose not to file with the Tribunal to date a consolidated Agreed Statement of Facts. Given the expanse of the complaint, and a lack of reasonable definition to its parameters, I cannot decide the services issue on the evidence filed.

B. Comparator

[9] However, on the evidence and submissions filed, I can decide the comparator issue. I can determine whether the allegation of *adverse differentiation* is legally deficient. Section 5(b) of the *CHRA* states that a service provider may not *adversely differentiate* against an individual in

providing services customarily available to the public. Whether these words in the *CHRA* require a comparison, and if so, the manner of comparison, are pure questions of law. The Crown has met its onus of demonstrating that this is a pure question of law that may be decided now. The parties have had full and ample opportunity to be heard on this question of law. There is no further evidence that the complainants can file that will further their position.

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[10] I decide as follows: In order to find that *adverse differentiation* exists, one has to compare the experience of the alleged victims with that of someone else receiving those same services from the same provider. How else can one experience *adverse differentiation*? hese words of the *CHRA* must be accorded their clear meaning as intended by Parliament. These words are unique to the *CHRA*. These words have been decided by the Federal Court of Appeal as requiring a comparative analysis in the case of *Singh v. Canada (Department of External Affairs)*, [1989] 1 F.C. 430 (F.C.A.) [*Singh*]. Further, the complaint itself seeks a comparison. The heart of the complaint involves comparing INAC's funding to provincial funding.

[11] Regarding the issue of choice of comparator, the parties agree that INAC does not fund or regulate child welfare for off-reserve children. The provision of child welfare to off reserve children is entirely a provincial matter falling within section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) of the *Act*? The answer is no.

[12] The *Act* does not allow a comparison to be made between two different service providers with two different service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared.

[13] Let us look at how the *Act* works. As an example, the *Act* allows an Aboriginal person who receives lesser service from a government to file a complaint if a non-Aboriginal person receives better service from the same government. However, the *Act* does not allow an Aboriginal

person, or any other person, to claim differential treatment if another person receives better service from a different government.

[14] Were it otherwise, the far-reaching impact of the proposed reasoning would also extend to employment. As another example, the *Act* allows an Aboriginal employee who receives different treatment from an employer to file a complaint if a non-Aboriginal employee receives better treatment from the same employer. However, the *Act* does not allow an Aboriginal employee, or any other employee, to claim differential treatment if another employee receives better treatment from a different employer.

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[15] In addition, such reasoning would extend to allow a member of one First Nation to argue that her First Nation adversely differentiated against her by comparing the services she received with those offered by another First Nation to another First Nation member.

[16] There would be no limit to the comparisons that could be made. Further, in this case, the comparison sought to be made is between constitutionally independent jurisdictions: the federal government and the provincial / territorial governments.

[17] On this issue, the parties have had a full and ample opportunity to file affidavits, cross-examine on affidavits, appear before the Tribunal with their lawyers, and submit arguments. Further, the parties were granted an opportunity to file submissions until August 23, 2010 and December 23, 2010 (see Appendix "A,,) respectively, with respect to three new decisions. These were *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 [*NBHRC v. PNB*] released on June 3, 2010, and two decisions of the Supreme Court of Canada being *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*], and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46 [*Native Child and Family Services of Toronto*] rendered together on November 4, 2010. They were also granted the opportunity to file submissions with respect to the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 [*UNDRIP*].

No further evidence in a further hearing with witnesses can make this legal issue any clearer. Indeed, a further hearing may result in the devotion of time and resources to a protracted and lengthy fact finding exercise that is irrelevant to the legal flaw identified. Any further hearing would be moot. The complaint cannot succeed on this legal point.

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Cultural Considerations – Canada's First Nations People – Oral Tradition

[18] The hearing of this motion opened with an Algonquin prayer recited by Elder Bertha Commanda. In deciding this motion, I am acutely aware of the need to be cognizant and respectful of the cultural concerns of Canada's First Nations people. The AFN, the Society and the Commission make vigorous submissions to move towards both a hearing and a determination that the *CHRA* allows a finding of adverse differential treatment by comparing the actions of one race based service provider or funder, in this case, INAC, to that of the provinces. I acknowledge the importance of the oral tradition to the First Nations people. However, had this complaint proceeded to a hearing with witnesses, which would be fruitless, the hearing would have been complex and lengthy, potentially stretching into years of protracted litigation. Such a hearing would have been mired with the requisite burden of emotional and legal costs for all parties and the witnesses. In fact, the Tribunal has been criticized by the Federal Court of Appeal for mismanaging a pay equity hearing that spanned more than ten years before the Tribunal, and is still in litigation (*Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at para. 145 [*Canada Post*] (leave to appeal to SCC granted Docket No. 33668, 33669, 33670). Proceeding to a *viva voce* hearing on a complaint that cannot succeed on a legal basis does not serve the parties or the justice system. This is not access to justice. This is contrary to access to justice.

[19] It is important to understand that the name of the *CHRA* is misleading. Even though its name imports a notion that the *CHRA* and the Tribunal may cure a range of human rights violations, the Tribunal's mandate is restricted to remedying discrimination on the legislated grounds in legislated areas such as employment, services, and residential accommodation, to name a few. Thus, Canada's First Nations people and their fellow Canadians are restricted from obtaining broader human rights remedies that do not involve a discriminatory practice within the

meaning of the *Act*. Unless the subject matter of the complaint falls within a section of the anti-discrimination statute, it cannot succeed.

[20] Finally, I am mindful of the constitutional quagmire that Canada's First Nations people find themselves in. However, the legal tools for contesting allegedly inequitable funding do not lie in s. 5(b) of the *CHRA* as it is currently framed. The Tribunal is not a court seized with a constitutional challenge. It does not have the ability to redefine the meaning of adverse differentiation to suit the circumstances. The Tribunal must reside with integrity within the four corners of the statute that creates it. The claims may well be cognizable through the initialization of other legal processes, or in political action and / or ongoing federal and provincial consultations, or may ultimately even require statutory amendments. The laudable arguments of the complainant group may be well received by those appropriately charged with hearing them.

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II. WHAT IS THIS COMPLAINT ABOUT?

[21] The Society and the AFN assert that thousands of First Nations children living on Canadian reserves do not receive adequate funding of child welfare. Child welfare for children residing off reserve is funded by provinces or territories. The complainants seek that INAC be required by law to fund child welfare to similar levels as provinces and territories. They allege that a First Nations child residing on a reserve receives less child welfare and protection services than another Canadian child, possibly living across the highway, not on reserve. They allege that the provinces fund child welfare to a significantly greater extent than INAC does and that INAC's underfunding results in a systemic discriminatory impact upon the lives of Aboriginal children residing on reserves. They allege that this underfunding results in culturally inappropriate delivery of such services contrary to the purposes of the funding program. They seek that the Tribunal order INAC to increase funding by 109 million dollars per year to address existing funding shortfalls.

[22] Specifically, the complaint alleges that a funding formula, Directive 20-1, Chapter 5 (Directive 20-1) contravenes s. 5 of the *Act* in that registered First Nations children and families resident on reserve are provided with inequitable levels of child welfare because of their race and national, ethnic origin as compared to non-Aboriginal and other children residing off reserve. The particulars / pleadings filed by the complainant group broaden the discrimination allegation to include the INAC First Nations Child and Family Services Program (FNCFS Program), that includes both Directive 20-1 and the Enhanced Prevention-Focused Approach funding (EPFA), and the funding INAC provides in Ontario pursuant to the Memorandum of Agreement Respecting Welfare Programs for Indians known as the 1965 Welfare Agreement (1965 Agt.).

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III. WHAT IS THIS MOTION ABOUT?

A. Crown Says Tribunal has no Jurisdiction to Hear the Complaint

[23] The respondent brings a motion for an order to dismiss this complaint for lack of jurisdiction alleging that the complaint does not come within the provisions of section 5(b) of the *CHRA*. The other parties say that the motion is unfounded and premature and that the matter should proceed immediately to a full hearing on the merits.

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B. What are the Issues in this Motion?

i. Does the *Act* require the Tribunal to hold a *viva voce* hearing inquiry in every case?

ii. If not, can the Tribunal decide the following issues in this motion:

a. Is INAC providing a service for the purposes of s. 5(b) of the *Act*? Is funding justiciable?

b. Does *adverse differentiation* within the meaning of s. 5(b) of the *Act* require a comparator group? Alternatively, does it allow a comparison between two service providers?

IV. CAN THE TRIBUNAL DECIDE THE ISSUES IN THIS MOTION BASED ON THE MATERIALS FILED WITHOUT A *VIVA VOCE* HEARING?

[24] The essence of this motion involves whether or not the complainants should be able to proceed to a *viva voce* hearing or whether this Tribunal may decide the complaint now, based on the materials before it without a *viva voce* hearing? The parties have widely diverging views on the Tribunal's authority to decide the issues raised in the motion at this stage.

A. Summary of the Positions of the Parties

The Crown

[25] The Crown's position appears somewhat multi-faceted. On one hand, the Crown in some instances characterizes its motion as being "jurisdictional„ in nature, and submits that the Tribunal may determine the limits of its own jurisdiction at any time during the course of the inquiry. Whereas it has been judicially recognized that the Tribunal has the authority to dismiss a complaint without a *viva voce* hearing for abuse of process, the Crown asserts that bringing a complaint outside the jurisdiction of the Tribunal is an abuse of process and thus susceptible to summary dismissal. However, at other points in its representations, the Crown characterizes its motion as concerning matters going directly to the "merits„ of the complaint. In this last regard the Crown argues that the burden is on the complainants to demonstrate, on a balance of probabilities, that they have shown a *prima facie* case of discrimination, and that this burden remains with the complainants throughout the inquiry. Moreover, the Crown also asserts that the matters raised in its motion deal with questions of law, which the Tribunal may decide in the course of hearing and determining any matter under inquiry. The Crown rejects the use of legal tests developed from rules of civil procedure, in particular, the "plain and obvious test„, which the civil Courts apply when hearing motions to strike a claim that allegedly discloses no reasonable cause of action.

The Commission

[26] The Commission's position is also multifaceted. First, the Commission alleges that the Tribunal may only dismiss a complaint after a hearing on the merits, unless it can be demonstrated that to pursue the inquiry would be an abuse of process. Even in the context of abuse of process, the power of summary dismissal must only be exercised with a great deal of caution, and only in the clearest of cases. The threshold to prove abuse of process is extremely high—the proceedings must be unfair to the point that they are contrary to the interests of justice. Second, the Commission asserts that the issue before the Tribunal in regards to the motion is whether it is "plain and obvious„ that the complainants and Commission's pleadings disclose no reasonable

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cause of action—or in *CHRA* terms—whether the respondent has demonstrated that the complaint is devoid of any merit. To strike the complaint, the Tribunal must find that, assuming all the facts alleged to be true and complete by means of affidavits, there is no chance that the complaint will succeed. Moreover, a claim should not be struck if it involves a serious question of law or questions of general importance, or if additional facts are required before the complainants' rights can be decided on the merits.

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The Society

[27] In the Society's view, the Crown must establish that it is "plain and obvious„ that the complaint should be dismissed without a *viva voce* hearing and in the absence of a complete evidentiary record, and contrary to a direction of the Federal Court pertaining to judicial review of the Commission's referral decision. The Society notes that the Tribunal has been loath to grant motions to dismiss, given the language of the *CHRA*, and the significance and remedial objectives of human rights legislation. Two particular legislative features militating against summary dismissal are: (i) the screening provisions enabling the Commission to dispose of a complaint without a Tribunal inquiry; and, (ii) the Tribunal's duty, set out in s. 50(1) of the *Act*, to give all parties a full and ample opportunity to present evidence and make arguments on the matters raised in the complaint. While Tribunal jurisprudence has recognized an authority to dismiss a complaint by motion in circumstances where the issues in the complaint have been heard in another forum, or where there is a clear breach of natural justice, the Society argues that such circumstances are not present in the case at hand. However, the Society also asserts that motions for preliminary dismissal should not be granted where the disposition of the case on the merits calls for an assessment and finding of fact, or where the claim raises a difficult and important point of law. Finally, in the Society's view, the current case is not a case that could ever be dismissed on a preliminary basis. It involves a significant personal interest for thousands of children. It raises difficult and important issues of law previously unaddressed. It has wide ranging precedential impact, and is fact driven where the facts are myriad and complex, and where the facts will inform the Tribunal's jurisdictional analysis.

The Ont. Chiefs

[28] The Ont. Chiefs submit that the Crown's motion is premature, and inappropriate given the Federal Court's refusal to judicially review the Commission's referral of the case for inquiry. The Ont. Chiefs assert that unless it is clear and plain that the complaint has absolutely no merit, the Crown's motion must be dismissed. The Crown must establish that it is plain and obvious that the complaint will inevitably fail even after a full record is laid before the Tribunal. The Ont. Chiefs argue that the jurisdictional and other issues raised by the Crown should be decided on a full body of evidence, as opposed to the relatively threadbare record attached to the current motion. A full record before the Tribunal is crucial, given the enormous stakes of the motion, namely determination of whether a program with a funding component falls within s. 5 of the *CHRA*. A negative finding on this point would effectively exempt from *CHRA* review the bulk of federal programming in relation to First Nations. Making a preliminary decision could also prejudice the parties by delaying a hearing on the merits, for if the case is terminated on preliminary grounds and this ruling is overturned by the superior courts, the parties will be obliged to start their case several years in the future (even though they are ready to proceed on the merits now). By the time the preliminary dismissal is remitted to the Tribunal, key witnesses may no longer be available. Judicial economy militates against the fragmentation of the proceeding in this way.

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B. The *CHRA* Does Not Require a *Viva Voce* Hearing in Every Case

Material Facts are Clear and Uncontroverted or Questions of Pure Law

[29] The Tribunal is a creature of statute and exists as part of a larger legislative scheme for identifying and remedying discrimination. Accordingly, the question as to the appropriateness of the motion for summary dismissal requires an examination of the *Act*. By examining all relevant aspects of the Tribunal's enabling statute, one may determine precisely what forms of case disposition Parliament intended the Tribunal to carry out. Any ambiguities in the enabling legislation must be interpreted in a manner that furthers, rather than frustrates the objectives of the *CHRA* (*Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para. 42 [*Bell Canada*]).

[30] The Tribunal is an independent body established by the *Act* to hold inquiries into complaints referred to it by the Commission. The *Act* provides that the Tribunal may hold two types of inquiries, one with a *viva voce* hearing and one without. Under s. 50(1) of the *Act*, the assigned Member shall inquire into the complaint and "shall„ give all parties a "full and ample opportunity„„ in person, or through counsel, to appear at the inquiry, present evidence and make representations. Section 50(3) of the *CHRA* authorizes the Tribunal Member presiding over a hearing of the inquiry to summon witnesses, compel them to give evidence and produce such documents and things as are necessary, administer oaths, receive such evidence and other information, on oath, by affidavit, or otherwise that the Member sees fit, and decide procedural and evidentiary questions. In *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81 at para. 17 [*Cremasco*], aff'd in *Canadian Human Rights Commission v. Canada Post Corp.*, 2004 FCA 363, the Federal Court made clear that the inquiry is distinct from the "hearing„ and is not coextensive with the term "hearing„„ as that word is used in s. 50(3) of the *Act*. In *Cremasco, supra*, the Federal Court held that Parliament's use of the term "inquiry" in subsection 50(1) and the term "hearing" in subsection 50(3) of the *CHRA* clearly indicates that the referral of a matter to the Tribunal does not necessarily have to result in a hearing in every case. Thus, while dismissal of the complaint requires an inquiry, it does not "necessarily„ require a hearing.

[31] Further to s. 48.9(2) of the *Act* the Tribunal shall proceed as informally and expeditiously as possible. As the Court said in *Cremasco, supra*, at para. 18, "it is hard to fathom a reason why it would be in anyone's interest to have the Tribunal hold a hearing in cases where it considers that such a hearing would amount to an abuse of its process„. In such endeavours, of particular relevance to the current issue is the inference to be drawn from s. 53(1) of the *Act*, namely, that the Tribunal can only dismiss a complaint "...[a]t the conclusion of an inquiry„.[emphasis added]

[32] The repeated use of the word "shall„ in these provisions strongly suggests the imposition of two mandatory duties on the Tribunal: on one hand, it must conduct its process as informally and expeditiously as natural justice will permit. On the other hand, it must ensure that in every inquiry the Tribunal accords a full and ample opportunity for the parties to participate as described. In this aspect, the *Act* is exceptional in codifying the common law duty of adherence to the principles of natural justice as well as the common law principles that administrative tribunals

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operate informally and expeditiously and neatly juxtaposes them as countervailing duties in s. 48.9(1) of the *Act*. It is for the Tribunal to find the judicial fulcrum in each case.

[33] The instruction in s. 48.9(2) of the *CHRA* to proceed with informality and expedition is subject to two important limits: the principles of natural justice and the Canadian Human Rights Tribunal Rules of Procedure, May 3rd, 2004 (Rules of Procedure).

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[34] But when can dismissal occur in the absence of a *viva voce* hearing? Here again, the *Cremasco* decision, *supra*, is instructive. In *Cremasco*, *supra*, the Court held that the Tribunal can dismiss a case without holding a hearing where holding a hearing would amount to an abuse of process. In the *Cremasco* case, *supra*, the particular form of abuse of process at issue was the re-litigation of previously decided questions, which is sanctioned by the doctrine of *res judicata*, or issue estoppel. There are other forms of abuse of process, but the question which immediately arises is, does *Cremasco*, *supra*, detail the only conceivable situation where the Tribunal can dismiss the complaint without a hearing? I do not believe so. I believe that the logic of the *Cremasco* decision, *supra*, based as it is on the legislative scheme of the *CHRA*, can be extended to other contexts, so long as no complaint is dismissed before the conclusion of an inquiry. And as has been seen above, the fundamental procedural requirement in any inquiry is the granting to parties of a "full and ample opportunity" to present evidence and make representations (as per s. 50(1) of the *Act*). But what this opportunity actually entails will depend on the nature of the specific case and the reasons for which dismissal is being sought.

[35] Thus when faced with a request to dismiss the case in the context of a motion inquiry, all the bases for the motion must be closely scrutinized to ensure that each one lends themselves to adjudication—in motion format—in compliance with s. 50(1) of the *Act*.

[36] The consequence of this analysis is that the moving party in a pre-hearing motion to dismiss bears a double onus:

(1) The "procedural" onus of convincing the Tribunal that the issues raised can be properly adjudicated in the context of a motion (as opposed to a *viva voce* hearing) and

in full compliance with the Tribunal's statutory obligation to provide all parties a full and ample opportunity to be heard.

(2) The "substantive„ onus of convincing the Tribunal that the reasons for dismissal are valid.

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[37] Given the wording of the *Act* and the objectives of the legislative scheme (in particular, the promotion of equal opportunity) it is appropriate that the party seeking summary disposition of the complaint justify why summary proceedings are appropriate. In practical terms, assuming that the Tribunal has safeguarded the rights of the parties for a full and ample opportunity to appear at the inquiry and make representations, the moving party must satisfy the Tribunal that the motion forum is one in which the rights of all parties to *present evidence* is safeguarded; i.e. that no further *evidence* can be of assistance in making the determination at hand.

[38] This may occur in two instances: a) where the moving party has demonstrated that the material facts in the relevant case are clear and are not in dispute and/or b) the issues raised involve only questions of pure law. Thus, additional evidence is of no assistance.

C. Does Using a Motion Forum to Decide a Complaint Based on Uncontroverted Facts or a Legal Issue Comply with Natural Justice?

Does the Motion Forum in this Case Comply with Natural Justice?

[39] Parties have the right to a fair hearing (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22 and 28 [*Baker*]; see also *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398 at para. 26 [*Uniboard*]).

[40] The factors affecting the content of the duty of fairness were discussed by the Supreme Court in *Baker, supra*, at paras. 22-27, and include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute, the importance of the decision to the individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly

when it has expertise and the statute gives it procedural discretion. Each of these five factors are not to be routinely applied to a given process but must be adapted to the particular context (*Uniboard, supra*). A case by case analysis is required to meet the requirements of procedural fairness (*Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 [*Ha*]).

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(i) Consider the Nature of the Decision Being Made and the Process – How Judicial is it?

[41] Pertaining to the administrative process, I observe that the Tribunal's administrative process is very close to the judicial process, and has been characterized as very Court-like as its hearings have "...much the same structure as a formal trial before a Court„ (see *Bell Canada, supra,* at para. 23). However, the Courts do not utilize the "trial model„ for the disposition of every case (see *Federal Courts Rules,* SOR/98-106, Rule 210 (motion for default judgment); Rule 213 (motion for summary judgment or summary trial); Rule 220 (preliminary determination of question of law or admissibility); Rule 221 (motion to strike out pleading); Part 5 (Applications)). Thus any analogy drawn between Tribunal adjudication and "judicial decision-making„ should reflect the fact that a good part of "judicial decision-making„ involves final – or potentially final — disposition of cases outside of the "trial model„.

(ii) Consider the Statutory Scheme and the Terms of the Statute – How Final is the Decision?

[42] The nature of the statutory scheme and the terms of the statute pursuant to which the body operates need to be examined in view of the degree of finality of the decision in question. While it is true that a Tribunal decision dismissing a complaint under the *CHRA* is not subject to appeal, it is not protected by a privative clause either, and Tribunal decisions are reviewable without leave, by the Federal Court, followed by an appeal as of right to the Federal Court of Appeal (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 52, 64, 123, 143; *Federal Courts Act*, R.S.C. 1985, c. F-7, ss.18, 27, 28). I note that in *Ha, supra*, the Court held that judicial review cannot be equated to full appeal rights because the reviewing judge's authority may be limited with respect to the substantive issues of the case. This is not to say that the availability of judicial review has no relevance whatsoever, especially as in this case here where there is no privative clause, no

leave is required and the judicial review proceeds directly to the Federal Court. *Ha, supra,* is a case in point: it is grounded in the examination of the particular statutory scheme of the *Immigration and Refugee Protection Act*, 2001, c. 27, s. 72 wherein leave is required for judicial review.

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(iii) Consider the Importance of the Decision to the Individual or Individuals Affected

[43] In considering the importance of the decision to the affected individuals, the Supreme Court directed that "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (*Baker, supra,* at para. 25). Yet, all decisions are equally important for those who are affected by them and thus there is a need to examine how the decision may actually affect the persons concerned. I believe that the cultural and constitutional considerations that resonate throughout this case militate in favour of significant procedural fairness. I am also fastidiously conscious of the quasi-constitutional nature of human rights litigation juxtaposed against the uniqueness of this case, the significant cultural, social and political ramifications of the decision for First Nations, as well as the oral tradition history of First Nations people that may be incongruous with the use of affidavit evidence that forms the basis of the motion.

[44] In the same vein, I observe that the Crown's affiant, Ms. Johnston deposed that INAC has increased funding from 193 million in 1996 to 523 million in 2008-2009 under the EPFA available in 5 provinces, and has tripled funding in this time period. The complainant group does not appear to contest these figures. Rather, it argues that this funding increase is insufficient, funding remains inadequate, and further that some provinces are seeking to access EPFA but are unable to do so due to INAC's failure to make it available to them.

(iv) Consider the Legitimate Expectations of the Parties – Did they Reasonably Expect a *Viva Voce* Hearing?

[45] The legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. This factor raises the

question of whether the complainant group in this motion had a reasonable expectation that the merits of the case would be dealt with exclusively by means of a *viva voce* "trial-type„ hearing. Of significant relevance to this issue are the Tribunal's informal Rules of Procedure, of which Rule 3 provides a broad opportunity for the bringing of motions, the presentation of evidence in support thereof, and in answer thereto, and flexibility in the options for disposition. The Rules of Procedure may not have the status of statutory instruments, but that does not diminish their ability to assist parties and members of the public to predict how the Tribunal may likely proceed (see *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at paras. 55-56 [*Thamotharem*]). Another consideration affecting the legitimate expectations of the parties in this case would be the absence of any firm promises made to them that all substantive matters would be dealt with in a formal hearing under s. 50(3) of the *Act*.

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[46] The former Chairperson's approach to case management of this case may have been less structured, but he was not irrevocably seized with the case for purposes of s. 48.2(2) of the *CHRA*. The parties would have known as of September 2009 that his term was due to expire imminently. Indeed, he had been *pro tempore* since January 1, 2009 (P.C. 2008-1886, C. Gaz. 2009.I.151.). Further, while he outlined a schedule for a *viva voce* hearing of this complaint, his schedule was not rigorously adhered to under his tenure. In a December 2009 case management conference, I asked the parties if they wished to make submissions regarding how I should exercise any discretion I may have had to extend the former Chairperson's tenure for the purposes of this inquiry. The parties chose not to avail themselves of this opportunity.

[47] Since early November of 2009, through case management discussions, the parties have been aware that there was a serious possibility that the "trial model„ would not be dogmatically adhered to in this case. As well, the Tribunal offered the parties new and innovative ways to work towards agreement concerning issues, facts and the presentation of evidence in dispute through the assignment of another Tribunal Member to act as a process mediator in January 2010. Finally, the complainant group had been aware of the Crown's intention to address these issues in this motion as threshold issues through the Crown's filing in November 2008 of a judicial review application of the Commission's referral decision. I will address the orders of Prothonotary Aronovitch and the appeal decision in respect of those orders below in another context (which

were only rendered on November 24, 2009 and March 30, 2010 respectively). All in all, abbreviation of the process, if appropriate, could have been reasonably anticipated. At the very least, it was not unforeseeable.

(v) Consider the Choice of Procedure Made by the Tribunal – Does the *Act* Give the Chairperson Discretion and does that Person have the Expertise to Make that Decision?

[48] Finally, one must consider the choices of procedure made by the Tribunal itself, particularly when the *Act* leaves to the Tribunal the ability to choose its own procedures, and further where the Tribunal has an expertise in determining what procedures are appropriate in the circumstances. Regarding the latter, Members of the Tribunal are appointed for their expertise, experience and sensitivity to human rights (*CHRA*, s. 48.1(2)). Moreover, where a case proceeds to a *viva voce* hearing it is noteworthy that Parliament has expressly entrusted the Members with the authority to decide any procedural question arising therein (*CHRA*, s. 50(3)(e)). Regarding the former, I have already discussed the issues above. Parliament has granted the Tribunal Chairperson with a broad discretion, both to establish a procedural framework for Tribunal inquiries (*CHRA*, s. 48.9(2)) and to otherwise define procedural aspects of the inquiry (*CHRA*, s. 49(2), (3)). In the current case, entertaining the Crown's motion exemplifies the access to justice policy adopted by the Tribunal, in pursuit of the twin goals of decreased costs (legal and emotionally restorative) for parties, and speedier—though nonetheless expert and fair—disposition of cases.

Conclusion – Hearing the Crown's Arguments in this Motion Meets Natural Justice

[49] A summary of the five *Baker*, *supra*, factors leads to the conclusion that while the duty of fairness (and consequently the principles of natural justice) requires much more than an administrative review or "paper hearing,, of the issues at stake, the procedural protections need not be identical to those existing in a formal trial. In the current case, the parties were able to file documentary evidence, affidavit evidence, as well as the transcribed cross-examinations of the affiants, and were granted a full opportunity to attend before the Tribunal to make oral arguments. The Tribunal record on this motion alone consists of more than 10,000 pages. Additional

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opportunities were sought and granted to present additional legal authorities and make submissions thereon as mentioned above. From the stand point of s. 48.9 (1) of the *Act*, I believe that the relatively informal and expeditious summary proceeding opted for by the Crown in this case does not offend the rules of natural justice. All parties have been accorded procedural fairness with regards to the presentation of the Crown's motion for dismissal.

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[50] Further, the disposition of certain issues through a motion is consistent with the longstanding mission of administrative tribunals, including this Tribunal, of continuously striving for the expeditious, fair and well-informed resolution of legal disputes (*Canada (Attorney General) v. Public Service Alliance Canada* [1993] 1 S.C.R. 941; *Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 S.C.R. 570).

[51] In response to the Ont. Chiefs' concerns about the potential for fragmentation of the hearing, cases involving clear legal issues are relatively rare, and further, the argument presupposes that the Tribunal's determination will be set aside in subsequent judicial proceedings. The benefits of clear and early determination of pivotal issues outweigh such speculative risks.

[52] On the whole, hearing the Crown's motion in the present case facilitates, rather than impedes access to justice. It allows the parties to consider where and how to best expend their resources and whether for example, a constitutional challenge or other avenues, may constitute a more appropriate means to address their concerns. It prevents the inflation of unrealistic expectations. It aims to address fundamental objections appropriately prior to parties dedicating significant resources to *viva voce* hearings, which may themselves run for years together. Indeed, the Federal Court of Appeal has chastised this Tribunal for mismanagement of the hearing process in allowing a complex case to consume exceptional amounts of time and resources (*Canada Post, supra*). In that case, the Applications Judge had noted "a legal hearing without discipline and timelines both delays and denies justice„ (*Canada Post, supra*, at para. 145). In my view, given the expansive nature of the present complaint, it did and does require disciplined case management. This is why I provided the parties with an innovative tool, being process mediation, whereby I appointed a Member of the Tribunal in January 2010, to work with them to narrow the issues in dispute. It is, in my view, incumbent upon the Tribunal to actively manage its inquiry

process from the receipt of the Commission's referral to the conclusion of either settlement or decision by utilizing all available administrative tools. This may include working with counsel and the parties to narrow the issues of fact and law that are truly in dispute actively prior to any hearing, and addressing and disposing of issues that may both be efficiently and fairly addressed prior to a full *viva voce* hearing. In this sense, the Tribunal, with this unique statutory framework, has greater flexibility than the courts do to manage its process, and also, may I add, has a greater responsibility. It is a specialized Tribunal that can and should identify the unique access issues in its field of expertise: e.g. costs and delay. It is the *raison d'être* of administrative tribunals to craft unique solutions to improve access, limited only by imagination and fairness within its statutory parameters.

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[53] The *Act* does not require a *viva voce* hearing in all cases. The presentation of further evidence is not required where the material facts are not in dispute and where pure questions of law are to be decided. Such a process does not violate procedural fairness.

V. OTHER ARGUMENTS RAISED BY THE PARTIES ADDRESSING WHETHER MOTION FORUM IS SUFFICIENT

A. The Crown Argues that the Complaint Raises a Real Question of Jurisdiction which should be Heard in a Motion

[54] In its motion, the Crown has described its application as one to dismiss the complaint for lack of jurisdiction. In *Canada (Attorney General) v. Watkin*, 2008 FCA 170 [*Watkin*], the Court of Appeal stated that, whether or not the action complained of was a "service,, is "a true question of jurisdiction or *vires*,,.

[55] It is true that historically, there was an attempt in the case law to identify and isolate preliminary questions which had to be answered in advance of a *viva voce* hearing, because they defined the jurisdiction of a Tribunal to proceed with a case (see *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 at p. 775; *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at para. 110 [*Bibeault*]). However, that trend has been reversed for some

time now (see *Canada Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Bibeault, supra*, at paras. 111-126). As the Newfoundland and Labrador Court of Appeal made clear in *Newfoundland (Human Rights Commission) v. Newfoundland (Health)* (1998), 164 Nfld. & P.E.I.R. 251, 31 C.H.R.R. 405, and, 13 Admin. L.R. (3d) 142 [*Prior*], not all jurisdictional questions lend themselves to preliminary determination:

> [17] I find myself in agreement with Hoyt, J.A., in *New Brunswick (Board of Management) et al. v. New Brunswick Council of Hospital Unions et al.* reflex, (1986), 77 N.B.R. (2d) 392; 195 A.P.R. 392; 35 D.L.R. (4th) 282 (C.A.), at p. 286, when he concluded that "whether the preliminary jurisdictional question will be considered initially is, in my view, a question for the chairman to decide in his properly exercised discretion.

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[56] The Court of Appeal went on to note at para. 21 that a tribunal may choose to entertain an application to decide a point of law, but that generally this would occur where there was an agreed statement of fact. Furthermore, while the Tribunal could receive affidavit evidence or oral evidence and make findings of fact thereon, doing so would not be practical "...where the issues of fact and law are complex and intermingled. In that event, it would be more efficient to await the full hearing before ruling on the "preliminary" point„ (*Prior, supra*, at para. 21, emphasis added).

[57] Thus characterizing the grounds of the Crown's motion as "jurisdictional„ or "going to jurisdiction„ does not assist in the determination of whether the issues raised should be considered in the context of a motion. With regards to preliminary jurisdictional questions, the Supreme Court of Canada has made it clear that it does not "...wish nor intend to return to the jurisdiction/ preliminary question doctrine that plagued the jurisprudence in this area for many years„ (*Dunsmuir, supra*, at para. 59).

B. The Crown Argues that the Complaint Raises an Abuse of Process Issue that can be Dealt with in a Motion

[58] Abuse of process is another issue that often lends itself to appropriate treatment in a motion. However, I do not agree with the Crown's arguments that pleading a cause of action that

is beyond the Court's jurisdiction to adjudicate constitutes an abuse of its process. The Crown invokes the case of *Weider v. Beco Industries Ltd.*, [1976] 2 F.C. 739 [*Weider*], as authority for the proposition. By extension, the Crown submits that bringing a complaint beyond the jurisdiction of the Tribunal is an abuse of the Tribunal's process, and thus is susceptible to summary dismissal. It is not clear to me this point was a contested issue before the Court in *Weider, supra*. Secondly, I am unsure how that statement in the *Weider* judgment, *supra*, would be articulated today in light of significant subsequent jurisprudence on what constitutes abuse of process (see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-36). Thirdly, the abuse of process issues that the Court found in *Cremasco, supra*, that could properly form the subject of preliminary disposition bore no resemblance to the jurisdictional "abuse of process„ objections raised by the Crown in the current case. Finally, based on what I have said earlier about jurisdictional questions not automatically lending themselves to preliminary determination, I cannot accept the *Weider* judgment, *supra*, as authority for the argument that the Crown's motion, no matter how technical, complex or factually challenging it may be, nonetheless qualifies—without further analysis—for summary disposition outside of the formal hearing process.

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[59] That having been said, from the perspective of the complainant group, it argues that early dismissal is only appropriate in such cases as contemplated by this Tribunal's ruling in *Harkin v. Canada (Attorney General)*, 2009 CHRT 6 [*Harkin*]. In *Harkin, supra*, the Member interpreted *Cremasco, supra*, to restrict the Tribunal's ability to hear summary dismissal motions to those involving a breach of natural justice, such as delay, an abuse of process, or where the issues have been heard and conclusively resolved in another forum. Inasmuch as *Harkin, supra*, purports to establish an exhaustive list of scenarios in which summary dismissal is permitted, I respectfully disagree. While the Tribunal in *Harkin, supra*, restricts *Cremasco, supra*, to its facts, *Harkin, supra*, did not directly consider the statutory language in s. 48.9(1) of the *Act* ("informally and expeditiously„). Further, I do not view *Cremasco, supra*, itself as setting out an exhaustive list of scenarios where summary dismissal is appropriate. On the contrary, the Court at one point speaks in quite general terms of entertaining "...preliminary motions so as to clear the procedural underbrush„ (*Cremasco, supra*, at para. 14). As I have said above, I believe that the most sound

and practical approach is simply for the Tribunal to review the motion record on an issue by issue basis and ensure that it adheres to the Parliamentary directions of ss. 48.9(1) and 50(1) of the *Act*.

C. The Complainants Argue that the Test is the "Plain and Obvious" Test that Comes from the Courts and therefore a Motion is not Appropriate

[60] The complainant parties appeared to accept the idea that the Tribunal may dismiss a complaint on a preliminary basis where it is "plain and obvious„ that the complaint cannot succeed. This legal threshold appears to originate from jurisprudence decided under rules of civil procedure allowing for the striking of a claim that did not disclose a reasonable cause of action (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). I agree with the Crown, that it is not appropriate to import such tests from the civil courts, which have a very different legal foundation, into the legislative scheme of the *CHRA*.

[61] As an aside, I should note that the Tribunal has been applying the "plain and obvious„ test when deciding whether to grant motions to amend the complaint (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 6 and 7; *Warman v. Lemire*, 2006 CHRT 13 at para. 4). However, this test was not adopted by the Federal Court in reviewing a Tribunal ruling that allowed an amendment to the complaint (*Canada (Attorney General) v. Parent*, 2006 FC 1313).

[62] I return to the test as being that if the objection can be fully and amply answered in a motion on the basis of the record generated by the motion and without having recourse to a full *viva voce* hearing, then the motion will be decided on such a basis. I find that the *Act* authorizes the Tribunal to deal with the Crown's objections in the context of a motion at this stage by determining—on an issue by issue basis—if the motion process was sufficient to accord the parties their rights to present their case, in particular their evidence, as contemplated by the *Act*.

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D. The Complainants Argue that the Earlier Federal Court Decision Requires the Tribunal to go to a *Viva Voce* Hearing

[63] The complainant group argues that the Federal Court has directed a *viva voce* hearing of the within complaint, and this order compels me to direct a *viva voce* hearing. I respectfully disagree. The Crown sought to have the Commission's referral decision in this case judicially reviewed. The complainants moved to strike the application for judicial review or, in the alternative, to have the Crown's application stayed pending the outcome of the proceedings before the Tribunal. The Court refused to strike the Crown's application stating that striking an application is an exceptional remedy that will be granted only in the clearest of cases [*David Bull Laboratories (Can) Inc. v. Pharmacie Inc.*, [1995] 1 F.C. 588]. Regarding the stay, Prothonotary Aronovitch applied the tripartite test established in *RJR MacDonald Inc. v. Canada (Attoney General)*, [1994] 1 S.C.R. 311 and granted the complainant group's stay application. In addressing whether there is a serious question to be tried, she wrote that the complaint being serious and complex, should not be determined in summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue. Secondly, in examining the balance of convenience, she wrote that there is an interest in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have an impact on the future ability of Aboriginal peoples to make discrimination claims.

[64] I do not read these comments as detracting from the statutory direction of ss. 48.9(1) and 50(1) of the *Act* and restricting in any manner the obligation of this Tribunal to hear the Crown's motion and determine the appropriate manner of procedure in the circumstances of this case, and based upon the evidentiary record before it. Nor does the Tribunal's *de novo* exercise of its mandate in entertaining a motion to dismiss constitute a review of the Commission's referral as it is grounded in the *CHRA*. Indeed, as seen above, the motion forum provides a legitimate forum for an inquiry in appropriate cases [see *Cremasco, supra*]. Finally, I note in passing that the net effect of the Federal Court decision is that the Crown's motion to judicially review the Commission's referral decision is deferred pending the completion of the hearing by this Tribunal.

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E. The Crown Argues that the Complainants Have the Burden to File the Requisite Evidence

[65] Finally, as I have stated earlier, there is a two-pronged burden of proof in this motion on the moving party, the Crown. In its submissions, the Crown suggested that the burden in the motion was borne by the complainant group, who had to establish a *prima facie* case of discrimination. I disagree. It is not for the Crown to require the complainants at this stage to "...lead trump or risk losing„ (*Goudie v. Ottawa (City)*, 2003 SCC 14 at para. 32), and I note here that the Crown itself has taken the position that summary judgment jurisprudence is as inapplicable to the motion as jurisprudence based on motions to strike for no cause of action. Put another way, it is not incumbent on complainants to proffer their entire evidentiary record in a motion in fear of a consequential dismissal of the complaint for want of evidence. In cases w ere the complainant is assigned the evidentiary burden of establishing a *prima facie* case of discrimination, such assignment occurs in the context of a formal "trial-model„ hearing, not in the context of a motion brought by the person accused of discrimination. In making submissions on the procedural onus, it is open to the complainant group to explain why the motion process itself did not afford the parties the "full and ample opportunity„ to, *inter alia*, present evidence. If the moving party fails to satisfy its procedural onus, and the complainant group's arguments that the motion forum is incapable of satisfying its evidentiary needs are accepted, then correspondingly, one simply cannot expect a *prima facie* case of discrimination to be adduced. It would not be logistically or procedurally possible within the confines of the motion. Within the context of the motion, it is the moving party who is seeking a specific form of relief from the Tribunal—it is for the moving party to satisfy the Tribunal that it is entitled to the specific form of relief sought (i.e. an order for summary dismissal). For these reasons, I believe that reversing the burden of proof would run afoul of the requirements of the *Act* and of procedural fairness.

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VI. ADDRESSING SERVICES IN A MOTION FORUM – ARE THE MATERIAL FACTS CLEAR, COMPLETE AND NOT IN DISPUTE

A. Summary of the Positions of the Parties

[66] I now turn to the Crown's argument that the Tribunal should summarily dismiss the complaint on the grounds that the expenditure of funds through the FNCFS Program does not constitute a service. The Crown says that the complaint does not properly explore the relationship between INAC, the entities that receive FNCFS Program funding, and their responsibility to provide child welfare to registered First Nations children ordinarily resident on reserve, and, consequently it is not a complaint of discrimination recognized by law. Concisely, it argues that the service providers in this case are the funding recipients under the program: various corporate bodies, bands, tribal councils and governments. It is these organizations that deliver child welfare to First Nations on-reserve children and families; INAC does not provide child welfare to anyone.

[67] The Crown also argues that funding decisions are not justiciable and argues that INAC's funding policy is an expression of pure executive policy that is not impeachable under the *CHRA*. Yet, the Crown concedes that government funding has been held to be a service where the government's role extends beyond providing funds to encompass significant obligations specific to the provision of the service itself (Written submissions of the Attorney eneral of Canada in support of the motion to dismiss the complaint, at p. 712, para. 66).

[68] Regarding the Supreme Court's recent decision in *NIL/TU,O*, *supra*, the decision confirms the Crown's position that child welfare is a matter within provincial legislative authority. The Crown argues that child welfare is not a "matter„ coming within section 91 of the *Constitution Act, 1867*, but rather falls squarely within s. 92. Further, the Crown argues that the ordinary activities of child welfare organizations do not touch on issues of Indian status or rights, encapsulated within s. 91(24) of the *Constitution Act, 1867*. By drawing an analogy from the labour relations issue in *NIL/TU,O*, *supra*, the Crown gains more support for its position that child welfare is a provincial matter. Its position is supported by both the majority and minority view in *NIL/TU,O*, *supra*. The funding of child welfare services to Indians on reserve is a matter that is

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integrally tied to the provincial scheme and cannot form the basis of a human rights complaint before the Tribunal.

[69] However, the complainant group resists this position by arguing that INAC's actions demonstrate that INAC exerts at least *some* control over child welfare through, *inter alia*, funding for staff and operations, compliance reviews, and review of children in care files. In response to the Crown's submissions that these actions constitute mere accountability measures, it argues that these actions should be viewed contextually and holistically in light of all other evidence proffered in a *viva voce* hearing. As well, it argues that the effect of the funding program demonstrates that INAC ultimately determines the type and level of child welfare. It argues that the relationship between INAC and the ultimate child welfare recipients, First Nations children and families, cannot be properly explored without the benefit of more evidence in a *viva voce* hearing. It says that INAC is the *de facto* service provider, or a co-service provider, of child welfare. The Ont. Chiefs state that further to the 1965 Agt. the federal government has responsibility for delivering child welfare, and that in this regard, INAC is not "a bemused bystander„ (Submissions of the Chiefs of Ontario, at p. 4, para 9).

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[70] Regarding *NIL/TU,O, supra*, the complainants reply that the decision is inapplicable and distinguishable from the circumstances in the present case. They say that the decision deals exclusively with jurisdiction over labour relations, and it does not address the service or comparator issues. The complainants claim that INAC's involvement in on-reserve child welfare services is an administrative exercise of federal jurisdiction under section 91(24) of the *Constitution Act, 1987*; or, in the altemative, an exercise of the federal spending power. For that reason, the complainants assert that it is Canada, and not the provinces, who determines which child welfare services are available to First Nations children on reserve.

B. What is the Law Regarding "Services"?

[71] The first step to be performed in applying section 5(b) of the *Act* is to determine whether the actions complained of are "services" (see *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 per La Forest J. at para.60 [*Gould*]; and, *Watkin, supra*). "Services„ contemplate something

of benefit being "held out„ as services and "offered„ to the public. Thus, enforcement actions do not constitute services as they are not "held out„ or "offered„ to the public, and are not the result of a process which takes place "in the context of a public relationship„ (*Watkin, supra*, at para. 31; and, *Gould, surpa*, at paras.16, 55 and 60). The mere fact that an action is undertaken in the public interest does not make it a "service„ (*Watkin, supra*, at para. 22). A service does not have to be available to all members of the general public in order to be "customarily available to the general public" (*Watkin, supra*; *Canada (Attorney General) v Rosin*, 1 F.C. 391 [*Rosin*]; and, *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 [*Berg*]).

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[72] Most services offered by governments are open to the public. Indeed, it may well be said that virtually everything government does is done for the public, is available to the public, and is open to the public (*Rosin, supra*, at paras. 8 and 11). This Tribunal has found INAC to be providing a service in INAC's intercession on behalf of locatees of reserve land in arranging leases with potential lessees (*Louie and Beattie v. Indian and Northern Affairs Canada,* 2011 CHRT 2, at paras. 44-49, judicial review pending, file no. T-325-11).

[73] It is incumbent upon the Tribunal to determine whether the impugned actions may be viewed as a service: whether government actions which are not "services„ within the commonly accepted meaning can nevertheless be treated as "services„ under section 5 of the *Act* (*Watkin, supra*, at para. 25). In *Watkin, supra*, enforcement actions were found not to constitute "services„.

[74] The question of whether government funding constitutes a "service„ has not been resolved under the *CHRA*. Some helpful principles arise out of jurisprudence from other jurisdictions where discrimination in the provision of a "service„ or "services„ is also captured by human rights legislation. For example, it has been held that the relationship or relationships between the alleged service provider and service recipient must be examined to determine whether or not any terms or conditions are imposed on the funding such as to control the content of the service (see *Bitonti v. British Columbia,* [1999] B.C.H.R.T.D. No. 60 at paras. 314-315 [*Bitonti*]; and, *Donna Martyn v. Laidlaw Transit Ltd. o/a Yellow Cab Ltd., Alberta Co-op taxi Line Ltd., Edmonton taxi commission, City of Edmonton, Alberta transportation* (2005), 55 C.H.R.R. D/235 (Alta. H.R.P.) at paras. 356-369 [*Martyn*]). For example, in *HMTQ* v. *Moore et al*, 2001 BCSC 336 at paras.

19-26 [*Moore*], where, apart from the provision of any funding, the Minister could make orders: (a) governing the provision of educational programs; (b) determining general requirements for graduation; (c) determining the general nature of education programs for use in schools; and, (d) preparing a process for the assessment of the effectiveness of educational programs, the Court held that allegations of discrimination against the Ministry should not be limited to the use or misuse of the Ministry's funding power.

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[75] The powers and duties of the funding government are relevant (*Moore, supra*). In *Moore, supra,* the funding Ministry had the power to tell school boards to spend certain money to provide programs to special needs students (see para. 22). On the other hand, the fact that a provincial government, for example, (i) has no supervisory role over the service system,(ii) has no statutory obligation to regulate the field, and, (iii) has delegated regulation of that field to a municipality, may be contra-indicative of that government being a service provider (*Martyn, supra).*

C. Analysis – Based on the Facts

[76] The evidence filed in this motion does not consist of clear, complete and uncontroverted facts. The motion record is insufficient to allow me to decide whether INAC's complex funding can be treated as a "service„ for the purpose of s. 5(b) of the *CHRA*. Some of these insufficiencies are set out below.

First Nation Service Providers Receive Funding but are not the Recipients of Child Welfare

[77] In this case, there is no dispute that INAC's funding is "held out„ or "offered„ to the public. Rather, one significant element of the dispute centers around the differing views of the parties regarding who constitutes the "public„. Are the First Nations service providers the "public„ as the direct recipients of INAC's funding? Or do First Nations children constitute the "public„? The Crown argues that the ultimate recipients of child welfare are not the service providers. The Crown argues that there is a missing link in that INAC cannot be held accountable for the First Nations children who are the recipients of child welfare. For the reasons cited, I do not accept this argument as determinative of the issue. It is not inconceivable that the *CHRA* may

allow for a piercing of the service provider veil to understand the real relationship between INAC and First Nations children and families.

[78] Rather, the epicentre of the dispute involves whether INAC has the authority to tell First Nations service providers how to deliver child welfare services, and whether, through the *terms and conditions* of the funding programs, it does so. On the other hand, if INAC lacks any supervisory role over child welfare, and it is exclusively the provinces that supervise child welfare, then INAC may not be viewed as providing a "service„.

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[79] Legislative jurisdiction over "Indians„ and lands reserved for "Indians„ is a federal matter. Legislative jurisdiction over child welfare for all children in the province is a provincial matter. The evidence filed in this motion does not demonstrate with any sufficient degree of precision:

1. the terms and conditions of the funding throughout INAC's complex funding scheme and whether INAC engages in control and/or delivery of child welfare in any discrete area through such terms and conditions;
2. whether INAC defines the content of child welfare, for example, whether INAC dictates what kinds of child welfare interventions short of maintenance are available to children and families; and,
3. whether INAC has a supervisory role over child welfare and engages in the assessment of child welfare services through actions such as auditing and administrative reviews.

(i) Crown has not Demonstrated Clear, Complete and Uncontroverted Material Facts

[80] Although the Crown brings this motion for a determination that funding is not a service, it has not filed the requisite evidence for me to decide the question.

[81] Further, while the parties have filed some evidence, even then, they do not agree on the material facts and the inferences to be drawn from the facts.

[82] The Commission in its referral of the complaint to the Tribunal for a hearing further to s. 49 of the *Act* took the position that "having regard to all of the circumstances it is apparent that inquiry is warranted and that an investigation would likely not be administratively efficient or effective in exploring the human rights allegations and reaching findings as the main arguments being adduced are legal and not factual in nature and are not settled in law,, (*First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Indian and Northern Affairs Canada*, decision 20061060 of the Canadian Human Rights Commission, September 30, 2008). I observe that the arguments adduced by the Commission in this motion are different from those outlined in its referral. As stated, the Tribunal invited the parties to file an Agreed Statement of Facts in order to move expeditiously to a hearing. The Tribunal Chairperson assigned another Tribunal Member to help the parties to come to an agreement on the material facts: although the parties had represented to the Tribunal that they were circulating an Agreed Statement of Facts in December 2009, and then continued to work on the same through the assistance of the process mediator. In March 2010, several parties precipitously chose not to proceed with work on an Agreed Statement of Facts pending the release of this decision. An Agreed Statement of Facts would have been of assistance to me in understanding the factual basis and dealing with the issue in the motion.

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[83] The Crown filed one eight page affidavit and its motion record of some 690 pages. The Crown's one affiant, Ms. Johnston, was not directly and personally involved in the delivery of child welfare by a First Nation service provider. I note that the Crown's proposed witness list includes persons who appear to be able to provide potentially useful evidence in a full *viva voce* hearing: i.e., INAC staff including Senior Policy Advisors regarding funding flows to recipients, managers regarding specific agreements / arrangements in specific provinces and memoranda of understanding and calculations of maintenance rates and reimbursements, acting regional directors regarding specific provincial models, and operational specialists. The Crown is anticipated to file a funding chart (Process Mediation Report #2, June 30, 2010, at para. 2). However, it did not do so for this motion.

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1. Complicated Funding Agreements – Not Filed

[84] INAC's funding supports 108 First Nations service providers to deliver child welfare to approximately 160,000 children and youth in approximately 447 of 663 First Nations (Cross-Examination of Dr. Cindy Blackstock, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 7, at pp. 337-338). However, the funding has many shades and permutations across the various provinces and the Yukon Territory. For example, in the Yukon, INAC funds the Yukon government for child welfare for all Indian children on and off reserve. The Crown has not filed each of the relevant agreements. Only one funding arrangement with a funding agency was filed in this motion. As noted, the scope and breadth of this complaint exceeds any complaint filed with the Tribunal to date and encompasses INAC's funding across Canada, involving at the minimum, 50 to 60 funding agreements with respect to Directive 20-1 alone.

2. Witnesses are Needed to Clarify Funding Agreement that is Filed and Are Yet to be Filed

[85] The complainant group filed the National Program Manual (NPM) that contains Directive 20-1. Directive 20-1 outlines the funding applicable to B.C., Manitoba, Newfoundland, New Brunswick and the Yukon Territory. The NPM is riddled with provisions that are not clear on their face to this Tribunal, and which the rest of the record fails to clarify: the Backgrounder refers to the primary program objective as being to "support culturally appropriate„ child and family services for Indian children and families resident on reserve, in the "best interest of the child„ in accordance with provincial legislation and standards (National Program Manual, Backgrounder, clause 1.3.2, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 3B). The policy is an interim step in "moving toward self-government„ (National Program Manual, Backgrounder, clause 1.3.3, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 3B). The child and family services offered by First Nations service providers on reserve are to be "culturally relevant and comparable„ but not "necessarily identical„ to those offered by the provinces off reserve in "similar circumstances„ (National Program Manual, Backgrounder, clause 1.3.5, written submissions of the Attorney General of Canada in support of the motion to

dismiss the complaint, Tab 3B). The Crown's evidence and submissions do not show what the various provincial statutes mandate, particularly in terms of "cultural relevance,, for First Nations children. Thus, it is premature to determine the issues of control and the content of child and family services.

[86] The funding architecture pertaining to Directive 20-1 alone is complex and involves numerous funding agreements and memoranda of understanding. The only agreement filed on the motion pertaining to Directive 20-1, is a sample Manitoba Comprehensive Funding Arrangement between INAC and the Southeast Child and Family Services Inc. (Comprehensive Funding Arrangement) filed by the complainant group. INAC provides almost seventeen million dollars to the agency to be used for the purposes of providing child welfare to 10 First Nations in Manitoba including Bloodvein and Buffalo Point.

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[87] Ms. Johnston, on the behalf of the Crown, in her affidavit, outlines who provides child welfare in each of the 4 provinces and 1 territory implicated in Directive 20-1 (Affidavit of Ms. Odette Johnston, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 2, at para. 15). From this deposition, one can deduce that funding in Newfoundland may involve 2 INAC agreements and 3 provincial government agreements; funding in New Brunswick may involve 2 INAC agreements and 14 provincial government agreements; funding in Manitoba may involve 14 INAC agreements; funding in British Columbia may involve 21 INAC agreements as well as self-government agreements; while, funding in the Yukon may involve one agreement. As well, I note from Ms. Johnston's affidavit that in Saskatchewan, even though it is largely under the EPFA, there are still *2 (two)* agency agreements under Directive 20-1. The EPFA is INAC's enhanced and alternative funding approach to Directive 20-1, first approved in 2007 for implementation in Alberta. Since its implementation, four other provinces also agreed to transition from Directive 20-1 to this approach. Yet, the EPFA and relevant agreements thereto are not filed. In Ontario the 1965 Agt. has been amended 4 times. In total, from this review of the record, potentially 60 agreements relevant to Directive 20-1 are implicated. There are more under the EPFA. The Crown has not filed these.

3. The Terms and Conditions of the NPM are not Clear

[88] The existence and nature of the terms and conditions are far from clear. The NPM contains only some of the terms and conditions of the funding while others are oral (Cross-Examination of Ms. Odette Johnston, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 6, at pp. 210-211). At one point in her cross-examination, Ms. Johnston indicates that the terms and conditions are not found in the NPM; rather they may be contained in INAC's Treasury Board submission and are verbally communicated to First Nations agencies. Neither her cross-examination, nor her affidavit, clearly elucidate what the terms and conditions are and how they are to be implemented, by whom, and how they affect the delivery of child welfare. The Crown's written argument is also deficient regarding the terms and conditions. The Crown writes: "INAC enters into funding agreements and memoranda of understanding with recipients containing express terms and conditions„ (Written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, at p. 705, para. 45). Yet, the Crown fails to outline the same, nor has the Crown explained how the *unwritten* terms and conditions of the FNCFS program interact with the *written* terms and conditions in the funding arrangements.

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4. Self-Government Agreements not Filed – Insufficient Evidence

[89] As well, there are cursory references in the transcript to self-government agreements, none of which are filed in this motion. For example, see reference to the Spallumcheen First Nations in B.C. (Cross-Examination of Dr. Cindy Blackstock, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 7, at p. 329). It is unclear from the record what arguments the parties seek to advance about these.

5. The Evidence does not Clarify how the Comprehensive Funding Arrangement Works

[90] The complainant group filed the Comprehensive Funding Arrangement between Manitoba and the Southeast Child and Family Services Inc.. It states that INAC provides monies (e.g. about 17 million dollars in one case) to the agency on the condition that these funds are to be used for child welfare in accordance with the *terms and conditions* of the agreement

(Comprehensive Funding Arrangement, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 4A, at 2.1). Yet the agreement expressly provides that INAC may reduce the funding if the Minister varies the formula. It states, *notwithstanding* any provision of the agreement, in the event that there is *a change in the formula established by the Minister,* INAC *may reduce* the level of funding payable to the agency First Nations service provider (Comprehensive Funding Arrangement, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 4A, at 2.5.2 (e)). The agreement does not appear to qualify how or when the Minister may vary the formula. The prerequisites for the exercise of such Ministerial discretion, if any, are crucial to the issue of INAC's control of child welfare. The Crown has not clarified this agreement and how First Nations child welfare works in Manitoba under this arrangement. At this juncture, I cannot decide, on the evidentiary record, if this ability to vary the formula constitutes an *indicium* of control of child welfare by INAC, or whether it supports the conclusion that INAC determines the content of child welfare services.

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[91] In Manitoba there are four authorities that oversee, monitor and support agencies that provide direct child welfare on and off reserve. It appears that there are 14 First Nations service providers in Manitoba, and 10 of the funding arrangements are administered by the Southern Authority (Affidavit of Ms. Odette Johnston, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 2; and, affidavit of Ms. Elsie Flette, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 4). The remaining 4 are potentially administered by the other three authorities. In short, for Manitoba alone, there are at least 13 other such funding arrangements that have not been filed by the Crown.

6. The Evidence does not Clarify how the 1965 Agreement Works and if all Relevant Agreements are Filed

[92] Further to the 1965 Agt., Ontario funds non-profit children's aid societies and INAC reimburses Ontario for a percentage of the costs of child welfare expenses incurred in Ontario, in respect of on-reserve children. Yet the effective date of the 1965 Agt. is December 1, 1965, and it

may be terminated by either party with 12 months written notice (1965 Welfare Agreement, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 8A, at 8(1)). Witnesses would need to speak to this clause, because its existence (and potential invocation by the government parties) could shed light on the extent of INAC's role in the provision of the subject services. Another example of documents in the record which require further explanation is a series of instruments that purport to be amendments to the 1965 Agt. by way of memoranda dated in 1971, 1972, 1981, and 1998. The evidence does not clarify the status of the various services referred to in the 1965 Agt., the status of the referenced enabling legislation, or the status of the various amendments and their substantive implications. In Ontario, there are specific service agreements between Ontario and both mandated and non-mandated First Nations child and family service organizations / children's aid societies (Cross-Examination of Tom Goff, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 8, at p. 456). Again, the Crown has not filed such agreements, nor has it explained how they operate *vis-à-vis* INAC funding.

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7. Cannot Determine if INAC Controls Preventative Measures

[93] The complainant group has emphasized that INAC's newest funding regime, the EPFA, is still deficient with respect to funding for portions of child welfare programming such as preventative measures (programs to reduce the risk of removal of children from their families). INAC's funding continues to require that First Nations service providers meet provincial standards. Both Directive 20-1 and the EPFA purport to provide funding for these types of services (Affidavit of Ms. Odette Johnston, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 2). It would have been helpful for the Crown to have indicated whether the various provincial statutes mandate preventative measures.

8. Cannot Determine if INAC Takes Actions Beyond Auditing for Accountability

[94] INAC conducts audits and administrative and compliance reviews of First Nations service providers. In the course of such reviews, INAC examines children in care files, reviews board of

governor minutes for content, as agencies in Manitoba conduct criminal record checks of staff (Cross-Examination of Ms. Elsie Flette, written submissions of the Attorney General of Canada in support of the motion to dismiss the complaint, Tab 9), reviews service provider board by-laws and amendments, and issues deficiency letters. While, the Crown's position that INAC only audits for financial accountability may be a valid argument, the Crown has filed only cursory evidence about the audit and review procedures. The evidence does not demonstrate the audit procedures comprehensively *vis-à-vis* the various funding agreements.

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D. Conclusion - The Crown has not met its Onus – Crown has not Filed Sufficient Evidence or Made Sufficient Submissions to Demonstrate that the Funding Program is not a Service

[95] In conclusion, the Crown has not demonstrated that the motion forum provides a full and ample opportunity for the exploration of the "services„ issue. The fact that the Crown failed to file, or was unable to file the necessary materials in this motion, in and of itself, demonstrates the complexity of this issue, and the need for a *viva voce* hearing as sought by the complainant group. The true nature of the funding program, and its impact on funding recipients, remains obscure, notwithstanding the documents, affidavits and transcripts filed.

[96] However, my comments on this "services„ issue are not meant in any way to negate the need for diligent case management of the presentation of evidence on this point were the issue ever to proceed to a *viva voce* hearing.

[97] As observed earlier, the magnitude and scope of this complaint is unprecedented in the Tribunal's history. It comprehensively challenges INAC's funding across Canada, across all provinces and one territory, across all funding recipients and First Nations communities, in one broad brush. In this case, the Tribunal is asked to consider the relationship between the federal government, eleven different provincial/territorial jurisdictions, and 108 First Nations service providers. The factual foundations of this complaint reach deep into the crevices of INAC federal policies, guidelines, funding agreements, and provincial and territorial statutes, practices, policies and guidelines regarding child welfare, and inter-jurisdictional child welfare agreements. The determination of the "services„ issue may not be possible on a generalized basis, for all child

welfare services agencies. In the substantive hearing, the complainants must be able to show that the federal government is involved in the provision of child welfare services in the circumstances of *each* of these child welfare agencies. Ultimately, the services question is a fact driven inquiry. The precise nature and extent of INAC's decision-making needs to be assessed through the prism of the myriad subordinate arrangements and agreements, in order to ascertain the impact of this decision-making on the services received, on reserve, by First Nations children and families. The Crown's record makes clear that the motion was not an adequate vehicle for this aspect of the inquiry.

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E. Regarding the Crown's Other Arguments

(i) *NIL/TU,O* - Evidence

[98] The Tribunal allowed the parties to make submissions regarding the recent decision of the Supreme Court of Canada in *NIL/TU,O*, *supra*. Although not determinative of the "services„ issue, the analysis in that case provides the Tribunal with an outline of the type of information it needs to appropriately render a decision pertaining to "services„ in this case. In *NIL/TU,O*, *supra*, the Supreme Court of Canada examined some of the following factors in making its determination regarding the constitutional jurisdiction of NIL/TU,O Child and Family Services Society's labour relations: the tripartite delegation agreement between the province of British Columbia, the federal government and the NIL/TU,O Child and Family Services Society; its relationship to the *British Columbia Child, Family and Community Service Act*; a "Delegation Matrix„ appended to the tripartite delegation agreement; the Aboriginal Operational and Practice Standards and Indicators; federal program Directive 20-1; and, the specific operations of the NIL/TU,O Child and Family Services Society. The same type of information was also used to determine the labour relations jurisdiction of Native Child and Family Services of Toronto, in *Native Child and Family Services of Toronto*, *supra*. In *NIL/TU,O*, *supra*, and *Native Child and Family Services of Toronto*, *supra*, the determination of the labour relations jurisdiction involved only one child welfare agency respectively.

(ii) Justiciability

[99] Finally, regarding the Crown's arguments that INAC's funding policy is an expression of pure executive policy that is not impeachable under the *CHRA* are not helpful. They miss the mark of the requisite services analysis. The doctrine of justiciability is fundamentally concerned with the proper ambit of the Court's function and authority in relation to the other institutions of government. Thus, in *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525, one finds the observation that:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. [emphasis added]

[100] Similarly, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 26, one finds the question of justiciability defined in terms of whether the issue put forward would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or whether the Court is able to give an answer that lies within its area of expertise: the interpretation of law. Finally, in *Bruker v. Marcovitz*, 2007 SCC 54 at para. 41, the majority of the Court relying on Dean Sossin's work, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999)—a text also relied upon by the Crown in the motion before me—defined "justiciability„ as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In addressing a complaint under the *CHRA*, the provisions of the *CHRA* itself govern as opposed to "judge-made rules„. Any exemption from its provisions must be clearly stated (*Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81 [*Vaid*]).

[101] The Crown argues that a federal transfer of funds has not attracted legal liability in claims of negligence and breach of fiduciary duty because there is insufficient proximity between the funder and those providing the service (*Aksidan v. Canada (Attorney General)*, 2008 BCCA 43 at paras.13-15; and, *Reference re Broome v. Prince Edward Island*, 2010 SCC 11 at para. 45). First, as a matter of principle, I observe that these cases apply the law as it evolves from areas that cannot provide direct assistance to the Tribunal (*Robichaud v. Canada (Treasury Board)*, [1987] 2

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S.C.R. 84; and, *Chopra v. Canada (Attorney General)*, 2007 FCA 268). Further, to the extent that they are insightful, they support the need for an examination of the extent of a Crown exercise of control of funding and the proximity to the ultimate service recipient through a thorough examination of the relationship between INAC and First Nations children and families.

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VII. ADDRESSING COMPARATOR IN A MOTION FORUM – QUESTION OF LAW

A. Summary of the Positions of the Parties

The Crown

[102] The Crown argues that s. 5(b) of the *Act* requires that in order to find adverse differentiation, a comparator is required. It further argues that there must be a difference in the provision of services to two different individuals or service recipients. The section does not allow a comparison between two different service providers serving two different "publics,,. Further, the section does not allow comparisons between the federal government and the provinces. The Crown supports the precepts of the importance of human rights legislation but disagrees that the complaint falls within the statutory mandate of the *Act*. While, the Crown acknowledges that it has a fiduciary obligation towards First Nations peoples, it submits that such a duty and other international commitments do not expand the statutory reach of s. 5(b) of the *CHRA*.

Complainant Group

[103] The complainant group argues that s. 5(b) of the *CHRA* must be read with a large and liberal interpretation in keeping with the quasi-constitutional nature of the *Act*. It argues that the very purpose of the *Act* is to remedy discrimination, including systemic discrimination. It argues that a purposive reading of s. 5(b) of the *CHRA* does not necessitate a comparison at all. It argues that failure to identify an appropriate comparator is not fatal to the complaint and cites the example of people with disabilities who are not required to demonstrate differential treatment in successfully raising a discrimination claim. The group argues that the focus should be on whether

a service meets the needs of those who experience adverse treatment due to an immutable personal characteristic.

[104] Second, in the alternative, it submits that s. 5(b) of the *Act* may be read to allow a comparison to be made between two different service providers, and that these may be INAC and the provinces. The complainant group argues that the Crown has not explained why the use of another service provider, being a province, is inappropriate and that the Crown has no precedent for disallowing cross-jurisdictional comparators. Further, it argues that within the context of a *viva voce* hearing, the appropriateness of such a comparison will become readily apparent.

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[105] Additionally, AFN proposes that on-reserve First Nations children who are receiving child welfare through INAC may be compared to on-reserve First Nations children who are receiving child welfare through the provincial system.

[106] Finally, the complainant group advocates that INAC is the sole provider of race-based child welfare that ultimately benefits First Nations children residing on reserve. This is the consequence of the constitutional division of powers wherein the federal government has jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867*. This constitutional reality prevents the rigid application of the traditional section 5(b) test outlined in *Singh*, *supra*, and prevents the application of the *Act* to this entire group of Canadian children. Requiring a comparator in this case cannot be the interpretation consonant with the intent of Parliament. Nor can it be reconciled with jurisprudence espousing the quasi-constitutional nature of human rights legislation and its large and liberal interpretation. This is particularly the case given the fiduciary obligations of the Crown toward First Nations people and Canada's endorsement of the *UNDRIP*. This legal impediment does not exist in any other case where the s. 5(b) analysis under the *CHRA* has been developed and applied. The effect of ruling that a comparator is not required and/or not using a discrimination analysis involving two service providers, is tantamount to sustaining a racial construction of discrimination wherein First Nations children residing on reserves are deprived of equal or similar child welfare to all other Canadian children.

B. The Comparator Issue is a True Question of Law

[107] Has the complainant group had a full and ample opportunity to present the evidence and make submissions required by the *Act* to address this comparator issue? This is a pure question of law. Indeed, as noted, the Commission's referral of the complaint characterized the issues raised by the complaint as ones of law, and not fact. The parties have had extensive opportunities to present their submissions and even additional submissions. On this issue, the parties have had a full and ample opportunity to file affidavits, cross-examine on affidavits, appear before the Tribunal with the help of their lawyers, submit arguments and present evidence (see Appendix "A,,). Further, the parties were granted an opportunity to file submissions until August 23, 2010 and December 23, 2010, respectively with respect to three new decisions being *NBHRC v. PNB*, *supra*, released on June 3, 2010, and two decisions of the Supreme Court of Canada being *NIL/ TU,O*, *supra*, and *Native Child and Family Services of Toronto*, *supra*, rendered together on November 4, 2010, and with respect to the *UNDRIP*. No further evidence in a further *viva voce* hearing can make this legal issue any clearer.

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C. What Does "Differentiate Adversely" Mean in the Context of Section 5(b) of the *Act*? How is s. 5(b) of the *Act* to be Interpreted?

[108] Section 5 of the *Act* states:

Denial of good, service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :**
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	**a) d'en priver un individu;**
(b) to differentiate adversely in relation to any individual,	**b) de le défavoriser à l'occasion de leur fourniture.**
on a prohibited ground of discrimination.	
1976-77, c. 33, s. 5.	**1976-77, ch. 33, art. 5.**

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[109] The Supreme Court of Canada has a specific procedure to be followed when interpreting bilingual statutes (*R. v. Daoust*, 2004 SCC 6 at para. 27 [*Daoust*]). The first step is to determine whether there is discordance between the English and French versions of s. 5(b) of the *Act* and, if so, whether a shared meaning can be found (see *R. v. S.A.C.*, 2008 SCC 47 at para. 15 [*S.A.C.*]; *Daoust*, *supra*, at para. 27). If s. 5(b) of the *CHRA* may have different meanings, the Tribunal has to determine what kind of discrepancy is involved. In *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), Côté suggests that there are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply (*S.A.C.*, *supra*, at para. 15; *Daoust*, *supra*, at para. 27; Côté, *supra*, at p. 327). Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous (*S.A.C.*, *supra*, at para. 15; *Daoust*,

supra, at para. 28; Côté, *supra*, at p. 327). Third, one version may have a broader meaning than the other. Where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning (*S.A.C., supra*, at para. 15; *Daoust, supra*, at para. 29; Côté, *supra*, at p. 327). At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent (*S.A.C., supra*, at para. 16; *Daoust, supra*, at para. 30; Côté, *supra*, at p. 328).

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[110] In *Vaid, supra*, the Supreme Court of Canada affirmed that proper statutory interpretation requires that "...the words of an Act [...] be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament„ (at para. 80).

[111] Such interpretative principles apply with special force in the application of human rights laws given the quasi-constitutional status of the *Act* (*Vaid, supra*, at paras. 80-81). While it is accepted that human rights statutes are to be interpreted in a "large and liberal„ fashion, it is also well established that the words of the statute must be capable of bearing the interpretation sought (*Gould, supra*, at para. 13). This approach is reinforced by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects„. In *Berg, supra*, former Chief Justice Lamer had this to say about the "broad, liberal and purposive approach„ in applying it to the British Columbia human rights statute:

> This interpretive approach does not give a board or court license to ignore the words of the *Act* in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3, that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, **without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature.** [emphasis added]
>
> (at p. 371)

[112] Within this analysis the intention of Parliament must be respected. The *CHRA* is a statutory creature with its genesis within the legislative control of the Parliament. Any exemption from its provisions must be clearly stated (*Vaid, supra*, at para. 81). International covenants, such as the *UNDRIP*, may inform the contextual approach to statutory interpretation (see *Baker, supra*). However, "effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament„ (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para. 36). Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue.

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D. Analysis

(i) Adverse Differentiation is a Comparative Concept

1. No Shared Meaning – English is Clear but French May or May Not Require a Comparator

[113] In English, the plain meaning of "differentiate adversely„ necessitates a comparison between two groups. The word "adverse„ in a legal context is to be "opposed„ or "contrary„ (*Black's Law Dictionary,* 6th ed., *s.v.* "Adverse„) and "differentiates„ in the ordinary context means "recognize or identify as different, distinguish„ (*The Oxford English Dictionary,* 2d ed., *s.v.* "Differentiates„). The plain meaning of the phrase requires a comparison through the word "differentiate„. "Differentiate„ involves being different from something or someone else. It involves distinguishing, or the drawing of a distinction. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, by definition, it is necessary to compare the situation of the complainant with that of a different individual.

[114] In French, the plain meaning of "défavoriser„ in s. 5(b) of the *Act* does not necessarily require a comparator. The definition may include a comparative concept: "priver d'un avantage„, "priver d'un avantage (consenti a un autre ou qu'on aurait pu lui consentir)„ import a comparison; however, "desservir„ "frustrer, handicaper„ do not import a comparison (*le Petit Robert, 2006, s.v.* "défavoriser„). The first group includes the possibility of a comparison while the second group of

words do not. The meaning is ambiguous in that it can have two meanings. Accordingly, the normal rules of statutory construction must be utilized to determine Parliamentary intention.

2. Parliament Intended that s. 5(b) of the *Act* be Interpreted as Requiring the Making of a Comparison

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[115] The *Act* is a unique creature of Parliament and s. 5(b) is unique and specific to the aspirations of Parliament within the *CHRA*. The historical genesis of s. 5 of the *Act* is closely linked to the prohibition of discrimination in employment and adverse differentiation during the course of employment. The *Act* originated from piece meal disparate legislation stemming largely out of proscribing discrimination in employment, but also from censuring discrimination against persons in public services (see W.S. Tarnopolsky, J., *Discrimination and the Law*, rev. by W. Pentney (Toronto: Carswell, 1993) (ongoing supplement) at pp. 2-3 - 2-4). This is salient as the phrase "differentiate adversely„ is common to sections 6(b) and 7(b) of the *Act* as well. Thus the analysis used in s. 5(b) of the *CHRA* is equally applicable to the areas of employment and commercial tenancy. The interpretation of s. 5(b) must be equally coherent and appropriate for sections 6(b) and 7(b) of the *Act*.

[116] The scheme and object of the *Act* can be gleaned from s. 2 being the purpose section wherein the *Act* enshrines the principle that "all individuals should have an opportunity equal with other individuals...„. The French text uses the phrase "...à l'égalité des chances d'épanouissement...„. The purpose section affirms that the *CHRA* is founded upon a comparator concept. In both English and French the concept of equality denotes a comparative concept. "Equal„ as used in law implies "...not identity but duality and the use of one thing as the measure of another„ (*Black's Law Dictionary*, 6th ed., *s.v.* "Equal„). "Equal„ as used generally means "...the same in quantity, quality, size, degree, rank, level etc.„ (*The Concise Oxford Dictionary, 9th* ed., *s.v.* "Equal„). In French, "égalité„ is derived from the word "égal" which means "[q]ui est de même quantité, dimension, nature, qualité ou valeur„ (*le Petit Robert*, 2006, *s.v.* "égal„). The definitions in both languages impute a comparison.

[117] Indeed, the Federal Court of Appeal in *Singh, supra*, at para. 17, restated the s. 5(b) test in algebraic terms: it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C. The Court illustrated this by using a concrete example: it would be a discriminatory practice for a policeman who, in providing traffic control services to the general public, to treat one violator more harshly than another because of his national or racial origins.

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[118] More recent jurisprudence continues to confirm the need for a comparator. Mactavish J. in *Canada (Attorney General) v. Walden*, 2010 FC 490 [*Walden*], pronounced as follows:

> Equality is inherently a comparative concept. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, it is therefore necessary to compare the situation of the complainant group with that of a different group. [at para. 78]

[119] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154, while Evans J. did not squarely address the issue of comparator, he implicitly accepted the need for comparative evidence in addressing the evidentiary burden of the *prima facie* case:

> Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*. [at para. 28]

[120] One may also refer to *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280 [*Wignall*], wherein O'Reilly J. wrote,

> A court or tribunal cannot decide whether a person has been discriminated against without making comparisons to the treatment of other persons. Comparisons are inevitable. [at para. 22]

3. Arguments to Use Case Law Arising Under *Charter* not Faithful to the *CHRA*

[121] At this juncture it is important to distinguish jurisprudence arising out of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the

Canada Act 1982 (U.K.), 1982, c. 11 [*Charter*]. The specific wording of the *Act* in s. 5(b) of the *CHRA* "differentiate adversely„ must be respected. Jurisprudence emanating from the *Charter* may be helpful to the analysis. However, it cannot be transposed unsupervised into the *CHRT* regime without a careful search for Parliament's intent. In *Wignall, supra*, the Federal Court found that the Tribunal had erred when it said that there has been a convergence in the approaches under human rights statutes and subsection 15(1) of the *Charter*. The Federal Court found that the Tribunal made an error when it analysed the complaint according to the full terms of the decision in *Law v. Canada (Minister of Employm nt and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]. In particular, the Federal Court stated that the "...definition of "discrimination" under subsection 15(1) of the *Charter*, and outlined in the *Law, supra*, case, does not apply to human rights legislation„ [*Wignall, supra*, at para. 8]. The Federal Court went on to explain that *Law, supra*, is concerned with the meaning to be given to the constitutional standard of equality as set out in the *Charter*, and the Supreme Court gave no indication that its approach should apply more broadly to human rights codes or statutes, whether in provincial or federal law.

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[122] For the same reasons, I do not find the decision in *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239, to be useful in determining this case. This decision arose out of a request for a declaration that ss. 75 and 90(1)(a) of the *Métis Settlements Act*, R.S.A. 2000, c. M-14, breach ss. 2(d), 7, and 15(1) of the *Charter*. The Alberta Court of Appeal's analysis focused exclusively on the third stage of the *Law, supra*, analysis, namely, whether the differential treatment amounted to discrimination.

[123] I would add as a final point on this issue that none of the complainant group before me has contested the constitutional validity of s. 5(b) of the *CHRA*.

4. Arguments to Use Case Law Arising Under Other Human Rights Statutes not Faithful to the *CHRA*

[124] The Society argues that the failure to identify an appropriate comparator should not be fatal to a discrimination complaint given that it is unclear whether comparator groups are required in human rights analysis. The Society refers to *Lane v. ADGA Group Consultants Inc.* (2008),

295 D.L.R. (4th) 425, 91 O.R. (3d) 649 (Ont. Sup. Ct. J. (Div. Ct.)) [*ADGA*]. This is an employment termination case grounded in Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19. In the *ADGA*, judgment, *supra*, the Court makes clear at para. 94 that "[i]n cases of disability in the employee termination context, it is not necessary or appropriate to have to establish a comparator group„. Disability cases bring with them particular and individualized situations. Once it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a *prima facie* case of discrimination. Thus, the lack of need for a comparator group in *ADGA*, *supra*, was largely driven by the fact that—unlike the case before me—it involved termination of employment in the context of disability.

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[125] Moreover, the result in *ADGA*, *supra*, is not surprising when one considers that Parliament has dispensed with the need for a comparator in termination cases under the *CHRA* (see s. 7(a)), nor does it require a comparator in cases where there is a *denial* of services (see s. 5(a)), a *denial* of occupancy of premises (see s. 6(a)), or a *denial* of residential accommodation (see s. 6(a)). However, Parliamentary intention may be very different between the same subsections of a section of the *Act*. Thus, in contrast to the foregoing provisions, sections 5(b), 6(b) and 7(b) of the *Act* specifically mention "differentiate adversely„ and a comparator analysis is therefore called for. The *ADGA* case, *supra*, cannot be invoked to defeat Parliament's clearly articulated legislative choices.

[126] For the same reasons, I do not find the comments in *NBHRC v. PNB*, *supra*, to be of much assistance to this Tribunal in interpreting the specific wording of the *CHRA*. The New Brunswick human rights statute addresses denial of services and sanctions discrimination *vis-à-vis* the provision of services. It does not address adverse differential treatment as does the *CHRA*.

5. Conclusion

[127] Accordingly, section 5(b) of the *Act* requires a comparison. This is the meaning that, in my view is most consistent with the words, scheme and object of the *Act*, and with Parliament's intent.

(ii) Section 5(b) does not Allow for Comparisons Between Two Service Providers

[128] Neither the English nor the French text of s. 5(b) of the *Act* expressly state that only one service provider may be used in making a finding of adverse differentiation. However, in my view, the grammatical and ordinary sense of the words of s. 5(b) of the *CHRA* contemplate that a single service provider is to be held accountable for adverse differentiation in the provision of services to two different persons. This is consistent with the analysis in *Singh, supra.*

[129] Furthermore, the use of more than one service provider expands the reach of the section to nonsensical parameters. Any expansion of s. 5(b) mandates a similar expansion of sections 6(b) and 7(b) of the *Act.* To accept an interpretation that one service provider may be compared to another, and that more than one employer may be compared to another, is to open the flood gates to a barrage of new types of complaints not only in services, but also in employment. For example, an employee of one employer could complain that she is being adversely differentiated against when compared to an employee of a different employer (e.g. an employee of Bank "A„ could complain of differential benefits when compared to an employee of Bank "B„; a First Nations employee of a First Nation in Ontario could complain of differential employment policies from an employee of a First Nation in British Columbia). In the area of *services* alone, a customer of Restaurant "A„ could complain of differential treatment in services from a customer of Restaurant "B„ on the basis of race. A First Nations member of a First Nation in Quebec could complain of differential funding when compared to a First Nations member of a different First Nation in Alberta, arguing that race was a factor as the First Nations only serves First Nations persons.

[130] Finally, the addition of the constitutional separation of powers adds an additional layer of complexity that makes the comparison even more illogical. How and when could federal government department employers be compared to provincial government employers, and federal departmental funders with provincial departmental funders?

[131] The interpretation of section 5(b) of the *Act* that the complainant group advocates is so expansive and has such far reaching implications that it could not, in my respectful view, have

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been contemplated by Parliament. Such a sea-change in the analytical framework would require in my view clear direction from Parliament.

(iii) Complainants' Arguments that Race Based Funding Require an Interpretative Exception – Hard Facts Make Bad Law

[132] The complainant group urges me to accept that no comparator is required in a case where the services are being delivered only to one race or people. Upon extensive reflection of the complainant group's position, I note that the preferential interpretation of the complainant group would result in potentially incongruous and illogical ramifications for First Nations themselves.

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[133] The Crown is not the only provider of race based services. As stated above, in my view, if race based considerations could be given significant credence within the current statutory language in a manner such as to place liability upon INAC, the analysis would also extend to liability, in other cases, squarely upon First Nations themselves. First Nations, as does INAC, provide race based services to their members. First Nations provide education, housing, social services, and all other services to their members. The proffered analysis would dictate that one First Nation could potentially be compared to another First Nation with respect to the level of funding and services that a Nation provides to its members. Each First Nation could be compared to services rendered by the provinces and others. This analysis would potentially encompass each First Nation and potentially bind it to provide a level of funding and services comparable to other First Nations and provinces.

[134] The complainant group cites *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, as being a ground-breaking novel case from its day that demonstrates that the Tribunal may and should enlarge the traditional application of the *Act* to new areas of alleged discrimination. In that case, Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices by denying employment opportunities to women in certain unskilled blue-collar positions. The Tribunal found that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs. Pursuant to section s. 41(2)(a) [now s. 53(2)(a)] of the *Act*, the Tribunal imposed an employment

equity program on CN to address the problem of systemic discrimination in the hiring and promotion of women. The question put before the Supreme Court of Canada was whether the Tribunal had the power to impose an employment equity program under s. 41(2)(a) of the *Act*. The Supreme Court of Canada upheld the order directing an employment equity program as falling within the scope of - or meeting the requirements of - s. 41(2) of the *Act*. While the order was unique there was a clear legislative base for the direction made. Furthermore, the Tribunal in that case did not contemplate a new area of alleged discrimination; rather, it explored the extent of its remedial powers. As a result, this case is distinguishable from the circumstances in the present case.

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[135] The complainant group also relied on the decision in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 [*Gibbs*], to support the arguments proffered. In that case, a Saskatchewan insurance company discriminated against mentally disabled insured persons when compared to physically disabled insured persons. The case involved one service provider and how it could not discriminate between two service recipients on these grounds by narrowing the parameters of service recipients. The group's argument that the only difference between the service recipients in this case, being First Nations children on reserve, is that they do not receive the same or similar child welfare. Otherwise they are the same in age and require child welfare and similar treatment. There is nothing in *Gibbs*, *supra*, suggesting two different service providers.

(iv) The Complainants' Arguments that the Crown's Position Results in an Unacceptable Situation is not Consonant with the Clear Words of the *CHRA*

[136] The Society advocates that the failure to hold a hearing, and ultimately determine that the *CHRA* does not provide relief to First Nations children in this case has unacceptable consequences. Effectively, First Nations children are deprived of the protection of the *CHRA*, which is tantamount to approving a separate but equal racial discrimination construct akin to the situation in the United States leading to the ruling of *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (U.S. Sup. Ct.1954). The Ont. Chiefs refer to the government's repeal of s. 67 of the *CHRA* that formerly prevented the Tribunal from hearing

cases that arose under the auspices of the *Indian* Act, R.S.C. 1985, c. I-5. The Ont. Chiefs argue that, in spite of the repeal of s.67 of the *CHRA,* INAC would be more or less immune from the *CHRA*. The complainant group argues that Parliament has deliberately repealed s. 67 of the *Act* to divide and conquer First Nations persons.

[137] In addressing this argument, I observe that the issue of Parliament's intention in repealing s. 67 of the *Act* is not directly before me in deciding this motion. The repeal of s. 67 of the *CHRA* provides a quasi-judicial / judicial obligation upon First Nations *vis-à-vis* their members to comply with the *Act.* The practical result of the amendment will be to encourage division amongst the First Nation executive and its members. From a contextual perspective, as it relates to this case, I observe that the repeal, on its face, requires the Federal government and First Nations, as with other federally regulated public and private sector service providers and employers, to adhere to the *CHRA*. The two results are that: federal government departments may not discriminate against First Nations persons on prescribed grounds when providing services to Aboriginal persons. For example, the government may not offer services to First Nations members and discriminate against disabled First Nations members, or female First Nations members. Concurrently, First Nations may not discriminate against First Nations members when providing services to members in their individual Nations. For example, First Nations may not offer services to its members and discriminate against disabled persons or women within the Nation. Far from exempting either the First Nations or the government, including INAC, from liability under the *Act*, the repeal of s. 67 places liability upon both of these potential respondents.

[138] I agree that the repeal of s. 67 of the *CHRA* contemplates that new types of cases may now become the subject of adjudication before this Tribunal. These cases may well be anticipated to be complex and of great consequence to entire communities of First Nations Canadians. They will stretch the imagination of the Tribunal to manage them in an appropriate and culturally sensitive manner. Each such case will have to be determined on its merits on a case by case basis. The fact that there is no relief in the circumstances of this complaint, does not equate to the fact that other complaints may not be made out. While, it may well be true, that in the circumstances of this case, a complaint of discrimination cannot be made out against INAC, and that this *result* may well be disconcerting to the First Nations communities; however, the *CHRA* cannot be

interpreted using a *results* based analysis. It is the words of the *CHRA* that must govern the ambit of both the complaint and the remedy. Unfortunately, if the *CHRA* provides no remedy in this case, then the remedy may lie elsewhere (e.g.: a constitutional challenge to the *Act*, or seeking political redress).

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[139] While I am alive to the ramifications of the above analysis for on-reserve First Nations children, for the reasons set out above, not only is the expansion of the comparator analysis illogical, it is also potentially self-defeating for First Nations themselves. Also, AFN suggested that the Tribunal should compare on-reserve First Nations children who are receiving child welfare through the federal government scheme with on-reserve First Nations children who are receiving child welfare through the provincial system. However, section 5(b) of the *Act* requires that any differential treatment be based on a prohibited ground of discrimination. This alternative argument fails to identify such a ground. As well, it again is grounded in comparing two different service providers.

[140] Given my finding on the comparator issue it is not necessary to address the Crown's argument regarding residency. Nor is there any need to address the issue of remedy in relation to Jordan's principle.

VIII. CONCLUSION

[141] Although I cannot decide the services issue in this motion on the basis of the current evidentiary record, I can decide the legal issue of the comparator group. For the reasons given above, the Crown's motion is granted on this comparator issue. I find that the complaint does not come within the provisions of section 5(b) of the *Act*. Therefore, the complaint is dismissed.

Signed by

Shirish P. Chotalia, Q.C.
Chairperson

OTTAWA, Ontario
March 14, 2011

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1340/7008
STYLE OF CAUSE:	First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)
DECISION OF THE TRIBUNAL DATED:	March 14, 2011
DATE AND PLACE OF HEARING:	June 2 and 3, 2010 Ottawa, Ontario
ADDITIONAL SUBMISSIONS FILED ON:	August 16 and 23, 2010; and, December 9, 17 and 23, 2010
APPEARANCES:	
Paul Champ Anne Lévesque Cindy Blackstock	For the Complainant, First Nations Child and Family Caring Society of Canada
David Nahwegahbow Joanne St. Lewis Valerie Richer	For the Complainant, Assembly of First Nations
Daniel Poulin Samar Musallam	For the Canadian Human Rights Commission
Jonathan Tarlton Edward Bumburs Heather Wilson Natalia Stelkova	For the Respondent
Michael Sherry	For the Chiefs of Ontario, Interested Party
Patricia Latimer	For Amnesty International, Interested Party

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PROCESS MEDIATION

PROCESS MEDIATION DATES AND VENUE:	**January 11 - 15, 2010** **March 2, 2010** **Ottawa, Ontario**

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Appendix "A"

Documents filed

Legend:

The Society:	First Nations Child and Family Caring Society of Canada
AFN:	Assembly of First Nations
The Commission:	Canadian Human Rights Commission
Canada/INAC/Crown:	Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)
Ont. Chiefs:	Chiefs of Ontario
Amnesty:	Amnesty International

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Document number	Title	Date filed
1	Complaint	November 3, 2008
2	Disclosure list of the Commission	April 30, 2009
3	Statement of Particulars of the Commission	June 1, 2009
4	Statement of Particulars of the Society and AFN	June 5, 2009
5	Canada's Statement of Particulars	July 22, 2009
6	Canada's Will-Say Statements for 4 witnesses (non-expert)	August 14, 2009
7	Canada's Will-Say Statements for additional witnesses (non-expert)	August 19, 2009
8	The Ont. Chiefs' witness list	September 18, 2009
9	Commission's Supplementary disclosure list	September 21, 2009
10	The Ont. Chiefs' expert witness list	September 25, 2009
11	Commission's Amended Statement of Particulars	September 28, 2009
12	The Ont. Chiefs' Statement of Particulars	October 14, 2009
13	The Ont. Chiefs' Disclosure	October 14, 2009
14	Commission's Expert Report of Dr. Margo Greenwood	October 14, 2009
15	Commission's Expert Report of Professor John Milloy	October 14, 2009
16	Commission's Expert Report of Dr. Nicolas Trocme	October 14, 2009
17	Commission's Corrected Expert Report of Dr. Trocme	October 20, 2009
18	Canada's Supplemental List of Documents	October 22, 2009
19	Commission's Supplementary Disclosure	October 28, 2009
20	Canada's Supplemental List of Potential Witnesses	October 28, 2009
21	Canada's Statement of Particulars responding to the Ont. Chiefs' Statement of Particulars	October 28, 2009

Document number	Title	Date filed
22	Canada's Statement of Particulars responding to the Commission's Statement of Particulars	October 28, 2009
23	Commission's Expert Report of Dr. Frederick Wien	October 30, 2009
24	The Ont. Chiefs' Expert Report of Dr. July Finlay	October 30, 2009
25	Amnesty's outline of submissions	October 30, 2009
26	Commission's lay witness will-say statements	December 4, 2009
27	Canada's Amended Statement of Particulars	December 10, 2009
28	Canada's Amended Statement of Particulars	December 16, 2009
29	Commission's Supplementary Disclosure	December 17, 2009
30	Canada's Notice of Motion to dismiss the Complaint	December 21, 2009
31	Canada's Affidavit of Odette Johnston	December 21, 2009
32	Commission's Book of Documents	December 22, 2009
33	Canada's Consolidated Witness List and Will-Says	January 12, 2010
34	Canada's Amended Consolidated Witness List and Supplemental Will-Says	February 1, 2010
35	The Society's Affidavit of Elsie Flette	February 12, 2010
36	Exhibit "A„ to the Society's affidavit of Elsie Flette's: Comprehensive funding arrangement between Her Majesty the Queen in right of Canada and Southeast Child and Family Services Inc., dated March 2007	February 12, 2010
37	Exhibit "B„ to the Society's affidavit of Elsie Flette's: Letters from Indian and Northern Affairs Canada officials to various agencies providing child protection services on reserve with respect to a compliance review, various dates	February 12, 2010
38	Exhibit "C„ to the Society's affidavit of Elsie Flette's: Letters from Indian and Northern Affairs officials to various agencies providing child protection services on reserve following compliance reviews, various dates	February 12, 2010
39	Exhibit "D„ to the Society's affidavit of Elsie Flette's: Letter from Indian and Northern Affairs Canada to Peguis Child and Family Services Inc. with respect to a compliance review, dated December 9, 2009	February 12, 2010
40	The Ont. Chiefs' Affidavit of Tom Goff	February 12, 2010
41	Commission's Affidavit of Cindy Blackstock	February 12, 2010
42	Exhibit "A„ to the Commission's affidavit of Cindy Blackstock's: House of Commons Journals no. 157 from Friday, May 18, 2007	February 12, 2010

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Document number	Title	Date filed
43	Exhibit "B„ to the Commission's affidavit of Cindy Blackstock's: Joint National Review Final Report, dated June 2000	February 12, 2010
44	Exhibit "C„ to the Commission's affidavit of Cindy Blackstock's: Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, dated December 2004	February 12, 2010
45	Exhibit "D„ to the Commission's affidavit of Cindy Blackstock's: Wen:de We Are Coming to the Light of Day, dated 2005	February 12, 2010
46	Exhibit "E„ to the Commission's affidavit of Cindy Blackstock's: Wen:de The Journey Continues, dated 2005	February 12, 2010
47	Exhibit "F„ to the Commission's affidavit of Cindy Blackstock's: 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4 First Nations and Family Services Program – Indian and Northern Affairs Canada, dated May 2008	February 12, 2010
48	Exhibit "G„ to the Commission's affidavit of Cindy Blackstock's: Fact Sheet on First Nations Child and Family Services, dated October 2006	February 12, 2010
49	Exhibit "H„ to the Commission's affidavit of Cindy Blackstock's: Speaking Points: Domestic Affairs Committee, dated December 13, 2004	February 12, 2010
50	Exhibit "I„ to the Commission's affidavit of Cindy Blackstock's: First Nations Child and Family Services National Program Manual, dated May 2005	February 12, 2010
51	Exhibit "J„ to the Commission's affidavit of Cindy Blackstock's: First Nations Child and Family Services (FNCFS) Q's and A's, undated	February 12, 2010
52	Exhibit "K„ to the Commission's affidavit of Cindy Blackstock's: FNCFS Costing of New Partnership Approach, dated July 25/26, 2007	February 12, 2010
53	Exhibit "L„ to the Commission's affidavit of Cindy Blackstock's: Report of the Standing Committee on Public Accounts, dated March 2009	February 12, 2010
54	Canada's Motion Record and Book of Authorities	May 5, 2010
55	Tab 1 of Canada's Motion Record: Notice of Motion for an Order to dismiss the Complaint, dated December 21, 2009	May 5, 2010
56	Tab 2 of Canada's Motion Record: Affidavit of Odette Johnston, sworn December 20, 2009	May 5, 2010
57	Tab 3 of Canada's Motion Record: Affidavit of Cindy Blackstock, sworn February 11, 2010	May 5, 2010
58	Tab 3A of Canada's Motion Record: Exhibit A – The House of Commons Journals No. 157, dated May 18, 2007	May 5, 2010

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Document number	Title	Date filed
59	Tab 3B of Canada's Motion Record: Exhibit I - First Nations Child and Family Services National Program Manual, dated May 2005	May 5, 2010
60	Tab 4 of Canada's Motion Record: Affidavit of Elsie Flette, sworn February 11, 2010	May 5, 2010
61	Tab 4A of Canada's Motion Record: Exhibit A - Comprehensive funding arrangement between Her Majesty the Queen in right of Canada and Southeast Child and Family Services Inc., dated March 2007	May 5, 2010
62	Tab 5 of Canada's Motion Record: Affidavit of Tom Goff, sworn February 12, 2010	May 5, 2010
63	Tab 6 of Canada's Motion Record: Cross-Examination of Odette Johnston, dated February 26, 2010	May 5, 2010
64	Tab 7 of Canada's Motion Record: Cross-Examination of Cindy Blackstock, dated February 23, 2010	May 5, 2010
65	Tab 7A of Canada's Motion Record: Exhibit 2 – Letter to Mr. Michael Wernick from Richard Tardif, undated with attached Human Rights Commission Complaint Form	May 5, 2010
66	Tab 8 of Canada's Motion Record: Cross-Examination of Tom Goff, dated February 25, 2010	May 5, 2010
67	Tab 8A of Canada's Motion Record: Exhibit 1 – 1965 Welfare Agreement	May 5, 2010
68	Tab 9 of Canada's Motion Record: Cross-Examination of Elsie Flette, dated March 3, 2010	May 5, 2010
69	Tab 10 of Canada's Motion Record: Canadian Human Rights Commission's Assessment Report, dated June 26, 2008	May 5, 2010
70	Tab 11 of Canada's Motion Record: Decision of the Canadian Human Rights Commission, dated September 30, 2008	May 5, 2010
71	Tab 12 of Canada's Motion Record: Written Submissions of the Attorney General of Canada	May 5, 2010
72	Commission's Motion record	May 14, 2010
73	Tab A of the Commission's Motion Record: Submissions of the Commission	May 14, 2010
74	The Society's written submissions	May 14, 2010
75	AFN's written submissions	May 14, 2010
76	Motion record of the Complainants, the Society and AFN and Book of Authorities	May 14, 2010
77	Tab 1 of the Complainant's Motion Record: *Canada (Attorney General) v. First Nations Child and Family Caring Society and Assembly of First Nations*, unreported, November 29, 2009, T-1753-08	May 14, 2010

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Document number	Title	Date filed
78	Tab 2 of the Complainant's Motion Record: *Canada (Attorney General) v. First Nations Child and Family Caring Society and Assembly of First Nations*, 2010 FC 343	May 14, 2010
79	Tab 3 of the Complainant's Motion Record: Exhibit "B„ to Cindy Blackstock's affidavit: Joint National Review Final Report, dated June 2000	May 14, 2010
80	Tab 4 of the Complainant's Motion Record: Exhibit "C„ to Cindy Blackstock's affidavit: Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, dated December 2004	May 14, 2010
81	Tab 5 of the Complainant's Motion Record: Exhibit "D„ to Cindy Blackstock's affidavit: Wen:de We Are Coming to the Light of Day, dated 2005	May 14, 2010
82	Tab 6 of the Complainant's Motion Record: Exhibit "E„ to Cindy Blackstock's affidavit: Wen:de The Journey Continues, dated 2005	May 14, 2010
83	Tab 7 of the Complainant's Motion Record: Exhibit "F„ to Cindy Blacktock's affidavit: 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4 First Nations and Family Services Program – Indian and Northern Affairs Canada, dated May 2008	May 14, 2010
84	Tab 8 of the Complainant's Motion Record: Exhibit "G„ to Cindy Blackstock's affidavit: Fact Sheet on First Nations Child and Family Services, dated October 2006	May 14, 2010
85	Tab 9 of the Complainant's Motion Record: Exhibit "H„ to Cindy Blackstock's affidavit: Speaking Points: Domestic Affairs Committee, dated December 13, 2004	May 14, 2010
86	Tab 10 of the Complainant's Motion Record: Exhibit "J„ to Cindy Blackstock's affidavit: First Nations Child and Family Services (FNCFS) Q's and A's, undated	May 14, 2010
87	Tab 11 of the Complainant's Motion Record: Exhibit "K„ to Cindy Blackstock's affidavit: FNCFS Costing of New Partnership Approach, dated July 25/26, 2007	May 14, 2010
88	Tab 12 of the Complainant's Motion Record: Exhibit "L„ to Cindy Blackstock's affidavit: Report of the Standing Committee on Public Accounts, dated March 2009	May 14, 2010
89	Tab 13 of the Complainant's Motion Record: Exhibit "B„ to Elsie Flette's affidavit: Letters from Indian and Northern Affairs Canada officials to various agencies providing child protection services on reserve with respect to a compliance review, various dates	May 14, 2010

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90	Tab 14 of the Complainant's Motion Record: Exhibit "C„ to Elsie Flette's affidavit: Letters from Indian and Northern Affairs officials to various agencies providing child protection services on reserve following compliance reviews, various dates	May 14, 2010
91	Tab 15 of the Complainant's Motion Record: Exhibit "D„ to Elsie Flette's affidavit: Letter from Indian and Northern Affairs Canada to Peguis Child and Family Services Inc. with respect to a compliance review, dated December 9, 2009	May 14, 2010
92	Tab 16 of the Complainant's Motion Record: Exhibit 1 to Cindy Blackstock's cross-examination – Letter to Chuck Strahl from Mary Polak and George Abbott dated November 17, 2009 and letter to Ministers Polak and Abbot from Minister Strahl, dated January 21, 2010	May 14, 2010
93	Motion record of the Ont. Chiefs' and Book of Authorities	May 14, 2010
94	Tab 1 of the Ont. Chiefs' Motion record: Written submissions	May 14, 2010
95	Tab 2 of the Ont. Chiefs' Motion record: Affidavit of Tom Goff sworn February 12, 2010	May 14, 2010
96	Tab 3 of the Ont. Chiefs' Motion record: 1965 Memorandum of Agreement Respecting Welfare Programs for Indians	May 14, 2010
97	Tab 4 of the Ont. Chiefs' Motion record: Cross-Examination of Tom Goff, dated February 25, 2010	May 14, 2010
98	Tab 5 of the Ont. Chiefs' Motion record: Affidavit of Dr. Cindy Blackstock sworn February 11, 2010	May 14, 2010
99	Amnesty's Memorandum of Fact and Law and Book of Authorities	May 14, 2010
100	Canada's Reply submissions and Book of Authorities	May 25, 2010
101	Amnesty's Additional Document: 2010 Speech from the Throne, dated March 3, 2010	June 3, 2010
102	The Society's Additional Document: Letter from Paul Champ to Nicole Bacon, Registry Officer, dated December 30, 2009 and Letter from Guy Grégoire, Director, Registry Operations, to the parties on record dated January 21, 2010	June 3, 2010
103	Canada's Additional submissions on the Motion to dismiss the complaint with respect to *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)*, 2010 NBCA 40	August 16, 2010
104	The Society's responding submissions on the Motion to dismiss the complaint with respect to the *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)* case	August 23, 2010

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105	Commission's responding submissions on the Motion to dismiss the complaint with respect to the *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)* case and Authorities	August 23, 2010
106	AFN's responding submissions on the Motion to dismiss the complaint with respect to the *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)* case and Authorities	August 23, 2010
107	The Ont. Chiefs' email supporting the Society's and the Commission's submissions on the Motion to dismiss the complaint with respect to the *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)* case	August 23, 2010
108	Amnesty's email supporting the Society's and the Commission's submissions on the Motion to dismiss the complaint with respect to the *New Brunswick Human Rights Commission v. Province of New Brunswick (Dept. of Social Development)* case	August 24, 2010
109	Canada's Expert report by KPMG	September 15, 2010
110	Canada's additional submissions on the Motion to dismiss the complaint with respect to *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46 and authorities	December 9, 2010
111	AFN's additional submissions on Canada's Endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* and Book of Authorities	December 9, 2010
112	Canada's responding submissions on AFN's additional submissions with respect to Canada's Endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* and Authorities	December 17, 2010
113	AFN's responding submissions on Canada's additional submissions on the Motion to dismiss the complaint with respect to *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46 and Authorities	December 17, 2010

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Document number	Title	Date filed
114	The Society's submissions responding to the submissions presented by Canada and AFN on the *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* decisions and Canada's Endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*	December 17, 2010
115	Commission's submissions responding to the submissions presented by Canada and AFN on the *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* decisions and Canada's Endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*	December 17, 2010
116	The Ont. Chiefs' email supporting the submissions of AFN with respect to the *United Nations Declaration on the Rights of Indigenous Peoples* as well as the submissions of the Society and the Commission on the *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* decisions	December 17, 2010
117	Canada's reply submissions on the *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union* and *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto* decisions and authorities	December 23, 2010
118	AFN's reply submissions to Canada's responding submissions on Canada's Endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*	December 23, 2010

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This is Exhibit "I" to the affidavit of
Cindy Blackstock, sworn before me this
22nd day of November, 2013

A Commissioner for taking Affidavits etc.

**Shannon Marie Kack, a Commissioner, etc.,
Province of Ontario, while a student-at-law.
Expires September 13, 2016**

Federal Court | Cour fédérale

Date: 20120418

Docket: T-578-11

Citation: 2012 FC 445

2012 FC 445 (CanLII)

Toronto, Ontario, April 18, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS,
CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-630-11

**FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY**

Applicant

and

**ATTORNEY GENERAL OF CANADA,
ASSEMBLY OF FIRST NATIONS,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

AND BETWEEN:

Docket: T-638-11

ASSEMBLY OF FIRST NATIONS

Applicant

and

**ATTORNEY GENERAL OF CANADA,
FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY,
CANADIAN HUMAN RIGHTS COMMISSION,
CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL**

Respondents

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1. Introduction

[1] The Government of Canada funds child welfare services for First Nations children living on reserves. The provinces fund child welfare services for all other Aboriginal and non-Aboriginal children.

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[2] The First Nations Child and Family Caring Society and the Assembly of First Nations filed a human rights complaint with the Canadian Human Rights Commission in which they allege that the Government of Canada under-funds child welfare services for on-reserve First Nations children. They say that the result of this under-funding is that the level of some of the services provided for these children is inadequate, and that other child welfare services otherwise available to Canadian children are not available to First Nations children living on reserves. The complainants allege that this amounts to discrimination in the provision of services customarily available to the public on the grounds of race and national or ethnic origin.

[3] The Canadian Human Rights Commission referred the complaint to the Canadian Human Rights Tribunal for hearing. Following a preliminary motion brought by the Government, the Tribunal dismissed the complaint. The Tribunal determined that there could be no adverse differential treatment in the provision of child welfare services to First Nations children living on reserve as no other group receives child welfare services from the Government of Canada.

[4] The Tribunal held that in order for the complainants to establish adverse differential treatment under subsection 5(b) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the Act], a comparison had to be made between the child welfare services provided by the Government of

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Canada to First Nations children living on reserves, and similar services provided to others by the same service provider. According to the Tribunal, subsection 5(b) of the Act does not permit a comparison between services provided by two different service providers to two different sets of recipients.

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[5] In the absence of a proper comparator group, the Tribunal concluded that there could be no finding of adverse differential treatment on the part of the Government of Canada. As a result, the Tribunal dismissed the complaint without a full hearing on the merits.

[6] These reasons relate to three applications for judicial review brought with respect to that decision.

[7] For the reasons that follow, I have concluded that although the Tribunal had the power to decide this issue in advance of a full hearing on the merits of the complaint, the process that it followed was not fair as the Tribunal considered a substantial volume of extrinsic material in arriving at its decision.

[8] I have also concluded that the decision was unreasonable as the Tribunal failed to provide any reasons as to why it could not consider the complaint under subsection 5(a) of the *Canadian Human Rights Act*. Subsection 5(a) of the Act makes it a discriminatory practice to deny a service to any individual on the basis of a prohibited ground of discrimination.

[9] The Tribunal also erred in its interpretation of subsection 5(b) of the Act, and in concluding that the complaint could not succeed in the absence of an identifiable comparator group. In interpreting subsection 5(b) the way it did, the Tribunal applied a rigid and formulaic interpretation of the provision - one that is inconsistent with the search for substantive equality mandated by the *Canadian Human Rights Act* and Canada's equality jurisprudence.

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[10] Finally, in making the factual determination that no appropriate comparator group was available to assist in its discrimination analysis, the Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in its funding policies.

2. The Parties

A. *The Complainants*

[11] The human rights complaint in issue in this proceeding was brought by the First Nations Child and Family Caring Society and the Assembly of First Nations who will be referred to collectively in these reasons as "the complainants".

[12] The First Nations Child and Family Caring Society (the "Caring Society") is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of Aboriginal children, youth and families, including children living on reserves. The Caring Society has a particular interest in the prevention of, and the response to the mistreatment of Aboriginal children.

[13] The Assembly of First Nations ("AFN,,) is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development.

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B. *The Canadian Human Rights Commission*

[14] Amongst other responsibilities, the Commission is charged with the investigation and conciliation of complaints of discrimination brought pursuant to the *Canadian Human Rights Act*. In the event that the Commission determines that an inquiry is warranted, it may refer the complaint to the Canadian Human Rights Tribunal for hearing. In appearing before the Tribunal, the Commission is statutorily mandated to represent the public interest having regard to the nature of the complaint: see section 51 of the Act.

C. *The Interveners*

[15] Two organizations were granted "Interested Party,, status before the Tribunal and both appeared as interveners in this Court.

[16] Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status before the Tribunal to assist it in understanding the relevance of Canada's international human rights obligations to the complaint, and its submissions in this Court were limited to the international law issues.

[17] The Chiefs of Ontario is a non-profit organization representing the political and other interests of the 132 First Nations in the Province of Ontario. It was granted interested party status before the Tribunal to speak to the particularities of on-reserve child welfare services in Ontario, and its submissions in this Court were largely related to this subject.

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D. ***The Respondent to the Complaint***

[18] The complaint names Indian and Northern Affairs Canada as the respondent in this case. It is the government department charged with primary responsibility for meeting the federal government's constitutional, treaty, political and legal responsibilities to Canada's First Nations and Inuit peoples. It appears that the department has undergone at least one name change since the complaint was filed, and is now known as Aboriginal Affairs and Northern Development Canada. To avoid confusion, it will be referred to in these reasons as the "Government of Canada,, or simply "the Government,,.

3. **<u>The Human Rights Complaint</u>**

[19] The complainants filed their human rights complaint with the Commission in February of 2007.

[20] The complaint alleges that the funding formula used by the Government of Canada to fund First Nations child and family services (known as Directive 20-1) results in inequitable levels of child welfare services being provided to First Nations children living on reserves as compared to other Canadian children living off reserve. The complaint further alleges that this inequity amoun

to discrimination in the provision of services to First Nations children on the basis of the children's race and national or ethnic origin.

[21] According to the terms of Directive 20-1, the funding formula aims to ensure that First Nations children living on reserves receive a "comparable" level of child welfare services to that provided to other Canadian children. However, the complaint alleges that studies have revealed that 22 percent less funding is available on a per child basis for First Nations children living on reserves than is provided to children living off reserves in the average province.

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[22] The complaint further alleges that the funding formula set out in Directive 20-1 provides unlimited resources for First Nations children who have been removed from their homes and are in foster care. However, child welfare services designed to allow abused or neglected children to remain safely in their homes with the necessary support services (known as "least disruptive measures") are allegedly grossly under-funded. The result of this is that a disproportionate number of First Nations children are removed from their homes, thus perpetuating the legacy of the residential school system.

[23] Moreover, the complaint alleges that jurisdictional disputes between the Government of Canada and the provinces result in delays in the delivery of child welfare services to First Nations children living on reserves, and in certain of these services being denied altogether.

[24] The complaint concludes by asserting that the alleged discrimination is systemic and ongoing. The complainants contend that the Government of Canada has been aware of the problem

for years, and has been presented with studies confirming the inequity in 2000 and again in 2005 and 2006. Yet, according to the complaint, the discriminatory treatment of First Nations children living on reserves continues.

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4. Background to the Complaint

[25] Because of the way that the hearing unfolded before the Tribunal, it did not make detailed factual findings regarding the manner in which child welfare services are actually delivered to First Nations children living on reserves, or with respect to the nature and scope of the Government of Canada's role in that regard.

[26] However, in order to put the issues raised by these applications for judicial review into context, it is helpful to have a more fully-developed understanding of the complainants' allegations as they relate to the way child welfare services are provided to First Nations children living on reserves.

[27] It should, however, be made clear at this juncture that what follows is primarily a description of the complainants' *allegations*. It is provided solely for the purpose of putting the Tribunal's decision into context and providing a framework for the issues raised by these applications for judicial review. Nothing in the following description should be understood to be findings of fact made by this Court. The responsibility for making the necessary factual findings in order to determine whether there has been discrimination within the meaning of section 5 of the *Canadian Human Rights Act* rests exclusively with the Canadian Human Rights Tribunal.

[28] Child welfare is ordinarily a matter falling within provincial jurisdiction. Provincial or territorial child welfare laws apply to all children living within the province or territory in question. Provincial and territorial governments ordinarily fund child welfare services for their residents, except where the child is a "Registered Indian,, living on a reserve.

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[29] Pursuant to the First Nations Child and Family Services Program, funding for child welfare services for First Nations children living on reserves is provided by the Government of Canada. It transfers funds to the provinces or territories, to Bands or tribal councils, or directly to government-authorized First Nations child and family services agencies operating on reserves. The degree of supervision and control exercised by the Government of Canada over these services is a matter of dispute between the parties.

[30] Parliament has not legislated in the area of child welfare, but has instead adopted provincial standards for the delivery of child welfare services on reserves. Government funding for child welfare is complex, and involves three governing policies and hundreds of bilateral and trilateral agreements. One of these arrangements has been described by the Supreme Court of Canada as "an example of flexible and co-operative federalism at work and at its best,,: see *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union,* 2010 SCC 45, [2010] 2 S.C.R. 696 at para. 44.

[31] The complaint was originally brought solely with respect to one of the three governing policies, namely Directive 20-1. It was subsequently broadened to include the First Nations Child and Family Services Program, which includes Directive 20-1, the more recent Enhanced Prevention

Focussed Approach ("EPFA") program, and the special agreement governing child welfare services in Ontario known as the "1965 Welfare Agreement".

A. ***The First Nations Child and Family Services Program National Program Manual***

[32] I understand the respondent to agree that the Government's "National Program Manual" for First Nations child and family services covers all three of the funding policies governing the delivery of child welfare services to First Nations children living on reserves.

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[33] Section 1.3.2 of the Manual provides that:

> The primary objective of the [First Nations Child and Family Services] program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, *in accordance with the legislation and standards of the reference province* [emphasis added].

[34] Funding is primarily provided to recipients through one of the three different arrangements referred to above, each of which is more fully described below. The Government of Canada also has other arrangements or agreements directly with some jurisdictions (such as First Nations governments) which specify how it will fund child welfare services in that jurisdiction.

B. ***Directive 20-1***

[35] Directive 20-1 is a funding formula that originally applied to the provinces and the Yukon Territory. It did not, however, apply to the Province of Ontario, nor did it apply to a small number of agencies that operated under separate funding agreements. Directive 20-1 came into effect in 1991.

[36] The "Principles„ governing the Directive 20-1 program are set out at section 6 of the document. Section 6.1 provides that "[t]he department ... is committed to expanding First Nations Child and Family Services on reserve *to a level comparable to the services provided off reserve in similar circumstances*...„ [emphasis added].

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[37] Directive 20-1 continues to apply in British Columbia, Manitoba, Newfoundland, New Brunswick and Yukon. Yukon's situation is somewhat unique in that the Government of Canada funds services there for all First Nations children, both on and off reserve. Two First Nations child and family services agencies in Saskatchewan also operate pursuant to Directive 20-1.

[38] The complainants' human rights complaint does not address child welfare services in Nunavut or the Northwest Territories. This is because funding for child welfare services in these territories is provided by or through the territorial governments with funding from the territorial governments' own budgets, a portion of which comes from transfer payments from the Government of Canada.

[39] The way in which funds flow from the Government of Canada to the beneficiaries differs from province to province, and in some cases within different parts of the same province, depending on the specific agreements in place.

[40] Directive 20-1 is characterized by two distinct funding streams: maintenance and operations.

[41] In the maintenance stream, the Government reimburses approved costs incurred by provincial or First Nations child welfare agencies for maintaining a child in care outside the family home. Maintenance funding is based on provincial and territorial rates established by the Government of Canada.

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[42] In contrast, funding for operations is calculated according to the population of eligible children on a reserve, plus an amount per band and a further amount for remoteness (where applicable). "Eligible„ children are registered Indians with at least one parent resident living on a reserve.

[43] Operational funding covers all other expenses associated with on-reserve child welfare, including programs and services to support children and families, staff salaries and benefits, and operational costs such as travel, bookkeeping, rent and facilities.

[44] The distinction between maintenance and operational funding under Directive 20-1 is central to the complainants' discrimination claim. They contend that the 'per child' operations formula fails to account for the divergent child welfare needs across communities. For example, an isolated reserve with a high proportion of residential school survivors obtains equal funding to an urban reserve with ready access to off-reserve community resources.

[45] Indeed, the complainants allege that the greater the number of at-risk children in a given community, the fewer the services that are actually available to each child.

[46] The complainants further assert that the separation between the two funding streams has resulted in an increase in the number of First Nations children unnecessarily being taken into care. Directive 20-1's emphasis on maintenance funding means that 'least disruptive measures' such as addiction services, special needs support services, counselling, and parenting education (which are funded from the limited 'per child' operations budget) are often unavailable for children living on reserves.

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C. ***Enhanced Prevention Focussed Funding***

[47] In 2007, the Government of Canada developed the Enhanced Prevention Focussed Approach to child welfare funding. The EPFA was developed as a pilot project in Alberta, but has since been applied to Saskatchewan and Nova Scotia (since 2008), and Quebec and Prince Edward Island (since 2009). The Government anticipates that other jurisdictions will transition to this formula by 2013.

[48] Under the EPFA, agencies submit a multi-year business plan with performance targets. The plan is then approved by the Government of Canada and the relevant provincial government. The funding formula under the EPFA includes budget categories for maintenance, operations and prevention, with allocated resources spread over a five-year period.

[49] Although initially developed to provide greater flexibility to agencies in the allocation of their funds, the complainants take issue with a number of aspects of the EPFA. They allege that maintenance funding - the most costly element of child welfare programs - is capped, and that any deficit in maintenance costs must thus be covered by funding from the least disruptive measures or

operations budgets. The complainants further allege that funding for preventative services is decreased in the third, fourth and fifth years of the plan.

D. ***The 1965 Indian Welfare Agreement with Ontario***

[50] Child welfare services are provided to First Nations children living on reserves in Ontario pursuant to a federal-provincial agreement known as the "Memorandum of Agreement Respecting Welfare Programs for Indians„ (or "1965 Indian Welfare Agreement„).

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[51] Pursuant to this agreement, the Government of Canada reimburses Ontario an agreed-upon share of the costs of delivering child welfare services to on-reserve children, including the costs of maintaining children in care. The Government provides additional funding to First Nations and First Nations child and family services agencies for prevention services.

[52] One of the stated objectives of the 1965 Indian Welfare Agreement is to see that the needs of First Nations communities are met in accordance with the standards applicable to non-First Nations communities.

E. ***The Alleged Discrimination***

[53] The complainants point out that a 2009 Report of Parliament's Standing Committee on Public Accounts concluded that "the average *per capita* per child in care expenditure of the [Department of Indian Affairs and Northern Development] funded system is 22% lower than the average of the selected provinces„: at 5.

[54] This under-funding, the complainants say, translates into fewer services being available to First Nations children living on reserve as compared to children living off reserve. The lack of preventative services for on reserve children, in particular, means that a disproportionately high number of Aboriginal children are in care.

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[55] The complainants have provided a "Fact Sheet„ from the Indian and Northern Affairs website that observes that the disproportionate placement rates for First Nations children living on reserves "reflect a lack of available prevention services to mitigate family crisis„.

[56] Indeed, the complainants allege in their complaint that an estimated 30 to 40 percent of children "in care„ in Canada are Aboriginal. They also note that the Report of the Standing Committee on Public Accounts found that five to six percent of First Nations children living on reserves are in care, which is almost eight times the percentage of children living off reserve who are in care.

[57] Dr. Cindy Blackstock, the Executive Director of the Caring Society, filed an affidavit with the Tribunal in connection with the Government's motion to dismiss. According to Dr. Blackstock's affidavit, there are now more First Nations children living away from their families in the care of child welfare authorities than there were at the height of the residential schools program.

[58] The complaint further alleges that various studies have revealed that the level of child welfare services provided to on-reserve children is less than the level of services provided to off-reserve children, notwithstanding the greater needs of First Nations children living on reserves.

These greater needs result from poverty and poor housing conditions, as well as from exposure to family violence and substance abuse.

[59] The complainants have also produced a 2000 Joint National Policy Review conducted by the Government of Canada and the Assembly of First Nations which observed that much of the dysfunction in First Nations communities is attributable to the fall-out from the residential schools experience.

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[60] This Review also appears to be the foundation for the claim that there is 22 percent less funding available on a per child basis for First Nations children living on reserves as compared to the provincial average. It should, however, be noted that the Government vigorously disputes this claim. As will be discussed later in these reasons, the Government filed an expert report prepared by KPMG with the Tribunal in connection with the merits of the case that takes issue with this allegation.

[61] The Auditor General of Canada and the Standing Committee on Public Accounts have also concluded that child welfare services for First Nations children living on reserves continue to be under-funded.

[62] The complainants allege that they have made repeated attempts to have the Government address inequities in funding through negotiations and political means, but to no avail. The long-term failure of the Government to address this problem in a meaningful fashion has led to the filing of the human rights complaint.

5. The Procedural History of the Complaint

[63] Because the complainants have challenged the way in which the Tribunal handled this case, it is necessary to review the process that culminated in the decision under review.

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A. *The Proceedings Before the Commission*

[64] After the complaint was filed with the Commission and an Assessor had been appointed to examine the complaint, the Government of Canada wrote to the Commission asking that it decline to deal with the complaint under section 41(c) of the *Canadian Human Rights Act*. The Government argued that the complaint was outside the Commission's jurisdiction and did not disclose a *prima facie* case of discrimination.

[65] Amongst other things, the Government argued that it does not itself deliver child welfare services to First Nations children living on reserves. As a consequence, section 5 to the *Canadian Human Rights Act* (which prohibits discrimination in the provision of services) had no application. This argument has become known as the "services issue".

[66] The Government of Canada also argued that because it does not provide funding for child welfare services for anyone other than First Nations children living on reserves, it could not discriminate in the provision of these services. It was not appropriate, the Government submitted, to compare the level of services provided by provincial child welfare authorities to the services provided to on-reserve First Nations children. The Government further argued that such a cross-

jurisdictional comparison could not amount to adverse differential treatment by one service provider on the basis of a proscribed ground. This is the "comparator group issue„.

[67] The Assessor recommended that the Commission deal with the complaint. He observed that the funding issue had been exhaustively examined by various experts in the field, who had made numerous recommendations for improvement. The question was whether the alleged lack of funding and the structure of the funding formula were discriminatory. The Assessor concluded that this could not be determined without an inquiry. He thus recommended that the complaint be referred to the Tribunal, without an investigation, for further inquiry.

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[68] In a decision dated September 30, 2008, the Commissioners accepted the Assessor's recommendation. In so doing, the Commissioners observed that the determination of whether a *prima facie* case of discrimination had been established was one that should properly be made by the Tribunal. The Commissioners also stated that there was enough information in the complaint to demonstrate a sufficient link to a prohibited ground and an alleged discriminatory practice.

B. *The Federal Court Proceedings*

[69] The Government of Canada then brought an application for judicial review of the Commission's decision to refer the complaint to the Tribunal for a hearing, citing both the services and the comparator group issues as grounds for review. In turn, the complainants brought a motion to strike the Government's Notice of Application, or, in the alternative, to stay the application until the Tribunal could deal with the complaint on its merits.

[70] Prothonotary Aronovitch refused the complainants' motion to strike the Attorney General's application: *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (24 Nov. 2009), Ottawa T-1753-08 (F.C.) (Proth.). She was satisfied, however, that it would be "just and equitable„ to stay the Government's application for judicial review pending the Tribunal's decision: at 6. 263

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[71] Prothonotary Aronovitch noted that the complainants had submitted that the issues raised by the Government's application were novel and complex, and could not be separated from the merits of the complaint. The complainants further argued that if the issues were determined on the basis of the limited record before the Court, it would deprive them of a full hearing on a complete record. Because the issues were complex and of importance to First Nations people, the complainants submitted that a full exploration of the issues before the Tribunal was warranted.

[72] In accepting the complainants' arguments, Prothonotary Aronovitch observed: "The subject matter of the complaint being serious and complex, I agree that it should not be determined in a summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue„: at 5. She went on to note that "[t]here is an interest … in allowing a full and thorough examination in the specialized forum of the Tribunal, of issues which may have an impact on the future ability of aboriginal peoples to make discrimination claims„: at 6.

[73] Prothonotary Aronovitch's decision was subsequently upheld by Justice O'Reilly: see *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, [2010] F.C.J. No. 397 (QL).

[74] Accordingly, the Attorney General's application to judicially review the Commission's referral decision was stayed pending the outcome of the Tribunal proceedings. Prothonotary Aronovitch subsequently granted a further stay pending the outcome of these applications for judicial review of the Tribunal's decision.

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C. ***The Tribunal Proceedings***

[75] Once the complaint was referred to the Tribunal, Grant Sinclair, the then-Chairperson of the Tribunal, assumed responsibility for the management of the proceeding. At the first case management conference on February 4, 2009, the Government raised both the services and the comparator group issues, asking the Tribunal to make preliminary decisions in relation to these matters. Mr. Sinclair refused to deal with either of the issues on a preliminary basis. It was his view that the issues were complex, and required a full hearing.

[76] The hearing commenced on September 14, 2009 with an opening statement from Dr. Blackstock on behalf of the Caring Society. Mr. Sinclair then addressed a number of housekeeping matters, including the granting of interested party status to the Chiefs of Ontario and Amnesty International. The hearing then adjourned to the week of November 16, 2009, when it was anticipated that the hearing of evidence would begin. The case was scheduled for 13 weeks of hearing, and it was expected that hearing would be completed in February of 2010.

[77] On November 2, 2009, Shirish Chotalia replaced Mr. Sinclair as Chairperson of the Tribunal. She immediately became involved in the management of the case. Four days after she

took office, Ms. Chotalia held a case management conference with the parties. She advised the parties that she wanted them to work together to narrow the scope of the complaint and to reduce the number of witnesses to be called.

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[78] In the course of the November case management conference, the Chairperson asked counsel for the Government why it had not sought a stay of the Tribunal proceedings pending the outcome of its judicial review application in the Federal Court. Counsel responded that he had been instructed not to seek a stay from the Tribunal, but that his client was contemplating bringing a motion to have the services and comparator group issues dealt with "in a summary fashion and before the merits are dealt [with]„: Joint Application Record, Volume 11, at 3018. While the Chairperson expressed a concern as to how the necessary evidence would get before the Tribunal to decide the issue, the parties did not discuss the matter further at that time.

[79] The Chairperson asked the parties to file affidavits for each of their proposed witnesses, outlining the witness's evidence-in-chief. She indicated that the parties would then have the option to cross-examine the affiants. This disclosure would allow the Tribunal and the parties to understand the evidence and to identify the points in dispute.

[80] All of the parties strongly opposed this last-minute change in approach to the management of this case. They all felt that the Chairperson's requests would impose onerous burdens on them. Counsel for the Caring Society observed that the case was ready to proceed on its merits in eight days' time, suggesting that the Chairperson was now unilaterally imposing a discovery process on the parties that was more onerous than that in a civil action in a Superior Court. Counsel for the

Government of Canada was also concerned that his client was being asked to plead its defence before hearing the complainants' evidence.

[81] The case management conference concluded with all counsel agreeing to seek instructions with respect to the Chairperson's suggestions. Counsel also agreed to see if progress could be made in relation to an agreed statement of facts.

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[82] As a result of this case management conference, there was some confusion on the part of the parties as to whether Mr. Sinclair remained seized with the case. Counsel for the Caring Society wrote to the Tribunal on November 9, 2009, seeking clarification of this issue. The Government of Canada responded, arguing that the former Chairperson had not been seized of the matter, taking no position as to who should preside over the case. The Commission also wrote to the Tribunal submitting that Mr. Sinclair had indeed been seized with the matter.

[83] The parties did not receive any response from the Tribunal in relation to this issue at that time, although the Chairperson subsequently canvassed the idea of appointing a three-person panel to hear the case with the parties in the course of a case management conference held in December of 2009. None of the parties raised any objection to this proposal, apart from the concern being expressed that the appointment of a panel not further delay the proceedings. Similarly, none of the parties objected when the new Chairperson assumed sole carriage of this matter.

[84] While the Caring Society has raised the issue of Mr. Sinclair's status in its Notice of Application, it confirmed at the hearing that it is not seeking any relief in this regard. I note that

subsection 48.2(2) of the Act gives the Tribunal Chairperson the discretion to decide whether or not to allow a member whose term has expired to complete any inquiry that the member had begun. Moreover, Mr. Sinclair had not yet heard any evidence in this case, and he was thus not seized of the matter. There is also no evidence as to whether he was even available to continue dealing with the case. In these circumstances, I do not intend to address this issue any further.

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[85] On November 12, 2009, the Tribunal issued a Direction, vacating the November 16-20, 2009 dates that had been set for the commencement of the hearing on the merits. Counsel for the Caring Society again wrote to the Tribunal raising concerns about the Tribunal's unilateral action, the delay of the proceedings and the fairness of the process the Tribunal was following. The Tribunal did not respond to this letter.

[86] A second case management conference was held with the new Chairperson on December 14, 2009. In the course of this conference, the Chairperson suggested that the parties engage in a process mediation in an effort to identify ways to streamline the proceedings. While concerns were repeatedly expressed about the ongoing delay of the hearing, the parties ultimately agreed to engage in such a process, and they subsequently participated in some seven days of meetings with the mediator. This process did not result in an agreement being reached on any of the substantive issues.

[87] In the meantime, counsel for the Government advised the Tribunal during the December 14 case management conference that it would be filing its motion on December 21, 2009 to have the complaint dismissed. The Chairperson set January 19, 2010 for the hearing of the motion. Without

consulting with the parties, the Tribunal subsequently vacated all of the remaining dates that had been set aside for the hearing on the merits.

[88] On December 21, 2009, the Government of Canada filed its motion to dismiss the complaint for want of jurisdiction with the Tribunal, arguing that the complaint did not come within the purview of sections 3 and 5 of the *Canadian Human Rights Act*. A copy of the relevant statutory provisions is attached as an appendix to these reasons.

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[89] The Government's motion was based upon the services and comparator group issues, and was supported by a brief affidavit from the Director of the Social Reform Program Directorate at the Department of Indian Affairs and Northern Development.

[90] The following day, the Caring Society filed a motion with the Tribunal to amend its complaint to include allegations of retaliation. The retaliation issue arose when Dr. Blackstock was allegedly excluded from a meeting with Government representatives.

[91] Counsel for the Government responded to the Caring Society's motion by letter dated January 29, 2010, in which it sought to clarify what had occurred at the meeting in issue.

[92] The Tribunal has never dealt with the Caring Society's motion to amend the complaint, nor did the Caring Society ever follow up with the Tribunal in order to have the motion addressed.

[93] The Caring Society raised the Tribunal's failure to deal with its motion to amend its complaint to allege retaliation in its memorandum of fact and law, suggesting at the hearing that it is evidence of unequal treatment on the part of the Tribunal. The Caring Society does not, however, allege bias on the part of the Tribunal, nor does it seek any specific relief in this regard. As a result, I do not intend to deal further with this issue, particularly in light of the fact that Dr. Blackstock's allegations of retaliation are evidently now the subject of a separate human rights complaint.

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[94] The Caring Society continued to object to the fairness of the process being followed by the Tribunal in relation to the Government's motion to have the complaint dismissed, alleging, amongst other things, that the motion was premature, and that the evidentiary record was not sufficient to decide the motion.

[95] Nevertheless, the complainants subsequently filed substantial affidavit evidence and documentary material with the Tribunal in response to the Government's motion to dismiss. The parties also cross-examined the deponents of the affidavits filed by the opposing side, and filed the transcripts of the cross-examinations with the Tribunal.

[96] The record before the Tribunal on the motion to dismiss was ultimately approximately 2,000 pages in length, plus an additional amount of legal authorities. As will be discussed later in these reasons, this number becomes important in relation to the fairness of the process followed by the Tribunal in dismissing the complaint.

[97] The motion to dismiss was finally heard on June 2 and 3, 2010. When no decision was forthcoming from the Tribunal, counsel for the Caring Society wrote letters to the Tribunal in August and December of 2010, asking when a decision could be expected. The Tribunal did not respond to either of these letters.

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[98] In November of 2010, counsel for the Government of Canada requested an opportunity to make submissions regarding a recent Supreme Court of Canada decision. The Assembly of First Nations also requested leave to comment on Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*. The parties' exchange of submissions on both matters was completed by December 23, 2010.

[99] In February of 2011, the Caring Society, Amnesty International and the Commission each wrote to the Tribunal, once again expressing their concern regarding the delay in the delivery of a decision on the motion to dismiss. When no response was received from the Tribunal, the Caring Society commenced an application in this Court seeking an order of *mandamus* to compel the Tribunal to render a decision in relation to the Government's motion to dismiss the complaint. This application was discontinued when the Chairperson released her decision on March 14, 2011, dismissing the complaint.

6. The Tribunal Decision

[100] I will discuss the Tribunal's analysis of certain issues in greater detail later in these reasons, as I examine each of the grounds for judicial review. However, the following brief synopsis of the decision will assist in putting the ensuing discussion into context.

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[101] The Tribunal determined that it had the authority to dismiss a human rights complaint without a full *viva voce* hearing on the merits where the facts of the case were clear and uncontroverted or where the issues involved raised pure questions of law, provided that the parties had had a full and ample opportunity to be heard.

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[102] The Tribunal considered whether the Government's funding program for child welfare services for First Nations children living on reserves constituted a 'service' within the meaning of section 5 of the *Canadian Human Rights Act*. The Tribunal concluded that the Attorney General h not met its burden in establishing that the facts necessary to decide the issue were clear, complete and uncontroverted. The Tribunal held that the services question was "a fact-driven inquiry,, that there were material facts in dispute, and that the evidentiary record on the motion was not sufficient to decide whether the Government of Canada provides a "service,, to First Nations children living on reserve.

[103] The Tribunal was, however, satisfied that the comparator group issue raised a pure question of law and that the parties had had a full and ample opportunity to be heard in relation to the issue. According to the Tribunal, there was no additional evidence that the complainants could provide that could further their position.

[104] Subsection 5(a) of the *Canadian Human Rights Act* makes it a discriminatory practice to deny a service or access to a service to an individual on the basis of a prohibited ground. The

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Tribunal was satisfied that no comparator group is required to establish discrimination in cases where a service is denied altogether.

[105] Subsection 5(b) of the Act makes it a discriminatory practice to "differentiate adversely in relation to any individual [in the provision of services], on a prohibited ground of discrimination„. The Tribunal held that a finding of discrimination under subsection 5(b) requires a comparison to be made to the treatment accorded by the service provider to a different service recipient who does not share the personal attribute identified as the basis for the discriminatory practice.

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[106] The Tribunal then considered whether two different service providers could be compared to each other in order to find adverse differentiation under subsection 5(b) of the Act. Specifically, the Tribunal asked itself whether it could compare the child welfare services provided by the Government of Canada to those provided by the provinces in order to determine whether the Government of Canada had committed a discriminatory practice in the provision of services.

[107] In concluding that such a comparison could not be made, the Tribunal held that subsection 5(b) required a comparison to be made to services provided to others by the same service provider. Given that the Government of Canada did not provide child welfare services to recipients other than First Nations children living on reserves, it followed that there could be no adverse differentiation in the provision of services under subsection 5(b) of the Act. As a result, the Tribunal dismissed the complaint.

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7. The Issues on These Applications

[108] The issues raised by these applications for judicial review are the following:

1. Does the Tribunal have the power to decide issues that could result in the dismissal of a human rights complaint without conducting a full hearing on the merits of the complaint that provides the parties with an opportunity to adduce *viva voce* evidence?
2. Was the process the Tribunal followed in deciding the comparator group issue fair?
3. Did the Tribunal err in failing to consider the complaint under subsection 5(a) of the *Canadian Human Rights Act*?
4. Does subsection 5(b) of the *Canadian Human Rights Act* require that there be a comparator group in all cases? and
5. Did the Tribunal err in concluding that there was no relevant comparator group in this case?

[109] It will also be necessary to identify the appropriate standard of review to be applied in relation to the Tribunal's decision on each of these issues.

[110] It is also important to understand what is *not* in issue in these applications.

[111] None of the parties has sought to judicially review the Tribunal's decision on the services issue, and that issue is thus not before me.[1]

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[1] To the extent that I refer to child welfare services provided by the Government of Canada, or refer to the Government as a "service provider„ in these reasons, I am merely adopting the terminology used by the parties during this proceeding and do so only to identify the activities in issue in this matter. My use of this nomenclature should not be interpreted as acceptance by the Court that the Government's actions in providing funding for child welfare programming amounts to the provision of a "service„ for the purpose of section 5 of the *CHRA*. The proper characterization of the Government's actions in this regard is an issue for another day.

[112] The Government also argued before the Tribunal that its funding formulae are an expression of pure executive policy, and that the issues raised by the complaint are thus not justiciable. However, the parties agree that the justiciability issue is not before me in these applications.

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8. The Procedural Issues

[113] The applications for judicial review raise two issues with respect to the process that was followed by the Tribunal in this case. The first is whether the *Canadian Human Rights Act* permits the Tribunal to decide an issue that could determine the outcome of a case before embarking on a full hearing on the merits of the complaint that allows the parties to lead *viva voce* evidence. The second is whether the process followed by the Tribunal in this case was fair to the parties.

[114] I will first consider whether the Tribunal has the authority to address issues on a preliminary basis in advance of a full hearing on the merits. The fairness of the process that the Tribunal followed in this case will be addressed further on in these reasons.

A. *Does the Tribunal have the Power to Decide Issues that Could Result in the Dismissal of a Human Rights Complaint without Conducting a Full Hearing on the Merits of the Complaint that Provides the Parties with an Opportunity to Adduce Viva Voce Evidence?*

[115] The Commission characterizes this issue as "whether the Tribunal had the jurisdiction to summarily dismiss the complaint on the merits„, whereas the Caring Society states the issue as "whether the Tribunal erred in dismissing the complaint without a hearing„.

[116] Neither characterization properly identifies the issue before the Court as the premise underlying each description is erroneous. The Tribunal did not dismiss the complaint "summarily„ or "without a hearing„. It did conduct a hearing on the comparator group issue. The parties were able to adduce evidence addressing the issue, and were able to challenge the evidence led by the opposing side. Each party was also afforded the opportunity to appear and to make submissions to the Tribunal in relation to the comparator group question. What the applicants really take issue with is the form that the hearing took.

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[117] The applicants argue that the process the Tribunal followed in this case raises a true question concerning its jurisdiction. As a result, they say that the Tribunal's choice of procedure should be reviewed against the standard of correctness.

[118] In contrast, the Government of Canada contends that the Tribunal's conclusion that it had the authority to decide a discrete issue on the basis of a preliminary motion, in advance of a full hearing on the merits, involves the interpretation of the powers conferred on the Tribunal by its enabling legislation. As a consequence, the Government says the issue is reviewable on the reasonableness standard.

[119] I need not resolve this issue as I am satisfied that the Tribunal correctly concluded that it had the authority to determine the process to be followed in deciding the issues raised by a human rights complaint. The Tribunal also correctly decided that it does not always have to hold a full evidentiary hearing in relation to each and every issue raised by a complaint in order to decide substantive issues coming before it.

[120] The applicants submit that the *Canadian Human Rights Act* requires the Tribunal to inquire into each complaint referred to it by the Commission. They further submit that the Act and the jurisprudence only allow the Tribunal to dismiss a complaint without a full hearing on the merits in limited circumstances: that is, where there has been an abuse of process, including an undue delay in the process.

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[121] In dismissing this complaint on its merits on a preliminary motion, the applicants say that the Tribunal expanded its jurisdiction in a way that is unsupported by either the Act or the jurisprudence.

[122] The applicants further contend that it is not open to the Tribunal to usurp the screening function that Parliament has assigned to the Commission by summarily dismissing a complaint without a full hearing on the merits.

[123] Finally, the applicants submit that this Court has already determined that this case raises important and complex issues which should not be determined in the absence of the necessary factual record.

[124] Subsection 49(1) of the Act empowers the Commission to ask the Tribunal Chairperson to "institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted,,. Subsection 53(1) allows the Tribunal to

dismiss a complaint at the conclusion of an inquiry if the Tribunal is satisfied that the complaint is not substantiated. The Act does not, however, specify the form that the inquiry must take.

[125] That said, after providing due notice, subsection 50(1) of the Act requires the Tribunal member assigned to the case to "give all parties to whom notice has been given a full and ample opportunity, in person or through co nsel, to appear at the inquiry, present evidence and make representations„.

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[126] Paragraph 50(3)(e) of the Act empowers the Tribunal to decide procedural issues related to the inquiry. Moreover, the Tribunal is not bound by the strict rules of evidence, and is specifically empowered to receive evidence by oath, affidavit or otherwise: paragraph 50(3)(c).

[127] Administrative tribunals are intended to provide a fast, flexible and informal alternative to the traditional court system. This is reflected in subsection 48.9(1) of the Act which provides at "[p]roceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow„.

[128] It is, therefore, properly part of the Tribunal's adjudicative role to identify an appropriate procedure to secure the just, fair and expeditious determination of each complaint coming before it. The nature of that procedure may vary from case to case, depending on the type of issues involved.

[129] Administrative tribunals are "masters of their own procedure„. In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25 (QL) at para.

16, the Supreme Court observed that "[i]n the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.„

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[130] In the case of the Tribunal, subsection 48.9(2) of the Act empowers the Chairperson to make rules of procedure governing the practice and procedure before the Tribunal. Rule 3 of the Tribunal's *Rules of Procedure* permits the parties to bring motions before the Tribunal, and allows the Tribunal to establish a procedure for the resolution of the issues raised by the motion.

[131] Nothing in either the Act or the Tribunal's *Rules of Procedure* limits the type of motions that can be brought before the Tribunal. Consequently, I see no statutory or regulatory impediment that would preclude the bringing of a motion to have the Tribunal determine a substantive issue in advance of a full hearing of the complaint on its merits.

[132] Nor is there anything in the Act or the Tribunal's Rules that would preclude the Tribunal from deciding such a motion, as long as it provides the parties with a "full and ample opportunity„ to adduce the evidence necessary to decide the issue and to make submissions. The process followed by the Tribunal in relation to the hearing of the motion must also be fair, and the rules of natural justice must be respected.

[133] The applicants say that the jurisprudence has established that the Tribunal may only dismiss a complaint on a preliminary motion in the clearest of cases, and then only where proceeding with the case would amount to an abuse of process.

[134] In support of this contention, the applicants rely on the decision of this Court in *Canada (Canadian Human Rights Commission) v. Canada Post*, 2004 FC 81, [2004] 2 F.C.R. 581 [*Cremasco*], as well as the Tribunal's decisions in *Harkin v. Canada (Attorney General)*, 2009 CHRT 6, [2009] C.H.R.D. No. 6 (QL) and *Buffet v. Canada (Canadian Armed Forces)*, 2005 CHRT 16, [2005] C.H.R.D. No. 9 (QL).

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[135] In *Cremasco*, the human rights complaint before the Tribunal was over eight years old, and the issues raised by the complaint had already been the subject of two labour arbitrations and a separate complaint to the Commission. Following a motion brought by the respondent to have the complaint dismissed without a hearing, the Tribunal concluded that the proceeding amounted to an abuse of process and dismissed the complaint.

[136] In upholding this decision on judicial review, Justice von Finckenstein stated that he could not accept "the proposition advanced by the Commission that the Tribunal must hold a full hearing when a matter is referred to it„: at para. 16.

[137] After examining some of the statutory provisions referred to above, Justice von Finckenstein observed that it was "hard to fathom„ why it would be in anyone's interest for the Tribunal to hold a hearing in a case where the hearing would amount to an abuse of its process: at para. 18. He concluded that there was no statutory or jurisprudential bar that would preclude the Tribunal from dismissing a complaint on the basis of a preliminary motion on the grounds of abuse of process,

"always assuming there are valid grounds to do so„: at para. 19. This decision was subsequently affirmed by the Federal Court of Appeal: 2004 FCA 363, 329 N.R. 95.

[138] While the decision in *Cremasco* arose in the context of an alleged abuse of process, nothing in the decisions of either the Federal Court or the Federal Court of Appeal states that the Tribunal can *only* dismiss a human rights complaint without a full hearing on the merits in cases of abuse of process. What Justice von Finckenstein's decision *does* say is that the Tribunal is not obliged to hold a full hearing in relation to every complaint that the Commission refers to it.

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[139] I have also carefully reviewed the Tribunal's decisions in *Harkin* and *Buffet*. I do not read either decision as saying that the Tribunal may *only* dismiss a complaint in advance of a full hearing in cases of abuse of process or undue delay.

[140] I do, however, understand the Government to agree with the statement in *Buffet* that the Tribunal's power to dismiss a human rights complaint in advance of a full hearing on the merits should be exercised cautiously, and then only in the clearest of cases: above at para. 39. I also agree with this statement.

[141] Most human rights cases are highly dependant on their individual facts and those facts are often hotly contested. As a result, many cases involve serious issues of credibility. While it is open to the Tribunal to receive evidence by way of affidavit, the more contested the facts and the greater the issues of credibility, the less appropriate this will be. Such cases may well require a full hearing

on their merits, including *viva voce* evidence in chief and cross-examinations held in the presence of a Tribunal member.

[142] Similarly, where the issues of fact and law are complex and intermingled, it may well be more efficient to await the full hearing before ruling on the preliminary issue: see *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)* (1998), 164 Nfld. & P.E.I.R. 251, 13 Admin. L.R. (3d) 142 at para. 21.

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[143] That said, there may be cases where a full hearing involving *viva voce* evidence is not necessarily required. As the Tribunal noted, this could include cases where there is no dispute as to the facts, or where the issue is a pure question of law.

[144] There may also be cases where it is appropriate to decide issues raised by a complaint in stages, in a particular order, so that the hearing may unfold in an efficient manner.

[145] For example, it may be entirely appropriate for the Tribunal to choose to hear and decide a truly discrete or threshold question in advance of the full hearing on the merits of the complaint, particularly if the determination of the question has the potential to narrow the issues, focus the hearing, or dispose of the case altogether.

[146] A hypothetical example discussed during the course of the hearing illustrates this point. The Tribunal could be faced with a pay equity case that would potentially involve a two-year-long hearing, in which a question arises as to whether the relationship between the complainants and the

respondent is such that the respondent was in fact an "employer„ within the meaning of section 11 of the Act. In such a case, it might well be appropriate for the Tribunal to hear and decide this issue first, as a negative decision on this point might dispose of the entire complaint.

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[147] Indeed, it would make no sense in this hypothetical scenario to compel the parties to go through the time and expense of a two-year-long hearing, if the legal status of the relationship between the complainants and the respondent was potentially dispositive of the complaint, and could quickly and fairly be determined before a full examination of the wage discrimination issue.

[148] The examples referred to above are not intended to provide an exhaustive list of all of the circumstances where the Tribunal might choose to deal with issues in advance of a full hearing on the merits of a complaint. In every case, the Tribunal will have to consider the facts and issues raised by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow.

[149] However, the process adopted by the Tribunal will have to be fair, and will always have to afford each of the parties "a full and ample opportunity to appear[,] ... present evidence and make representations„ in relation to the matter in dispute.

[150] I do not agree with the applicants' suggestion that Prothonotary Aronovitch provided specific directions to the Tribunal as to the form that the Tribunal hearing should take. Prothonotary Aronovitch was faced with a motion to stay an application for judicial review pending the

Tribunal's decision in relation to the applicants' human rights complaint. It was in that context that she observed that the issues before the Tribunal were "serious and complex,,, and that there was an interest in allowing a full and thorough examination of the issues raised by the complaint in the specialized forum of the Tribunal. It was up to the Tribunal to decide how best to conduct that examination, subject always to the rules of fairness and natural justice.

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[151] I also do not accept the applicants' argument that, in considering the Government's motion, the Tribunal was improperly usurping the Commission's screening function and was reviewing the Commission's decision to refer the complaint to the Tribunal.

[152] In this regard, I adopt the words of Justice von Finckenstein in *Cremasco*, where he stated that "[t]his was not a review of the decision to refer by the Commission. Rather, it was a *de novo* decision in which the Member was determining how best to deal with the issues which had been referred to the Tribunal,,: above at para. 14.

[153] It also bears noting that the Commission's Assessment Report made no finding as to whether the applicants' human rights complaint disclosed a *prima facie* case of discrimination. Moreover, the Commission's September 30, 2008, decision made it clear that such a finding could only be made by the Tribunal: see also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 23.

[154] Finally, I do not accept Amnesty International's argument that the proper monitoring and enforcement of Canada's international human rights obligations require that the Tribunal hold a *viva voce* hearing on the merits.

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[155] I accept Amnesty's contention that international human rights law requires Canada to monitor and enforce individual human rights domestically, and to provide effective remedies where these rights are violated: see, for example, the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, article 8; 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*, 32^{d} Sess., UN Doc. CRC/GC/2002/2 (15 Nov. 2002) at paras. 1 and 25; Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44(6))*, 34th Sess., UN Doc. CRC/GC/2003/5 (3 Oct. 2003) at para. 65.

[156] That said, I do not read the international instruments relied upon by Amnesty to mandate the particular form that these enforcement measures must take. Provided that the Tribunal operates independently, and that the procedures it follows are fair and are able to address the issues in question, Canada will have met its international obligations.

[157] I am thus satisfied that the Tribunal's power to control its own process allows it to consider motions raising substantive issues, including motions to dismiss human rights complaints, brought in advance of a full hearing into the merits of the complaint in some circumstances. The process

followed by the Tribunal in this regard will, however, always be subject to the requirements of procedural fairness.

[158] The next question, then, is whether the process followed by the Tribunal in this case was fair.

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B. *Was the Process that was Followed by the Tribunal in Deciding the Comparator Group Issue Fair?*

[159] The applicants raise several issues with respect to the fairness of the process followed by the Tribunal in this case. Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[160] The Commission argues that it was treated unfairly, as it was not aware that the Tribunal was actually going to address the merits of the complaint in deciding the motion.

[161] I do not accept this argument. It was clear from the Notice of Motion served by the Government of Canada that it was seeking to have the complaint dismissed by the Tribunal, and on what grounds.

[162] One of the grounds the Government cited in its Notice of Motion supporting the dismissal of the complaint was that the complaint did not fall within section 5 of the *Canadian Human Rights Act*. The Notice of Motion asserted that the Government does not provide funding for child welfare

services for anyone other than First Nations children living on reserve, and that it could not be compared to provincial child welfare service providers. It is also clear from the transcript of the motion hearing that the applicants, including the Commission, understood what was at stake on the motion.

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[163] I am thus satisfied that the Commission was aware of what was at issue on the Government's motion, notably that the complaint could be dismissed if the Tribunal found that it did not come within the scope of the service and/or discrimination requirements of section 5 of the Act.

[164] The applicants also say that the process that the Tribunal followed was unfair as they were unable to lead the necessary evidence to respond to the comparator group issue. There is, however, no indication that the Tribunal limited the type or amount of evidence that could be adduced on the motion in any way. Nor have the applicants identified any specific evidence that they were unable to put before the Tribunal in response to the Government's motion. Consequently, I am not persuaded that they were treated unfairly in this regard.

[165] The applicants further contend that the Tribunal erred by failing to respect First Nations culture in deciding one of the most important cases to come before it involving Canada's First Nations people. They submit that the Supreme Court of Canada has long recognized the value of oral evidence in cases involving Aboriginal peoples. By insisting on proceeding with the motion on the basis of a written record, the applicants say that the Tribunal failed to respect First Nations' customs and traditions.

[166] There are two difficulties with this argument. The first is that, once again, the applicants have failed to identify *any* evidence that they were unable to put before the Tribunal in relation to the comparator group issue as a result of the Tribunal's choice of procedure. The second difficulty is that the applicants have not explained how oral evidence would be relevant to the interpretive exercise that the Tribunal undertook in relation to section 5 of the *Canadian Human Rights Act*.

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[167] I am, however, satisfied that there was a breach of procedural fairness in this case as the Tribunal considered extrinsic evidence, without advising the parties that it would be considering this evidence in deciding the motion, and without affording the parties any opportunity to respond to it.

[168] In preparation for the hearing on the merits of the complaint, the parties served and filed documents with the Tribunal which related to the merits of the case. These filings continued after the Government brought its motion to dismiss in December of 2009. Indeed, the parties continued to file material with the Tribunal that related to the merits of the complaint well after the motion to dismiss was heard in June of 2010.

[169] By all accounts, the parties filed many thousands of pages of documents with the Tribunal addressing the merits of the complaint.

[170] I do not understand the Government to take issue with the assertion in paragraphs 42 and 51 of Dr. Blackstock's affidavit that the parties were never advised that the Tribunal would be considering material filed outside of the motion context in connection with the motion to dismiss.

[171] The materials filed by the Government of Canada in support of its motion to dismiss were relatively brief, whereas the applicants filed a significant amount of responding material. Affiants were cross-examined on their affidavits, and the transcripts of those cross-examinations were filed with the Tribunal. As mentioned earlier in these reasons, the record before the Tribunal on the motion to dismiss was approximately 2,000 pages in length, plus authorities.

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[172] The Tribunal appeared to recognize at paragraph 62 of its decision that the motion to dismiss should be decided "on the basis of the record generated by the motion„.

[173] However, it is clear from other statements in the reasons that the Tribunal did not confine itself to "the record generated by the motion„. The reasons show that the Tribunal did not distinguish between the material filed by the parties in relation to the Government's motion to dismiss and the materials filed in relation to the merits of the complaint, and that the Tribunal considered material filed outside of the motion context in deciding the issues before it.

[174] In paragraph six of its decision, the Tribunal states that:

> The Crown's motion has resulted in the following evidence being placed before me. In this case, the Crown, and the complainants, and two interveners, Chiefs of Ontario (The Ont. Chiefs) and Amnesty International (Amnesty), have filed the documents and the submissions as outlined in Appendix "A„.

Other references to the documents in Appendix "A„ appear at paragraphs 17 and 107 of the decision.

[175] Appendix "A„ contains a list of 118 documents, including document lists, witness lists, will-say statements, statements of particulars, documentary disclosure, experts' reports and so on. Many of these documents relate to the merits of the case and were not filed in connection with the motion to dismiss.

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[176] Of particular concern to the applicants is one of the Government's experts' reports – the report prepared by KPMG – which the Government filed with the Tribunal several months *after* the hearing of the motion. The KPMG report is an opinion prepared by an accounting firm addressing, amongst other things, the feasibility of comparing child welfare funding levels across jurisdictions. The report also calls into question the complainants' assertion that the Government of Canada provides 22 percent less funding per child for child welfare services than does the average province.

[177] The Tribunal went on in paragraph 6 of its decision to state that "I have vetted the materials filed relevant to this motion, *more than 10,000 pages*„ [emphasis added]. The Tribunal then observes that "[i]ronically, this volume of materials appears to be grossly insufficient to address the scope and breadth of this complaint„.

[178] The Tribunal's confusion as to the scope of the record before it is clearly reflected in the statement appearing at paragraph 49 of the decision, which states that "*[t]he Tribunal record on this motion alone consists of more than 10,000 pages*„ [emphasis added].

[179] The Tribunal's decision was released on March 14, 2011, "subject to editorial revisions,,. On April 7, 2011, the Tribunal issued an amended decision correcting various errors in the original text. Significantly, it made no changes to any of the statements cited above.

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[180] It thus appears on the face of the decision that, unbeknownst to the parties, the Tribunal considered as much as 8,000 pages of extrinsic material in deciding the Government's motion to dismiss. The parties were not aware that this was going to happen, and thus had no opportunity to address or respond to any of the material.

[181] The Caring Society commenced its application for judicial review on April 13, 2001. One of the grounds for review cited in the Caring Society's Notice of Application was that it was denied procedural fairness as a result of the Tribunal's reliance on extrinsic evidence.

[182] On April 18, 2011, the Government of Canada filed a request under Rule 317 of the *Federal Courts Rules*, SOR/98-106.

[183] The Tribunal's Director of Registry Operations responded to the Rule 317 request shortly thereafter. The Registry official provided a "Certified Index confirming all of the documentation that was before Chairperson Chotalia when making the determination of March 14, 2011, which dismissed the complaint in the matter T1340/7008,,. The Index included all of the materials referenced in Appendix "A,, to the Tribunal's decision, except the parties' experts' reports. The covering letter from the Registry official states: "Please note that the expert reports filed by the

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parties were not taken into consideration by the Chairperson when rendering her ruling. As such, they do not appear in the Certified Index„.

[184] I am not prepared to attach any weight whatsoever to this statement.

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[185] First of all, it flies in the face of the Tribunal's own statement that it had "vetted„ the materials relevant to the motion, which it identified as the documents listed in Appendix "A„ of the decision. The parties' experts' reports are specifically referenced in Appendix "A„.

[186] Moreover, the Registry official's statement appears to have been an attempt to respond to the procedural fairness arguments advanced by the Caring Society in its Notice of Application for Judicial Review. As such, it is improper.

[187] Reviewing courts have repeatedly cautioned adjudicators against trying to shore-up their decisions through after-the-fact affidavit evidence filed in response to applications for judicial review of their decisions: see, for example, *Sapru v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35, 413 N.R. 70 at para. 51, and *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576 at para. 45.

[188] What happened in this case is even more problematic than what occurred in *Sapru* and *Sellathurai*. When a decision-maker files an affidavit in an *ex post facto* attempt to improve on his or her decision, the statements in issue are made under oath and it is at least open to the aggrieved party to challenge statements contained in the affidavit through cross-examination.

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[189] In this case, the statement as to what materials the Tribunal did and did not consider in deciding the motion to dismiss came not from the Tribunal member herself, but rather from a public servant within the Tribunal Registry. There is no explanation as to how the Registry official knew what the Tribunal member had or had not considered in arriving at her decision. Nor is there any explanation as to why contradictory statements appear in the decision itself. Moreover, the statement in question is contained in a letter rather than in an affidavit. Consequently, the applicants have no way to challenge the Registry officer's assertions.

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[190] At the end of the day what we are left with is the Tribunal's own statement that it had "vetted„ 10,000 pages of material in relation to the motion to dismiss, when the record on the motion before it was only some 2,000 pages in length. There is, moreover, no suggestion by any of the parties that the authorities filed in relation to the motion came anywhere close to accounting for the 8,000 page difference.

[191] Taking the Tribunal's statements in its decision at face value, I can only conclude that the Tribunal considered thousands of pages of material not properly before it on the motion to dismiss, without advising the parties accordingly, and without affording them any opportunity to make representations in this regard. This is a clear breach of procedural fairness: *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1977] 1 S.C.R. 456 at 463.

[192] As the Ontario Court of Appeal observed in *Khan v. University of Ottawa*, 148 D.L.R. (4th) 577, 34 O.R. (3d) 535 (C.A.) at para. 33, "[t]he right to procedural fairness means little unless the

person affected is informed of contrary information and arguments and given an opportunity to address them before the decision is made„.

[193] I do not understand the Government to dispute that the Tribunal considered extrinsic evidence in arriving at its decision on the motion to dismiss. However, it points out that there is no reference to anything in the KPMG report in the Tribunal's reasons. While the Government accepts that the applicants are not required to show that they were actually prejudiced by the Tribunal's reliance on extrinsic evidence, it says that the applicants do have to show that the material the Tribunal relied upon may have affected the result.

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[194] The Government submits there is no evidence in this case that the extrinsic material played any role in the Tribunal's decision to dismiss the applicants' human rights complaint. As a result, any error on the part of the Tribunal was not material to the outcome.

[195] I would start by noting that the applicants need not show actual prejudice resulting from the Tribunal's consideration of extrinsic evidence in order to prove that they have been denied procedural fairness in this matter. They need only show that the Tribunal's breach of fairness may reasonably have prejudiced them: see *Khan*, above at para. 34; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at 1116.

[196] The Tribunal's consideration of extrinsic evidence in this case was, moreover, not limited to its review of the KPMG report. As I previously noted, it appears from the Tribunal's decision that it

considered thousands of pages of material that was not part of the motion record. The KPMG report is only 141 pages in length.

[197] While I have not been provided with the all of the documentary material that was filed with the Tribunal in relation to the merits of the case, it is clear from the record before me that this material included document lists, witness lists, will-say statements, statements of particulars, documentary disclosure, the applicants' experts' reports and so on. In my view, the sheer volume of extrinsic materials "vetted" by the Tribunal cannot help but raise real concerns about the fairness of the process followed in relation to the motion to dismiss.

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[198] Moreover, the comparator group issue has been "on the table" from virtually the moment the complainants filed their complaint with the Commission in 2007. Indeed, the Government's response to the receipt of the complaint was to immediately seek to have the Commission summarily dismiss it for want of jurisdiction on the basis of both the services and comparator group issues.

[199] As a consequence, it is impossible to imagine that there would be no mention of the comparator group issue in any of the thousands of pages of material that the parties filed with the Tribunal in relation to the merits of the complaint. It is therefore only reasonable to assume that some of these submissions would have been relevant to the issues being addressed by the Tribunal on the motion to dismiss. Consequently, I am satisfied that the Tribunal's breach of fairness may reasonably have prejudiced the applicants.

[200] The Government of Canada also submits that even if I were to conclude that the Tribunal's reliance on extrinsic evidence did constitute a breach of procedural fairness, this error, by itself, would not justify setting aside the Tribunal's decision. According to the Government, the decision should be allowed to stand if this Court finds that the Tribunal did not err in its interpretation of section 5 of the Act as it relates to the comparator group issue.

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[201] However, as the Supreme Court of Canada observed in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661, [1985] S.C.J. No. 78 (QL), the denial of a fair hearing "must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision„.

[202] In reaching this conclusion, the Supreme Court observed that "[t]he right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have„. The Court further observed that it is not for a reviewing court to deny that right "on the basis of speculation as to what the result might have been had there been a [fair] hearing„: all quotes at 661.

[203] I recognize that there is a limited exception to this rule. A reviewing court may disregard a breach of procedural fairness "where the demerits of the claim are such that it would in any case be hopeless„: W. Wade, *Administrative Law* (6th ed. 1988) at 535, as cited in *Mobil Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228, [1994] S.C.J. No. 14 (QL). See also *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172

N.R. 308, 27 Imm. L.R. (2d) 135 at para. 9 (F.C.A.). This may arise where, for example, the circumstances of the case involve a legal question which has an inevitable answer: *Mobil Oil*, above at 228.

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[204] I am not persuaded that this case comes within either the *Yassine* or *Mobil Oil* exceptions. I am, moreover, satisfied that the Tribunal committed three different reviewable errors in its interpretation and application of section 5 of the Act and in its treatment of the comparator group issue. As a result, the Tribunal's decision must be set aside.

[205] These errors will be addressed in the next section of these reasons.

9. The Section 5 Issues

[206] As will be explained below, I have concluded that the Tribunal erred in failing to provide any reasons as to why the complaint could not proceed under subsection 5(a) of the *Canadian Human Rights Act*. I have also found that its interpretation of subsection 5(b) of the Act was unreasonable. Finally, I have concluded that the Tribunal failed to have regard to a material fact in concluding that no appropriate comparator group was available to assist in the analysis under subsection 5(b) of the Act, namely the Government's own choice of provincial child welfare standards as the appropriate comparator.

A. *The Tribunal's Failure to Consider the Complaint under Subsection 5(a) of the Act*

[207] The human rights complaint at issue in this proceeding was brought under section 5 of the

Canadian Human Rights Act, which provides that:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :**
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	**a) d'en priver un individu;**
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	**b) de le défavoriser à l'occasion de leur fourniture.**

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[208] Section 3 of the Act identifies "race„ and "national or ethnic origin„ as prohibited grounds of discrimination.

[209] The complaint under consideration by the Tribunal asserts that as a result of the Government of Canada's under-funding of child welfare services, First Nations children living on reserves receive a lower quality of certain services. However, at page three of the complaint form, the complainants specifically allege that jurisdictional disputes between the Government of Canada and the provinces have caused First Nations children living on reserve to be *denied* services that are otherwise available to Canadian children living off reserve.

[210] The complainants also put evidence before the Tribunal on the motion to dismiss alleging that the Government of Canada's actions have denied First Nations children on reserves access to

certain child welfare services: see, for example, Dr. Blackstock's affidavit at paras. 11, 42 and 48; Elsie Flette's affidavit at paras. 24 and 26.

[211] Of particular concern to the complainants is the alleged lack of funding for preventative measures that would allow First Nations children living on reserves to remain in their homes under the supervision of child welfare authorities. According to the complaint, the denial of these service has resulted in a disproportionate number of First Nations children living on reserves being taken from their homes and placed into foster care. As was noted earlier, the complainants argue that this has the effect of perpetuating the legacy of the residential schools experience.

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[212] Documentary evidence was also put before the Tribunal through Dr. Blackstock's affidavit to support the complainants' contention that the Government's actions have resulted in certain child welfare services being denied altogether to First Nations children living on reserves. For example, the October, 2006 "Fact Sheet" from Indian and Northern Affairs states:

> [T]he current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with provincial and territorial policy changes. *As a result, First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians* [emphasis added].

[213] Similar comments regarding the unavailability of some child welfare services for First Nations children living on reserves appear in the report of the Parliamentary Standing Committee on Public Accounts.

[214] While the complaint form tracks the language of section 5 of the Act in general terms, it does not make specific reference to section 5, nor does it distinguish between subsections 5(a) and (b) of the legislation. Moreover, the Government's motion to dismiss simply references section 5 of the Act in support of its contention that the Tribunal lacks jurisdiction to deal with the complaint, and does not distinguish between subsection 5(a) and (b) as they may apply to the complaint.

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[215] There was some discussion between the parties and the Tribunal, both before and during the hearing of the motion to dismiss, as to whether the complaint related to both subsections 5(a) and (b) or just to subsection 5(b) of the Act. Moreover, some of the parties' arguments on the motion to dismiss referred specifically to subsection 5(b) of the Act.

[216] That said, most of the written and oral submissions before the Tribunal were directed at the question of whether there could be discrimination under section 5 of the Act *as a whole* if the Government of Canada did not provide child welfare services to anyone other than First Nations children living on reserves.

[217] There was no attempt by any of the parties during the hearing of the motion to dismiss to address the differences in wording between subsections 5(a) and 5(b) of the Act, nor were any submissions made with respect to the implications that the differences in wording between subsections 5(a) and 5(b) might have for the complaint.

[218] In addition, a number of the applicants' oral submissions addressed the fact that the alleged result of the Government's conduct was to deny certain child welfare services to First Nations children living on reserves, seemingly bringing the complaint within subsection 5(a) of the Act.

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[219] At paragraph 125 of its decision, the Tribunal concluded that a comparator group is not required in cases where there has been a *denial* of services as contemplated by subsection 5(a) of the Act, although it made no factual findings in this regard. The Tribunal did, however, find that a comparator group was required to establish adverse differential treatment under subsection 5(b) of the legislation.

[220] Although the Tribunal examined the complaint in relation to subsection 5(b) of the Act at some considerable length, it provided no explanation whatsoever as to why the complaint could not be considered under subsection 5(a) of the Act, to the extent that it dealt with the alleged denial of child welfare services to First Nations children living on reserves. This is an error of law and a breach of procedural fairness: see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 22.

[221] The complete absence of reasons on this point also means that this aspect of the Tribunal's decision lacks the justification, transparency and intelligibility required of a reasonable decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47, and *Khosa*, above at para. 59.

B. *Does Subsection 5(b) of the Canadian Human Rights Act Require that there be a Comparator Group in all Cases?*

[222] It will be recalled that subsection 5(b) of the *Canadian Human Rights Act* makes it a discriminatory practice to "differentiate adversely in relation to any individual, on a prohibited ground of discrimination„ in the provision of services customarily available to the general public.

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[223] The Tribunal accepted the Government's argument that in order to find adverse differential treatment for the purposes of subsection 5(b) of the Act, the treatment accorded to the complainant must necessarily be compared to the treatment accorded to others receiving the same service from the same service provider.

[224] In reaching this conclusion, the Tribunal acknowledged the need for a broad, liberal and purposive approach to the interpretation of the Act. However, it also noted that the words of the statute must be capable of bearing the interpretation sought.

[225] The Tribunal observed that the French version of subsection 5(b) used the term "défavoriser„ in lieu of "differentiate adversely„, accepting that this term did not necessarily contemplate the need for a comparison. As a result of the Tribunal's finding that the English version of the provision necessarily required a comparison, whereas the French version of the provision did not, the Tribunal turned to consider principles of statutory interpretation and case law in an effort to ascertain Parliament's intent in enacting subsection 5(b) of the Act.

[226] Applying general rules of statutory construction, the Tribunal held that the narrower interpretation in the English version of subsection 5(b) was to be preferred. In coming to this

conclusion, the Tribunal also had regard to jurisprudence which it saw as confirming the need for a comparator group analysis in every case. It also attempted to distinguish jurisprudence leading to the opposite result.

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[227] Having determined that a discrimination analysis under subsection 5(b) necessarily required a comparison, the Tribunal then concluded that it could not compare child welfare services provided by the Government of Canada with similar services provided by the provinces. This led the Tribunal to conclude that there was no appropriate comparator group in this case for the purposes of a subsection 5(b) analysis.

[228] The Tribunal was also not persuaded that the repeal of section 67 of the *Canadian Human Rights Act* (which insulated discrimination under or pursuant to the *Indian Act* from review under the Act) had any relevance to the issue before it. According to the Tribunal, the amendment merely subjected the Government of Canada and First Nations to the prohibitions against discrimination on prescribed grounds in their provision of services to Aboriginal persons.

[229] The Tribunal concluded that the complainants could not establish adverse differentiation in the provision of services for the purposes of subsection 5(b) of the Act without comparing the child welfare services provided by the Government of Canada to First Nations children living on reserves with the child welfare services provided by the Government to others. Given that the Government of Canada did not provide child welfare services to anyone other than First Nations children living on reserves, and having determined that the child welfare services provided by the Government of

Canada could not be compared to the child welfare services provided by provincial or territorial governments, the Tribunal dismissed the complaint.

[230] I will first examine the Tribunal's finding that the wording of subsection 5(b) necessarily required a comparison in order to establish adverse differential treatment in the provision of a service. I will then go on in the next section of these reasons to address the Tribunal's conclusion that there was no appropriate comparator group in this case as the child welfare services provided by the Government of Canada to First Nations children living on reserves could not be compared to provincial child welfare services for the purposes of establishing discrimination under subsection 5(b) of the Act.

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i) ***The Standard of Review***

[231] The first issue for determination in examining the Tribunal's conclusion that subsection 5(b) of the Act necessarily required a comparison to be made to another group receiving the same service from the same service provider is the standard of review to be applied to this aspect of the Tribunal's decision.

[232] The applicants argue that the Tribunal's conclusion that a comparator group is required to establish discrimination under subsection 5(b) of the Act is a true question of jurisdiction, thus requiring review on the correctness standard: *Dunsmuir*, above at para. 59. I do not agree.

[233] The interpretive exercise engaged in by the Tribunal required it to identify the necessary elements in a discrimination analysis under a provision of the *Canadian Human Rights Act*. The

Tribunal was interpreting a provision in its own enabling legislation in relation to an issue falling squarely within its "core function and expertise„: see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 [*Mowat*] at para. 24.

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[234] It is now well established that decisions involving the interpretation of a Tribunal's enabl' g legislation presumptively attract a reasonableness standard of review, and will only attract a correctness standard in limited circumstances: see, for example, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 28 and *Dunsmuir*, above at paras. 58-61. See also *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 420 N.R. 364 at para. 18; *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at para. 34.

[235] The applicants have attempted to classify this issue as 'jurisdictional' and thus reviewable on the correctness standard. However, decisions of the Supreme Court since *Dunsmuir* have repeatedly emphasized the need for reviewing courts to shift their focus away from historically broad notions of 'jurisdiction' in favour of increased deference to specialized decision-makers interpreting their enabling legislation: see *Mowat*, above; *Smith*, above at para. 28; and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, 339 D.L.R. (4th) 428.

[236] I also do not accept the applicants' argument that the interpretation of subsection 5(b) of the Act is an issue of general importance to the legal system as a whole, thus attracting the correctness standard of review.

[237] It is true that reviewing courts did not historically defer to human rights tribunals on legal questions, which they often perceived to be of general importance. However, the Supreme Court has recently distanced itself from this position: see *Mowat*, above at paras. 19-24.

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[238] Indeed, the Supreme Court recognized in *Mowat* that there is a "degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals„: at para. 21. However, it concluded that reviewing courts owe the same deference to human rights tribunals interpreting their enabling legislation as is owed to other administrative tribunals. Moreover, the Court instructed reviewing courts to exercise restraint in classifying human rights issues as being issues 'of central importance to the legal system', even where they are of broad import: at paras. 23-24.

[239] *Mowat* also reminds us that regard must be had to the expertise of the Tribunal in relation to the issue before it: at para. 25. In this case, the Tribunal has expertise in human rights matters: see subsection 48.1(2) of the Act.

[240] The Tribunal was thus interpreting a provision in its own enabling legislation relating to the definition of discrimination, an issue falling squarely within its core function and expertise. As such, the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is reviewable on the standard of reasonableness.

[241] I would note, however, that at the end of the day, my conclusion regarding the standard of review has no impact on the result. This is because I am satisfied that the Tribunal's interpretation of subsection 5(b) was unreasonable.

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[242] In coming to this conclusion, I would start by considering the purpose of the *Canadian Human Rights Act* and the general interpretive principles that apply to it.

ii) ***The Purpose of the CHRA and its Interpretation***

[243] When addressing a question of statutory interpretation, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: see *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL) at para. 21, and see Ruth Sullivan, ed., *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1.

[244] In this case we are dealing with the *Canadian Human Rights Act*, quasi-constitutional legislation which Parliament has enacted to give effect to the fundamental Canadian value of equality - a value that the Supreme Court of Canada has described as lying at the very heart of a free and democratic society: see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 615, [1993] S.C.J. No. 20 (QL), per Justice L'Heureux-Dubé, dissenting (but not on this point).

[245] As identified in section 2 of the Act, the purpose of the legislation is to ensure that individuals have an equal opportunity to make for themselves the lives that they are able and wish to

have, without being hindered by discriminatory practices based upon considerations such as race, national or ethnic origin, sex and age, amongst others.

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[246] Human rights legislation has been described as "...the final refuge of the disadvantaged and the disenfranchised„: *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, [1992] S.C.J. No. 63 (QL) at para. 18. As such, the Supreme Court of Canada has repeatedly warned of the dangers of strict or legalistic interpretative approaches that would restrict or defeat the purpose of such a quasi-constitutional document: see *Mossop*, above at 613, per Justice L'Heureux-Dubé J., dissenting (but not on this point). Rather, the task of the Court is to "breathe life, and generously so, into the particular statutory provisions [in issue]„: *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 7.

[247] Indeed, the Supreme Court has observed on numerous occasions that human rights legislation is to be given a large, purposive and liberal interpretation in a manner consistent with its overarching objectives, so as to ensure that the remedial goals of the legislation are best achieved: see, for example, *Mossop*, above at 611-12. See also *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 3 C.H.R.R. D/1163; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, [1985] S.C.J. No. 74 (QL) [*O'Malley*]; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, [1987] S.C.J. No. 42 (QL) [*Action Travail*].

[248] These cases teach us that ambiguous language should be interpreted in a way that best reflects the remedial goals of the statute. It follows that a strict grammatical analysis may be

subordinated to the remedial purposes of the law: see *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604 at para. 67.

[249] That is, "it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature„: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at para. 30 (citing *Gould*, above, and *O'Malley*, above).

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[250] This interpretive approach does not, however, permit interpretations which are inconsistent with the wording of the legislation: see *Potash Corporation*, above at para. 19. See also *Mowat*, above at para. 33, and *Bastien Estate v. Canada*, 2011 SCC 38, [2011] 2 S.C.R. 710 at para. 25.

iii) ***The Ordinary Meaning of "Differentiate Adversely"***

[251] As will be explained below, the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely„ in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.

[252] The term "differentiate adversely„ is not unique to the services provision in section 5 of the *Canadian Human Rights Act*. Identical language also appears in subsection 6(b) of the Act, which makes it a discriminatory practice to "*differentiate adversely* in relation to any individual„ on a

prohibited ground of discrimination in the provision of commercial premises or residential accommodation [emphasis added].

[253] Subsection 7(b) of the Act similarly makes it a discriminatory practice "in the course of employment, to *differentiate adversely* in relation to an employee„ on the basis of a prohibited ground [emphasis added].

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[254] In my view, the ordinary meaning of the phrase "*differentiate adversely* in relation to any individual„ on a prohibited ground of discrimination is to treat someone differently than you might otherwise have done because of the individual's membership in a protected group. This interpretation is one that accords with the purpose of the Act and the intention of Parliament in enacting the *Canadian Human Rights Act*.

[255] In contrast, the Tribunal's conclusion that the term "differentiate adversely„ in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services leads to patently absurd results that could never have been intended by Parliament.

[256] On the Tribunal's analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.

[257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.

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[258] It will be recalled that section 2 of the Act identifies the purpose of the *Canadian Human Rights Act* as being to ensure that individuals have an equal opportunity to make for themselves the lives that they are able and wish to have, ***without being hindered by discriminatory practices based upon considerations such as sex, colour, religion and sexual orientation***, amongst others.

[259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.

[260] Other examples discussed during the hearing serve to further illustrate that a person or a group can be treated in an adverse differential manner even if there is no one else working for the same employer or receiving the same services from the same service provider.

[261] Take the employer who sets out to hire only foreign workers in the belief that the company could pay such workers 50 percent of the going rate. On the Tribunal's analysis, that employer would not have committed a discriminatory practice if the company did not employ any Canadian workers to whom the foreign workers could be compared.

[262] Similarly, the restaurateur who insists on seating a customer at the back of the room because of the colour of the customer's skin would not have committed a discriminatory practice if the restaurant never served another customer.

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[263] Lastly, the Tribunal's interpretation of subsection 5(b) of the Act would mean that it would not be a discriminatory practice for the Government of Canada to limit the services it provides only to a single protected group, even if the Government *admitted* that its decision to do so was based on discriminatory considerations.

[264] That is, no recourse would be available under subsection 5(b) of the Act in the hypothetical situation where the responsible Minister expressly acknowledged that the Government made the decision to limit the services it provided to a particular class of individuals because it did not like or respect the group in question because of their race or their national or ethnic origin, and did not feel that they were worthy of support or dignity because of their membership in that particular group.

[265] The Government of Canada agrees that the Tribunal's interpretation of subsection 5(b) leads to the results described above. Nevertheless, it maintains that the Tribunal's interpretation of the legislation is not only reasonable, but is in fact correct.

[266] I cannot agree. An interpretation of "differentiate adversely„ as the term is used in subsections 5(b), 6(b) and 7(b) of the Act that leads to the above conclusions does not fall within the range of possible acceptable outcomes which are defensible in light of the facts and the law. Such an interpretation is inconsistent with Parliament's clearly articulated purpose in enacting the

Canadian Human Rights Act, and could not have been what Parliament intended in enacting these provisions of the Act. It is simply unreasonable.

[267] Subsections 5(b), 6(b) and 7(b) of the Act must be read together, and accorded a harmonious interpretation. Therefore, to the extent that the Tribunal attempted to distinguish case law arising under subsection 7(b) on the basis that "[d]isability cases bring with them particular and individualized situations„ the Tribunal erred: see Tribunal's decision at paras. 124-25.

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[268] Moreover, the examples cited above illustrate that the types of situations in which a direct comparator will not be available to prove discrimination extend well beyond the disability in employment context. Yet each example clearly involves a discriminatory practice.

[269] My conclusion as to the interpretation of the phrase "differentiate adversely„ as it is used in subsection 5(b) of the *Canadian Human Rights Act* is confirmed when regard is had to the French version of the legislation, and to the incoherence that the Tribunal's interpretation of subsection 5(b) would create within section 5 as a whole.

[270] Further confirmation of my interpretation of the legislation is found in the jurisprudence dealing with what is required to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act* and the role of comparator groups in discrimination analyses. My interpretation also accords with Parliament's intention in repealing section 67 of the *Canadian Human Rights Act* and with Canada's obligations under international law.

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[271] I will address each of these matters in turn.

iv) ***The French and English Versions of Subsection 5(b)***

[272] The French version of subsection 5(b) states that it is a discriminatory practice "s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur ... de services ... destinés au public ... de le *défavoriser* à l'occasion de leur fourniture,, [emphasis added].

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[273] As the Tribunal noted, the term "défavoriser,, as it is used in subsection 5(b) of the Act does not necessarily require a comparator in all cases: see para. 114 of the Tribunal's reasons.

[274] I have already explained why the English version of section 5(b), properly interpreted, also does not require a comparison. As a result, there is no incoherence between the English version of subsection 5(b) and the French version of the same provision: the two versions share a common meaning.

[275] The Tribunal's interpretation of subsection 5(b) does, however, create an internal incoherence within section 5 of the *Canadian Human Rights Act*. This issue will be addressed next.

v) ***The Incoherence Created Between Subsections 5(a) and (b)***

[276] A further reason for concluding that the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is unreasonable is that it would create an internal incoherence between subsections 5(a) and (b) by establishing different legal and evidentiary requirements in order to establish discrimination under each provision.

[277] There is a general principle of statutory interpretation that "the provisions of an Act fit together to form a coherent and workable scheme„ to "give effect to a plausible and coherent plan„: Sullivan, above at 361 and 364. Interpreting section 5 of the Act so as to impose a higher evidentiary burden on claimants who suffer adverse differentiation in the provision of a service than is imposed on those who are denied the service altogether does not support a "plausible and coherent plan„: Sullivan, above at 364. Indeed, the Tribunal's interpretation of section 5 of the Act has the opposite effect.

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[278] That is, requiring a comparator group in every case brought under subsection 5(b) of the Act but not for complaints brought under subsection 5(a) would create anomalous results. As the Commission has pointed out, the Tribunal's interpretation would mean that "[i]f the funding as $0, the *CHRA* would apply; if the funding was $1 and arguably insufficient, the *CHRA* would not apply„: Memorandum of Fact and Law of the Commission, at para. 101.

[279] Neither the wording of the legislation nor the jurisprudence contemplates such an anomalous result: see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, 140 D.L.R. (4th) at para. 49, McLachlin J. (as she then was), concurring.

vi) ***The Role of Comparator Groups in a Discrimination Analysis***

[280] My conclusion that the Tribunal's interpretation of subsection 5(b) of the Act is unreasonable is further supported by the jurisprudence that has developed under both the *Canadian Human Rights Act* and under section 15 of the *Canadian Charter of Rights and Freedoms*, s. 7, Part

I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the Charter].

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[281] While not a universally accepted proposition[2], the Supreme Court of Canada has long held that equality is an inherently comparative concept, and that determining whether discrimination exists in a given case will often involve some form of comparison: *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6 (QL) at para. 26.

[282] This does not mean, however, that there must be a formal comparator group in every case in order to establish discrimination under subsection 5(b) of the Act.

[283] The onus is on a complainant to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act*. The test for establishing a *prima facie* case of discrimination is a flexible one, and does not necessarily contemplate a rigid comparator group analysis.

[284] According to the Supreme Court of Canada, a *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent: *O'Malley*, above.

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[2] See, for example, Sophia Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5 J.L. & Equal. 81; and Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate„ in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) at 410 and 427.

[285] Once a complainant has established a *prima facie* case of discrimination, the burden shifts to the respondent to provide a reasonable explanation for the conduct in issue.

[286] Although rarely mentioned in early human rights cases, the notion of comparator groups has figured prominently in equality jurisprudence in recent years, particularly in cases brought under section 15 of the Charter: see, for example, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12 (QL).

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[287] While the analytical frameworks under section 15(1) of the Charter and under federal and provincial human rights statutes have evolved separately and have taken distinct forms, they have not done so in isolation from one another. As the British Columbia Court of Appeal recognized in *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478, 326 D.L.R. (4th) 77 at para. 40, Rowles J.A., dissenting (but not on this point), there has been "considerable cross-fertilization" between the two areas of the law.

[288] One area of "cross-fertilization" from the Charter jurisprudence has been the occasional adoption of a formal comparator group analysis in the interpretation of human rights legislation: *Moore*, above at para. 112, Rowles J.A., dissenting (but not on this point).

[289] It is thus important to understand precisely what it is that we are talking about when we consider whether a comparator group is required in order to establish adverse differential treatment in the provision of services for the purposes of subsection 5(b) of the *Canadian Human Rights Act*.

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[290] A comparator group is not part of the *definition* of discrimination. Rather, it is an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases.

[291] There are many types of human rights cases in which no comparator group analysis will be required. A woman who is sexually harassed by her boss does not need to establish that other employees have not been subjected to similar treatment to succeed in establishing a *prima facie* case of discrimination.

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[292] Similarly, a comparator group may not be necessary to establish adverse differential treatment in employment on the basis of disability: see, for example, *Lane v. ADGA Group Consultants Inc.* (2008), 91 O.R. (3d) 649, 295 D.L.R. (4th) 425 at para. 94 (Ont. Div. Ct.). Looking to a comparator group may in fact be *inappropriate* in such cases. Disabled employees are often not seeking to be treated in the same way as their co-workers. Rather, it is often the crux of a disability claim that the individual seeks to be treated *differently* than his or her co-workers in order to have a disability accommodated.

[293] Indeed, identical treatment may in some cases result in "serious inequality„: see, for example, *Andrews*, above at para. 26. It is therefore sometimes necessary to treat people differently in order to achieve substantive equality: *Law*, above at para. 46.

[294] A test for discrimination that requires likes to be treated alike is the essence of formal equality, "leaving persons who are differently situated to be treated differently„: see Beverley Baines, "Equality, Comparison, Discrimination, Status„, in Fay Faraday, Margaret Denike & M.

Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 73 at 76.

[295] Such a "similarly situated,, approach to equality is one that harkens back to invidious 'separate but equal' regimes, and has long been rejected in Canadian law: see, for example, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, [1989] S.C.J. No. 42 (QL) versus *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.

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[296] In some cases, a comparison to others may be helpful. An unsuccessful candidate for a position may seek to compare his or her own qualifications to the qualifications of the successful candidate in an effort to establish that there has been discrimination in the hiring process: see, for example, *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.H.R. D/1001 (Ont. Bd. Inq.).

[297] However, an unsuccessful job applicant can also establish that he or she has been the victim of discrimination in employment, *even if no one else was ever hired*: *Israeli v. Canadian Human Rights Commission* (1983), 4 C.H.H.R. D/1616 (C.H.R.T.).

[298] Moreover, as the Federal Court of Appeal observed in *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, 322 N.R. 50, the decisions in *O'Malley* and *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, [1982] S.C.J. No. 2 (QL) explain what it is that a complainant must demonstrate in order to establish a *prima facie* case of discrimination. The Court noted that "[t]he tribunals' decisions in *Shakes* ... and *Israeli* ... are but illustrations of the application of that guidance,,: at para. 18.

[299] Similarly, in *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, 334 N.R. 316, the Federal Court of Appeal held that the legal definition of a *prima facie* case does not require the complainant to adduce any particular type of evidence to prove the facts necessary to establish that he or she was the victim of a discriminatory practice within the meaning of the *Canadian Human Rights Act*: see para. 27.

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[300] It should be noted that *Morris* involved a complaint brought under subsection 7(b) of the Act alleging adverse differential treatment in employment on the basis of a prohibited ground. As noted earlier, subsection 7(b) uses precisely the same language as appears in subsection 5(b) of the Act, making it a discriminatory practice to "differentiate adversely„ in employment on the basis of a prohibited ground.

[301] The Tribunal in *Morris* had concluded that the complainant had established discrimination on the basis of age, even though he had been unable to produce comparative evidence regarding the treatment accorded to his co-workers. In finding that the complaint had been substantiated, the Tribunal held that it would suffice "if the evidence establishes that discrimination was a factor in denying the complainant an employment opportunity„: *Morris v. Canada (Canadian Armed Forces)* (2001) 42 C.H.R.R. D/443, [2001] C.H.R.D. No. 41 (QL) (C.H.R.T.) at para. 75.

[302] In upholding the Tribunal's decision, the Federal Court of Appeal specifically rejected the appropriateness of a fixed formula or test for the establishment of a *prima facie* case, noting that a flexible legal test is better suited to advancing the broad purpose underlying the Act. The Federal

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Court of Appeal noted that "[d]iscrimination takes new and subtle forms„ and that it was "now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes„*: *Morris*, above at para. 28.

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[303] While not binding on the Tribunal Chairperson in this case, it is noteworthy that the Canadian Human Rights Tribunal has previously determined that a comparator group is not always required for the purposes of establishing a *prima facie* case of discrimination under section 7(b) of the Act: see, for example, *Lavoie v. Canada (Treasury Board of Canada)*, 2008 CHRT 27, [2008] C.H.R.D. No. 27 (QL) at paras. 143 and 153.

[304] In finding that a comparator group is always required to establish discrimination under subsection 5(b) of the Act, the Tribunal in this case placed great reliance on the decision of the Federal Court of Appeal in *Re Singh*, [1989] 1 F.C. 430, [1988] F.C.J. No. 414 (QL) at para. 17.

[305] *Singh* involved alleged discrimination in the refusal of visitors' visas. The matter came before the Federal Court of Appeal on a reference, and the issue for the Court was whether the Commission could investigate a human rights complaint filed by a Canadian resident alleging discrimination in the provision of a service customarily available to the general public as a result of the refusal of a visitor's visa to the complainant's family member living outside of Canada.

[306] It was in this context that the Federal Court of Appeal said: "Restated in algebraic terms, it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds

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in relation to C_n: at para. 17. The Court thus concluded that the Commission could indeed investigate such complaints.

[307] The Tribunal appears to have understood the Federal Court of Appeal's algebraic formulation as the Court having "restated the s. 5(b) test„ for all purposes: see the Tribunal decision at para. 117.

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[308] However, the comment in *Singh* cited above was clearly not intended to be a definitive statement of the test to be applied in all subsection 5(b) cases. Indeed, this statement was subsequently described by the Federal Court of Appeal as "an apparent *obiter*„: see *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 167 A.C.W.S. (3d) 135 at para. 29.

[309] All the Federal Court of Appeal was saying with its algebraic formulation in *Singh* was that an individual could suffer discrimination for the purposes of section 5(b) of the *Canadian Human Rights Act* as a result of adverse differential treatment accorded to a family member.

[310] The Federal Court of Appeal did go on in *Singh* to state: "Or, in concrete terms, it would be discriminatory practice for a policeman who, in providing traffic control services to the general public, treated one violator more harshly than another because of his national or racial origins„: at para. 17.

[311] I agree with the Caring Society that the police example provided by the Federal Court of Appeal in *Singh* is just that: one example provided in a particular context in an effort to explain the

nature of discrimination in that case. It is, moreover, clear from the reasons in *Singh* that the Federal Court of Appeal did not intend its comment to identify the only form that discrimination could take, nor did it foreclose other means by which discrimination may be proven.

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[312] Indeed, as the Caring Society points out at paragraph 75 of its memorandum of fact and law, "the Court did not preclude a finding of discrimination if the same policeman treated a violator more harshly because of his national or ethnic origin than he would have had the violator *not* been of that origin„ [emphasis in the original].

[313] I also agree with the Caring Society that "[i]n treating *Singh* as prescriptive of the only manner of proving discrimination, the Chairperson incorrectly determined that a comparator group is required in every case, and by extension, in this case„: Memorandum of Fact and Law at para. 75.

[314] It is also important to note that the issue of whether a comparator group is required to establish discrimination under subsection 5(b) of the Act was not even before the Federal Court of Appeal in *Singh*. As a result, the Tribunal's reliance on the *Singh* decision was misplaced.

[315] As was noted earlier, the use of comparator groups in the statutory human rights context h s been imported from the section 15 Charter jurisprudence. However, the Supreme Court of Canada has recently expressed real concern with respect to the role of comparator groups in the evaluation of section 15 claims. As will be discussed in the next section of these reasons, the recent decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 lends further support for the view that the Tribunal's interpretation of subsection 5(b) of the Act is unreasonable.

vii) ***The Supreme Court of Canada's Decision in Withler***

[316] The Supreme Court's decision in *Withler* was released approximately 10 days before the Tribunal rendered its decision in this case, although the decision does not appear to have been brought to the Tribunal's attention. Although it is not determinative of this case because of the differences in the analytical frameworks applicable under the *Canadian Human Rights Act* and the Charter, *Withler* is nevertheless instructive as it provides important guidance with respect to the use and limitations of comparator groups in identifying discrimination.

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[317] Indeed, as Justice Rowles observed in her dissenting opinion in *Moore,* importing concepts from Charter jurisprudence into the statutory human rights context "is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of the enabling statute„: above at para. 51, citing Leslie A. Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter„ in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 373 at 375.

[318] Moreover, as I noted earlier, the use of comparator groups as an evidentiary tool in identifying discrimination has been imported into the statutory human rights context from section 15 Charter jurisprudence. To the extent that the comparator group analysis is a creature of the Charter, the jurisprudence developed in the Charter context is of obvious assistance in understanding the role and limitations of comparator group analyses in statutory human rights cases.

[319] It also bears mentioning that the differences in the analytical frameworks under section 15 of the Charter and statutory human rights cases are narrowing. Indeed, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, the Supreme Court rejected the *Law* decision's focus on human dignity, and refocused the Court's approach to discrimination on the principles outlined in the *Andrews* case: see *Moore*, above at para. 52, Rowles J.A., dissenting (not on this point).

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[320] *Andrews* is an early Charter decision which "closely parallels traditional human rights jurisprudence,,: see *Moore*, above at para. 53, Rowles J.A., dissenting (but not on this point). Indeed, in attempting to define "discrimination,, in *Andrews*, Justice McIntyre drew on established statutory human rights jurisprudence, including the decisions in *O'Malley* and *Action Travail*, above; in articulating the definition of discrimination that has formed the foundation of the section 15(1) Charter analysis.

[321] In *Withler*, above at para. 43, the Supreme Court observed that the application of a strict comparator approach can be detrimental to the goal of substantive equality and to the discrimination analysis.

[322] As summarized in the headnote, *Withler* states that:

> A "mirror comparator group,, analysis may become a search for sameness, may shortcut the substantive equality analysis and may be difficult to apply. While equality is inherently comparative and comparison plays a role throughout the s. 15(1) analysis, a mirror comparator approach can fail to identify - and may, indeed, thwart the identification of - the discrimination at which s. 15 is aimed. What is required is an approach that takes account of the full context of the claimant group's situation, the actual impact of the law on that

> situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

[323] The Supreme Court noted in *Withler* that the central issue in section 15(1) cases is whether the impugned law violates what it described as "the animating norm of s. 15(1)„ namely substantive equality: at para. 2. The Court went on in the same paragraph to observe that in order to determine whether there has been a violation of substantive equality, regard must be had to the "full context„ of the case, "including the law's real impact on the claimants and members of the group to which they belong„.

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[324] The Court cautioned that "[c]are must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the 'proper' comparator group„. According to the Court there was, at the end of the day, only one question, namely "[d]oes the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?„: at para. 2.

[325] The Supreme Court reiterated in *Withler* that equality is an inherently comparative concept. While recognizing that a level of comparison may be "inevitable„ it did not accept that a rigid comparator group analysis is essential in every case. Indeed, the Court cautioned that comparison must be approached with caution, advocating instead for consideration of "the full context of the claimant group's situation and the actual impact of the law on that situation„: at para. 43.

[326] The Court observed that decisions such as *Law*, above, emphasize that the analysis more usefully focuses on "factors that identify impact amounting to discrimination„. These factors

include the "perpetuation of disadvantage and stereotyping as the primary indicators of discrimination„: both quotes from *Kapp*, above at para. 23, as cited in *Withler*, above at para. 53.

[327] Indeed, the Court recognized in *Withler* that there may even be cases *where there is no appropriate comparator group* – such as the circumstances that present themselves in the present case - where no one is like the complainants for the purpose of comparison: see para. 59.

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[328] Quoting Professor Margot Young, the Court cautioned that "[i]f there is no counterpart to the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance„: "Blissed Out: Section 15 at Twenty„ in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: Butterworths, 2006) 45 at 63, as cited in *Withler*, above at para. 59.

[329] The Supreme Court thus concluded that a mirror comparator group analysis "may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive inequality analysis, and may be difficult to apply„. Not only may such an approach fail to identify discrimination, the Court said, it may actually thwart that identification: at para. 60.

[330] While recognizing that the first stage of the subsection 15(1) analysis requires a "distinction„ thus engaging the concept of comparison, the Court nevertheless held in *Withler* that:

> *It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.* Provided that the claimant establishes a distinction

> based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. *It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited* [at para. 63, emphasis added].

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[331] The Court observed that the probative value of comparative evidence will depend on the circumstances of the particular case: at para. 65. In cases where no precise comparator exists due to the complainants' unique situation, a decision-maker may legitimately look at circumstantial evidence of historic disadvantage in an effort to establish differential treatment: see *Withler*, above at para. 64.

viii) ***The Lessons to be Learned from Withler***

[332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure. They are, moreover, the only class of people identified by the Government of Canada for legal purposes on the basis of race.

[333] This creates many unusual or singular situations. Indeed, the *sui generis* nature of the Crown's relationship to First Nations people has long been recognized by the Supreme Court: see, for example, *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55 (QL) at para. 44.

[334] At the same time, no one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society.

[335] As a result of their unique position in the Canadian constitutional order, Canada's First Nations people receive services from the federal government that are not provided to other Canadians at the federal level. These include child welfare services, education services and health care, amongst others.

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[336] This has the effect of placing Canada's First Nations people in the "no man's land,, envisaged by Professor Young, where there may be no counterpart to the experience or profile of those marginalized or dispossessed individuals or groups who are seeking the vindication of their rights through the legal process.

[337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.

[338] The *O'Malley* test is flexible enough to allow the Tribunal to have regard to all of the factors that may be relevant in a given case. These may include historic disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.

[339] Canadian legislation must be interpreted in a manner that is consistent with the Charter. As the Caring Society observed, "[a]n interpretation of the Act that invariably requires a perfect mirror comparator group, and thereby excludes First Nations from the ability to make discrimination claims in respect of government services that other Canadians are able to make, is not consistent with the *Charter* or *Charter* values„: see Memorandum of Fact and Law at para. 81.

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[340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.

ix) ***The Significance of the Repeal of Section 67 of the Canadian Human Rights Act***

[341] The applicants and the Chiefs of Ontario point to the recent repeal of section 67 of the *Canadian Human Rights Act* as evidence of Parliament's intention to be bound by subsection 5(b) of the Act in relation to services that the Government of Canada provides to First Nations people. They further submit that this is a contextual factor supporting a generous interpretation of subsection 5(b) of the Act.

[342] Section 67 of the Act formerly provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act„.

[343] In particular, the AFN and the Chiefs of Ontario point to comments made in the course of Committee hearings leading up to the passage of the Bill repealing section 67. There, Jim Prentice (the then-Minister of Indian Affairs) discussed the significance of the repeal of section 67.

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[344] Minister Prentice testified that the *Canadian Human Rights Act* would now provide a basis for reviewing federal actions, including the quality of services provided by the Government of Canada. In this regard, the Minister stated that:

> The repeal of section 67 will provide [F]irst [N]ation citizens, in particular [F]irst [N]ation women, with the ability to do something that they cannot do right now, and that is to file a grievance in respect of an action either by their [F]irst [N]ation government, or frankly by the Government of Canada, relative to decisions that affect them. This could include access to programs, access to services, ***the quality of services that they've accessed***, in addition to other issues …
>
> Canada, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence*, 39th Parl., 1st Sess. (22 March 2007).

[345] The Government argues that the repeal of section 67 of the *Canadian Human Rights Act* is irrelevant to the issues in this case, as section 67 applies only to decisions authorized by the *Indian Act*, R.S.C., 1985, c. I-5 or its Regulations, which is not the case here. The federal funding of child welfare is not statutorily based, but flows from agreements between the federal government and agency recipients pursuant to the federal spending power.

[346] The Government further submits that the federal spending power is not restricted to matters falling within its legislative authority, and that child welfare falls within provincial jurisdiction: see *NIL/TU,O Child and Family Services Society*, above.

[347] I do not need to consider all of the ramifications that the repeal of section 67 of the *Canadian Human Rights Act* may have for the ability of First Nations people to challenge actions of the Government of Canada. Suffice it to say that my interpretation of subsection 5(b) of the Act is one that is consistent with Parliament's intent in repealing section 67 of the Act.

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x) ***The International Law Arguments***

[348] Amnesty International, the AFN and the Chiefs of Ontario submit that the Tribunal also erred in failing to consider Canada's international human rights obligations in interpreting subsection 5(b) of the *Canadian Human Rights Act*, and that its interpretation of the legislation is inconsistent with Canada's obligations under international law.

[349] Amnesty International provided detailed arguments regarding a number of international instruments, the consideration of which, it says, is necessary to properly interpret section 5(b) of the Act. These include the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 Sept. 1990, accession by Canada 13 Dec. 1991); the *International Covenant on Civil and Political Rights*, 19 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); the *International Covenant on Economic, Social and Cultural Rights*, 19 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); and the *International Convention on the Elimination of all forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 Jan. 1969, accession by Canada 14 Oct. 1970).

[350] Amnesty and the AFN also point to the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) [*UNDRIP*] (which has now been formally endorsed by Canada) as an important indication of the Government of Canada's commitment to treating First Nations peoples fairly and equitably. They further submit that *UNDRIP* also reflects emerging norms in international law regarding the rights of indigenous peoples.

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[351] The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act*. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, 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. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.

[352] While these presumptions are rebuttable, clear legislative intent to the contrary is required: see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53; Sullivan, above at 548.

[353] International instruments such as the *UNDRIP* and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL) at paras. 69-71.

[354] As a result, insofar as may be possible, an interpretation that reflects these values and principles is preferred: see Amnesty International's Memorandum of Fact and Law at para. 29; Sullivan, above at 547-49; *Hape*, above at paras. 53-54; *Baker*, above at paras. 65 and 70; and *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at para. 175.

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[355] I have already explained why the Tribunal's interpretation of subsection 5(b) of the *Canadian Human Rights Act* is unreasonable when considered in light of domestic legal principles. Suffice it to say that my interpretation of the provision also accords more fully with Canada's international obligations than does that of the Tribunal, and is thus to be preferred.

[356] Before leaving this issue, I would observe that a number of Amnesty International's other arguments (which relate to the alleged obligations of the Government of Canada under international law with respect to the provision of child welfare services) are more properly directed to the underlying merits of the applicants' human rights complaint. These arguments need not be addressed in the context of the issues before this Court.

xi) *Summary of Conclusions Regarding the Need for a Comparator Group under Subsection 5(b) of the Act*

[357] Ultimately, the focus of both the Tribunal and of the Court must be on the wording of subsection 5(b) of the *Canadian Human Rights Act*, which makes it a discriminatory practice to "differentiate adversely in relation to any individual [in the provision of services], on a prohibited ground of discrimination„.

[358] The ordinary meaning of the phrase "*differentiate adversely* in relation to any individual„ on a prohibited ground of discrimination is to treat an individual or group differently than one might otherwise have done on the basis of a prohibited ground.

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[359] The Tribunal's interpretation of subsection 5(b) as requiring a comparator group receiving the same services from the same service provider in every case is contrary to the purpose and language of both the French and English versions of the Act, and as such is unreasonable.

[360] The Tribunal's interpretation also leads to consequences that do not fall within the range of possible acceptable outcomes which are defensible in light of the facts and the law. This is because it would deny the protection of the Act to individuals and groups who have been victims of discriminatory practices if they are unable to identify a suitable comparator for the purposes of their complaints.

[361] The Tribunal's interpretation is, moreover, contrary to the teachings of the Federal Court of Appeal in *Morris* that the use of the term "differentiate adversely„ in the Act does not require a complainant to adduce any particular type of evidence in order to prove the facts necessary to establish that he or she was the victim of a discriminatory practice.

[362] The Tribunal's interpretation is also inconsistent with the Supreme Court's decision in *Withler*, which recognizes that reliance on comparator groups is not always necessary - and may even thwart the objective of substantive equality - the animating purpose of both section 15 of the Charter and of the *Canadian Human Rights Act*: see *British Columbia (Public Service Employee*

Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (QL) at para. 41 [*Meiorin*].

[363] Finally, an interpretation of section 5 of the Act that invariably requires a mirror comparator group would exclude First Nations Canadians from the protection of the Act in relation to services provided by the Government of Canada only to Aboriginal people. Unlike other Canadians, First Nations people would be unable to make a complaint under section 5 of the *Canadian Human Rights Act* if they believed that they were the victim of a discriminatory practice in the provision of those services. Such an interpretation of what is intended to be a remedial statute is not consistent with the purpose of the Act, with Charter values, or with Canada's obligations under international law. As such, it is unreasonable.

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[364] This then takes us to the final issue.

[365] Having concluded that a comparator group is always required in order to establish discrimination under subsection 5(b) of the *Canadian Human Rights Act*, the Tribunal went on to find that there was no appropriate comparator group in this case, as the child welfare services provided by the Government of Canada to First Nations children living on reserves could not be compared to provincial child welfare services for the purposes of establishing discrimination under subsection 5(b) of the Act. This finding led the Tribunal to dismiss the applicants' human rights complaint.

[366] As I will explain below, I am of the view that the Tribunal erred by failing to have regard to material evidence in concluding that there was no appropriate comparator group in this case.

C. *The Failure of the Tribunal to Consider Canada's own Choice of Provincial Child Welfare Standards as an Appropriate Comparator*

[367] I have concluded that subsection 5(b) of the *Canadian Human Rights Act* does not require a comparator group in order to establish adverse differential treatment in the provision of services. However, even if I am mistaken in that conclusion, I am satisfied that the Tribunal erred concluding that there was no relevant comparator group in this case. The Tribunal failed to address the parties' submissions in relation to a material fact on the record. As a result, its decision on this point lacks the transparency, intelligibility and justification required of a reasonable decision.

[368] Although the Tribunal characterized the comparator group issue as a "pure question of law", there was a factual component to the Tribunal's analysis. That is, it is implicit in the Tribunal's decision that it determined that no appropriate comparator group existed in this case: see Tribunal's decision at paras. 5, 10-13 and 128-130.

[369] Having determined that a discrimination analysis under subsection 5(b) necessarily required a comparison to be made in order to establish adverse differentiation in the provision of services, the Tribunal determined that it could not compare the child welfare services provided by the Government of Canada with those provided by the provinces.

[370] According to the Tribunal, the grammatical and ordinary sense of the words of subsection 5(b) requires a comparison between the services provided by a single service provider to different

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individuals. To hold otherwise, the Tribunal stated, would be to open floodgates to new types of complaints across jurisdictions or between employers. The Tribunal concluded that nothing in the case law supports such an interpretation.

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[371] The Tribunal was further of the view that allowing what it called a "cross-jurisdictional„ comparison in this case would constitute preferential treatment of the complainant parties, and would have the adverse effect for First Nations of inviting future claims against them, using different First Nations as comparators.

[372] There are two aspects to the Tribunal's finding in this regard: one factual and the other legal. To the extent that the Tribunal determined that there was no appropriate comparator group in this case, that determination is one of mixed fact and law, reviewable on the standard of reasonableness.

[373] The Tribunal's conclusion that there is no appropriate comparator group in this case is unreasonable, as it failed to consider a material fact in determining that there was no appropriate comparator group available in this case. That is, the Tribunal failed to consider the significance of the Government of Canada's own adoption of provincial child welfare standards as the appropriate comparator for the purposes of its child welfare programs.

[374] As was noted earlier in these reasons, the Government of Canada has itself chosen to hold its child welfare programming for First Nations children living on reserves to provincial child welfare standards in its programming manual and funding policies.

[375] The Government's "National Program Manual„ for First Nations Child and Family Services program governs all three of the current policies for the funding and delivery of child welfare services to First Nations children living on reserves. It will be recalled that section 1.3.2 of the Manual provides that the "primary objective„ of the First Nations Child and Family Services program is to support "culturally appropriate„ child welfare services to First Nations children living on reserves "in the best interest of the child, *in accordance with the legislation and standards of the reference province*„ [emphasis added].

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[376] Moreover, Section 6.1 of Directive 20-1 provides that "[t]he department ... is committed to expanding First Nations Child and Family Services on reserve *to a level comparable to the services provided off reserve in similar circumstances*...„ [emphasis added]. Similar language appears in the 1965 Indian Welfare Agreement.

[377] The Caring Society and the AFN specifically addressed this commitment in their complaint form. The implications of the Government's adoption of a provincial comparator for the purpose of its First Nations child welfare programming was, moreover, the subject of vigorous debate before the Tribunal in the course of the hearing of the motion to dismiss.

[378] The Tribunal seemed to be aware that the primary objective of the Government of Canada's First Nations Child and Family Services program was to provide child welfare services to First Nations children living on reserves in accordance with the standards of the reference province: see the Tribunal's decision at paras. 85 and 93.

[379] However, the Tribunal never addressed what, if any, implications this may have in determining that child welfare services provided by the Government of Canada could not be compared with those provided by the provinces. The failure of the Tribunal to come to grips with a key argument advanced by the applicants in support of the Caring Society and AFN's human rights complaint means that this aspect of the Tribunal's decision lacks the justification, transparency and intelligibility required of a reasonable decision.

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[380] The Government of Canada argues that little should be made of its reference to provincial child welfare standards in documents governing its First Nations Child and Family Services program. According to the Government, this is simply a "financial accountability issue„.

[381] It is not for me to assess the significance of the Government's adoption of provincial child welfare service levels and standards for the purpose of its First Nations Child and Family Services program or what implications this may have for the Caring Society and AFN's human rights complaint. I would simply note that this choice is part of "the full context of the claimant group's situation„ and is thus a matter that must be addressed by the Tribunal: *Withler*, above at para. 43.

[382] As the Tribunal noted, the arrangements governing the Government of Canada's funding of child welfare services for First Nations children living on reserves are extremely complex. The Tribunal found that the record before it did not sufficiently explain the true nature of the arrangements surrounding the delivery of the Government's First Nations Child and Family Services program. Nor was information put before the Tribunal with respect to provincial child welfare service standards: see the Tribunal's decision at paras. 7, 76 and 80-97.

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[383] It will be the task of the Tribunal to decide what the implications are of Canada's choice to identify the meeting of provincial child welfare standards as a primary objective of its First Nations Child and Family Services program. That determination will require an appreciation of the relationship between the Government of Canada and the provinces in the funding and delivery of child welfare services and will likely require a far more complete evidentiary record than the one that was before the Tribunal on the motion to dismiss.

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[384] One final note of caution: to the extent that the Tribunal's decision may be read as suggesting that it is never appropriate to look beyond the actions of a respondent service provider or employer for comparative evidence that may assist in establishing discrimination under the Act, the decision is clearly in error.

[385] In the hypothetical case cited earlier where an employer sets out to hire only foreign workers so as to exploit their vulnerability by paying them less, it would be perfectly open to the Tribunal to receive expert evidence regarding the "going rate„ for employees providing similar services to other employers. Expert evidence of market salaries could also assist in the case of the sole employee who believes that she has been paid less by her employer because she is a woman, or black, or a Muslim.

[386] In each case, the probative value of the evidence in question would have to be evaluated by the Tribunal. There is, however, no reason, in principle, why evidence of this nature could not be received to demonstrate that there has been discrimination in a given case.

[387] Indeed, this Court has held that statistical evidence is often a useful tool in identifying discrimination: *Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra)* (1998), 146 F.T.R.106, [1998] F.C.J. No. 432 (QL). Moreover, it is not just statistical evidence regarding the respondent employer's own workforce or employment practices that may be relevant in proving discrimination.

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[388] For example, in *Action Travail*, above, a comparison was made between the percentage of women employed in certain positions within CN and the percentage of women employed in the labour market generally, and in similar blue-collar positions in the same geographic region, in order to demonstrate the under-representation of women in blue-collar positions within CN: see pp. 1123-24.

[389] Indeed, many human rights cases depend upon circumstantial evidence, some of which may involve trends and practices beyond those of the individual respondent. It has often been observed that "[d]iscrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised„: see *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 at D/5038, [1988] C.H.R.D. No. 2 (QL) (C.H.R.T.).

[390] As a result, it may be well be necessary to look beyond the actions of the respondent employer or service provider to see if what was described in *Basi* as "the subtle scent of discrimination„ can be detected: at D/5040.

10. Conclusion

[391] I have thus concluded that although the Tribunal had the power to decide the comparator group issue in advance of a full hearing on the merits of the complaint, the process that it followed in this case was not fair as the Tribunal considered a substantial volume of extrinsic material in arriving at its decision.

[392] I have also concluded that Tribunal erred in failing to provide any reasons as to why the complaint could not proceed under subsection 5(a) of the *Canadian Human Rights Act*.

[393] The Tribunal further erred in interpreting subsection 5(b) of the Act as requiring an identifiable comparator group in every case in order to establish adverse differential treatment in the provision of services.

[394] Finally, in determining that no appropriate comparator group was available to assist in its discrimination analysis, the Tribunal erred in failing to consider the significance of the Government's own adoption of provincial child welfare standards in its programming manual and funding policies.

[395] As a result, the three applications for judicial review are granted. The March 14, 2011 decision of the Tribunal is set aside, and the matter is remitted to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination in accordance with these reasons. In accordance with the agreement of the parties, no order is made as to costs.

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JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. All three applications for judicial review are granted.

2. The March 14, 2011 decision of the Tribunal is set aside, and the matter is remitted to a differently constituted panel of the Canadian Human Rights Tribunal for re-determination in accordance with these reasons.

3. A copy of these reasons shall be placed on Court Files T-578-11, T-630-11 and T-638-11; and

4. Each party shall bear its own costs.

"Anne Mactavish"
Judge

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APPENDIX A

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

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.	**2.** La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.	(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

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6. It is a discriminatory practice in the provision of commercial premises or residential accommodation

(a) to deny occupancy of such premises or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

6. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de locaux commerciaux ou de logements :

a) de priver un individu de leur occupation;

b) de le défavoriser à l'occasion de leur fourniture.

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

...

(c) the complaint is beyond the jurisdiction of the Commission; ...

41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

...

c) la plainte n'est pas de sa compétence; ...

48.1 ... (2) Persons appointed as members of the Tribunal must have experience, expertise and interest in, and sensitivity to, human rights.

...

48.1 ... (2) Les membres doivent avoir une expérience et des compétences dans le domaine des droits de la personne, y être sensibilisés et avoir un intérêt marqué pour ce domaine.

...

48.2... (2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections

48.2 ... (2) Le membre dont le mandat est échu peut, avec l'agrément du président, terminer les affaires dont il est saisi. Il est alors réputé être un membre à temps partiel pour l'application des articles 48.3, 48.6, 50 et 52 à 58.

...

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48.3, 48.6, 50 and 52 to 58.

...

48.9 (1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing

(a) the giving of notices to parties;

(b) the addition of parties and interested persons to the proceedings;

(c) the summoning of witnesses;

(d) the production and service of documents;

(e) discovery proceedings;

(f) pre-hearing conferences;

(g) the introduction of evidence;

(h) time limits within which hearings must be held and decisions must be made; and

(i) awards of interest.

...

49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

...

48.9 (1) L'instruction des plaintes se fait sans formalisme et de façon expéditive dans le respect des principes de justice naturelle et des règles de pratique.

(2) Le président du Tribunal peut établir des règles de pratique régissant, notamment :

a) l'envoi des avis aux parties;

b) l'adjonction de parties ou d'intervenants à l'affaire;

c) l'assignation des témoins;

d) la production et la signification de documents;

e) les enquêtes préalables;

f) les conférences préparatoires;

g) la présentation des éléments de preuve;

h) le délai d'audition et le délai pour rendre les décisions;

i) l'adjudication des intérêts.

...

49. (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.

...

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50. (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

50. (1) Le membre instructeur, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, instruit la plainte pour laquelle il a été désigné; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations.

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

(2) Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie.

(3) In relation to a hearing of the inquiry, the member or panel may

...

(3) Pour la tenue de ses audiences, le membre instructeur a le pouvoir :

...

(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

c) de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

(d) lengthen or shorten any time limit established by the rules of procedure; and

d) de modifier les délais prévus par les règles de pratique;

(e) decide any procedural or evidentiary question arising during the hearing.

...

e) de trancher toute question de procédure ou de preuve.

...

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

51. En comparaissant devant le membre instructeur et en présentant ses éléments de preuve et ses observations, la Commission adopte l'attitude la plus proche, à son avis, de l'intérêt public, compte tenu de la nature de la plainte.

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.

...

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

...

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67. [Repealed, 2008, c. 30, s. 1] Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.	**67.** [Abrogé, 2008, ch. 30, art. 1] La présente loi est sans effet sur la Loi sur les Indiens et sur les dispositions prises en vertu de cette loi.

Canadian Human Rights Tribunal Rules of Procedure (03-05-04)

3. (1) Motions, including motions for an adjournment, are made by a Notice of Motion, which Notice shall	**3.** (1) Les requêtes, y compris les requêtes d'ajournement, sont présentées par voie d'avis de requête. Ledit avis doit
(a) be given as soon as is practicable;	a) être donné dans les plus brefs délais possibles;
(b) be in writing unless the Panel permits otherwise;	b) être communiqué par écrit, à moins que le membre instructeur permette de procéder différemment;
(c) set out the relief sought and the grounds relied upon; and	c) indiquer le redressement recherché et les motifs invoqués à l'appui; et
(d) include any consents of the other parties.	d) préciser tout consentement obtenu des autres parties.
(2) Upon receipt of a Notice of Motion, the Panel	(2) Dès réception de l'avis de requête, le membre instructeur
(a) shall ensure that the other parties are granted an opportunity to respond;	a) doit s'assurer de donner aux autres parties la possibilité de répondre;
(b) may direct the time, manner and form of any response;	b) peut préciser sous quelle forme, de quelle manière et à quel moment la réponse doit être présentée;
(c) may direct the making of argument and the presentation of evidence by all parties, including the time, manner and form thereof;	c) peut donner des directives au sujet de la présentation de l'argumentation et de la preuve par toutes les parties, et préciser notamment sous quelle forme, de quelle manière et à quel moment elles doivent être présentées;
(d) shall dispose of the motion as it sees fit.	d) doit disposer de la requête de la façon qu'il estime indiquée.

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-578-11
STYLE OF CAUSE:	CANADIAN HUMAN RIGHTS COMMISSION v. ATTORNEY GENERAL OF CANADA ET AL
DOCKET:	T-630-11
STYLE OF CAUSE:	FIRST NATIONS CHILD AND FAMILY CARING SOCIETY v. ATTORNEY GENERAL OF CANADA ET AL
DOCKET:	T-638-11
STYLE OF CAUSE:	ASSEMBLY OF FIRST NATIONS v. ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 13, 14 and 15, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	April 18, 2012

APPEARANCES:

Mr. Philippe Dufresne Mr. Daniel Poulin Ms. Samar Musallam	FOR THE APPLICANT (CANADIAN HUMAN RIGHTS COMMISSION)
Mr. Nicholas McHaffie Ms. Sarah Clarke	FOR THE APPLICANT (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
Mr. David Nahwegahbow Ms. Joanne St. Lewis	FOR THE APPLICANT (ASSEMBLY OF FIRST NATIONS)

2012 FC 445 (CanLII)

Mr. Jonathan D.N. Tarlton Ms. Melissa Chan	FOR THE RESPONDENT (ATTORNEY GENERAL OF CANADA)
Mr. Michael Sherry	FOR THE RESPONDENT (CHIEFS OF ONTARIO)
Mr. Justin Safayeni	FOR THE RESPONDENT (AMNESTY INTERNATIONAL)

2012 FC 445 (CanLII)

SOLICITORS OF RECORD:

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STOCKWOODS LLP Barristers Toronto, Ontario	FOR THE RESPONDENT (AMNESTY INTERNATIONAL)

This is Exhibit "J" to the affidavit of
Cindy Blackstock, sworn before me this
22nd day of November, 2013

A Commissioner for taking Affidavits etc.

Shannon Marie Kack, a Commissioner, etc.,
Province of Ontario, while a student-at-law.
Expires September 13, 2016

Federal Court of Appeal | Cour d'appel fédérale

Date: 20130311

Docket: A-145-12

Citation: 2013 FCA 75

2013 FCA 75 (CanLII)

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY, ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL

Respondents

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on March 6, 2013.

Judgment delivered at Ottawa, Ontario, on March 11, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

2013 FCA 75 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

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2013 FCA 75 (CanLII)

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

CANADIAN HUMAN RIGHTS COMMISSION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY, ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL

Respondents

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Attorney General appeals from the judgment dated April 18, 2012 of the Federal Court (*per* Mactavish J.): 2012 FC 445. For the following reasons, I would dismiss the appeal without costs.

2013 FCA 75 (CanLII)

A. Introduction

[2] This matter arises from a complaint under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, brought by the respondents, the First Nations Child and Family Caring Society and the Assembly of First Nations (the "complainants"). The complainants allege that the Government of Canada has engaged in prohibited discrimination by under-funding child welfare services for on-reserve First Nations children, and denying them services available to other Canadian children.

[3] The Canadian Human Rights Commission referred the complaint to the Canadian Human Rights Tribunal for hearing.

B. Proceedings before the Tribunal

[4] Before the Tribunal, the Attorney General brought a preliminary motion alleging that the complaint could not succeed. The Tribunal granted the motion and quashed the complaint: 2011 CHRT 4.

[5] The Tribunal considered the complaint to raise paragraph 5(*b*) of the Act, not paragraph 5(*a*) of the Act. Section 5 of the Act reads as follows:

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

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

2013 FCA 75 (CanLII)

[6] The Tribunal considered whether the complainants could establish that the Government of Canada "differentiate[d] adversely„ under paragraph 5(*b*) of the Act concerning its funding for assistance programs for Aboriginal children. On its view of paragraph 5(*b*), the Tribunal concluded that in order to succeed, the complainants would have to point to some other similarly situated group, such as another group receiving the same assistance programs from the Government of Canada.

[7] The Tribunal's conclusion is best seen in the following passages in the Tribunal's reasons (at paragraphs 10-12):

> [10] In order to find that *adverse differentiation* exists, one has to compare the experience of the alleged victims with that of someone else receiving those *same* services from the *same* provider. How else can one experience *adverse differentiation*? These words of the [Act] must be accorded their clear meaning as intended by Parliament. These words are unique to the CHRA.... These words... requir[e] a comparative analysis.... Further the complaint itself seeks a comparison. The heart of the complaint involves comparing [Indian and Northern Affairs Canada's] funding to provincial funding.
>
> [11] Regarding the issue of choice of comparator, the parties agree that [Indian and Northern Affairs Canada] does not fund or regulate child welfare for off-reserve children. The provision of child welfare to off reserve children is entirely a provincial matter.... Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) [sic] of the Act? The answer is no.

> [12] The Act does not allow a comparison to be made between *two different* service providers with *two different* service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared. [emphasis in original]

2013 FCA 75 (CanLII)

Accordingly, the Tribunal held that the complainants could not succeed under paragraph 5(*b*) of the Act and quashed the complaint: there is no relevant comparator group because the Government of Canada does not provide welfare funding for any other children.

C. Proceedings before the Federal Court

[8] The Federal Court set aside the Tribunal's decision for two reasons:

(1) *The decision was substantively unreasonable*. The Federal Court identified three matters that took the Tribunal's decision outside of the range of the acceptable and defensible and made it unreasonable:

- The Tribunal improperly characterized the complaint as raising only paragraph 5(*b*). The complaint also raised paragraph 5(*a*). The Tribunal did not deal with paragraph 5(*a*) of the Act, as it should have. (See Reasons, at paragraphs 207-221.)

- By making the existence of a comparator group a mandatory requirement in paragraph 5(*b*), the Tribunal adopted a "rigid and formulaic interpretation" of paragraph 5(*b*), an interpretation that was "inconsistent with the search for

substantive equality mandated by the [Act] and Canada's equality jurisprudence„ (Reasons, at paragraph 9). A comparator group might be evidence that is helpful on the issue of discrimination, but is not a prerequisite to a finding of discrimination. In the Federal Court's words (at paragraph 290): "A comparator group is not part of the *definition* of discrimination„ but is "an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases„ [emphasis in original]. (See also Reasons, at paragraphs 280-315.)

- In the alternative, even if the complainants had to point to a comparator group, the Tribunal unreasonably found that one did not exist – in its funding policies, the Government of Canada has adopted provincial child welfare standards. (See Reasons, at paragraphs 367-390.)

(2) *The decision was procedurally unfair*. The Tribunal improperly considered a large volume of extrinsic material in arriving at its decision. (See Reasons, at paragraphs 167-204.)

[9] The Attorney General appeals to this Court.

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D. The substantive reasonableness of the decision

[10] The Federal Court reviewed the Tribunal's decision on the basis of the deferential standard of reasonableness: Reasons, at paragraphs 234-240. This was the proper standard of review. Reasonableness is the presumptive standard of review of a tribunal's interpretation of its own statute: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 34. Further, the Supreme Court has recently confirmed reasonableness to be the presumptive standard of review when the Tribunal is interpreting the Act: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paragraphs 15-27 (also known as the *Mowat* decision).

2013 FCA 75 (CanLII)

[11] The Attorney General submits that the Federal Court misapplied the reasonableness standard by adopting an insufficiently deferential posture. In particular, the Attorney General says the Federal Court developed its own interpretation of paragraph 5(*b*) and used it as a yardstick to judge the Tribunal's interpretation.

[12] I disagree. A review of the Federal Court's reasons as a whole shows that it appreciated the test for reasonableness – whether the Tribunal's decision falls within a range of acceptability and defensibility on the facts and the law – and applied it deferentially: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47.

[13] As the Attorney General accepted in argument before us, one must remember that the range of acceptability and defensibility "takes its colour from the context,,, widening or narrowing

depending on the nature of the question and other circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; and see also *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50.

2013 FCA 75 (CanLII)

[14] In this case, the range is relatively narrow. The Tribunal's decision primarily involves statutory interpretation – a matter constrained by the text, context and purpose of the statute. It also involves equality law – a matter constrained by judicial pronouncements. In this case, the Tribunal had less room to manoeuvre than in a case turning upon one or more of factual appreciation, fact-based discretions, administrative policies, or specialized experience and expertise not shared by the reviewing court on the particular point in issue.

[15] The Supreme Court's decision in *Mowat*, *supra* – also involving a review of the Tribunal's interpretation of the Act – illustrates this well. There, the Supreme Court reviewed the Tribunal on the basis of the deferential standard of reasonableness. However, acting under that standard, the Supreme Court engaged in an exacting review of the Tribunal's decision, a review more exacting than that of the Federal Court in this case. Some might describe what the Supreme Court did in *Mowat* as disguised correctness review. I disagree. *Mowat* is reasonableness review, still deferential, conducted in recognition that, as far as the Supreme Court was concerned, the Tribunal had only a narrow range of acceptability and defensibility open to it, given the constrained nature of the matter before it. Within that range, the Tribunal was entitled to deference. For similar examples, see *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 and

Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 S.C.R. 345.

[16] In this case, the Federal Court concluded that the Tribunal's interpretation of paragraph 5(*b*) – an interpretation requiring the complainants to point to a similarly situated comparator group in order to succeed – was outside the range of acceptability and defensibility and, thus, was unreasonable. In reaching this conclusion, the Federal Court relied upon the following matters, each of which it found to be inconsistent with the Tribunal's interpretation:

- the text of paragraph 5(*b*) (Reasons, at paragraphs 251-275);

- the surrounding wording in the Act and the wider context, including the repeal of section 67 of the Act (Reasons, at paragraphs 276-279 and 341-347);

- the purposes underlying the Act (Reasons, at paragraphs 243-250);

- this Court's jurisprudence concerning similar provisions of the Act (Reasons, at paragraph 299; and see, e.g., *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154);

- Canada's international obligations, with which Canada's domestic legislation is presumed to accord unless ousted by clear, contrary legislative intent (Reasons, at

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paragraphs 348-356; and see *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paragraph 53); and

- Canada's equality jurisprudence, including the recent diminution of the role of comparator groups in the equality analysis ((Reasons, at paragraphs 280-340). The Federal Court's analysis reflects the position articulated by the Supreme Court in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at paragraph 59: in some cases "finding a mirror [comparator] group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison.„ See also *Withler* at paragraphs 2, 3, 45-48, 55 and 80-81.

2013 FCA 75 (CanLII)

[17] Despite the able submissions of the Attorney General, I am not persuaded that the Federal Court erred in its conclusion that the Tribunal's decision was unreasonable. To the contrary, the careful, reflective and scholarly reasoning of the Federal Court amply demonstrates that the Tribunal's decision fell outside the range of the acceptable and defensible and, thus, was unreasonable.

[18] On the inconsistency between the Tribunal's decision requiring the complainants to show a comparator group under paragraph 5(*b*) and Canada's equality jurisprudence, cases postdating the Federal Court's decision have confirmed the reduced role of comparator groups in the equality analysis:

- In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy„ (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period„ (at paragraph 60).

- In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply„: *Withler*, supra at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative role was given to the existence of a comparator group – similar to what the Tribunal did here.

In light of these recent cases, the Tribunal's decision lies even further outside of the range of reasonableness.

2013 FCA 75 (CanLII)

[19] In oral submissions, the Attorney General questioned the Federal Court's examination of cases under section 15 of the Charter instead of restricting its analysis to cases specific to the Act. In my view, the Federal Court *had* to have regard to the Charter cases – and the same can be said for the Tribunal. The equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and *vice versa*: see *e.g.*, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pages 172-176; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paragraph 27; *Moore*, *supra* at paragraph 30; *A.*, *supra* at paragraphs 319 and 328.

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[20] As mentioned previously, the Federal Court based its conclusion of unreasonableness upon a second ground: the Tribunal's failure to consider the complaint under paragraph 5(*a*) of the Act. Here, in my view, the Federal Court's analysis is unimpeachable. The complaint refers globally to "section 5" (*i.e.*, both paragraphs 5(*a*) and 5(*b*)), certain of the allegations in the complaint do raise matters that potentially fall under paragraph 5(*a*), and earlier proceedings show that paragraph 5(*a*) was part of the complaint: Reasons, at paragraphs 216-220.

[21] The Federal Court relied upon an alternative ground for its finding of unreasonableness, namely that comparison with the provinces might be appropriate in light of the Government of Canada's adoption of provincial child welfare standards in its funding policies. I prefer not to comment upon this. The legal significance and factual relevance of the Government of Canada's adoption of provincial child welfare standards in its funding policies – and, for that matter, larger issues such as whether comparison can be made to provincial child welfare funding and whether

provincial funding constitutes relevant evidence deserving of weight in the analysis of discrimination – is best left for the Tribunal to consider alongside all of the evidence it will receive.

[22] In this regard, it bears recalling that discrimination is a broad, fact-based inquiry. Among other things, it requires "going behind the facade of similarities and differences„ and taking "full account of social, political, economic and historical factors concerning the group„: *Withler*, *supra* at paragraph 39. Consequently, the relevance and significance of particular facts, such as the existence or non-existence of a comparator, will vary in the circumstances. As the Supreme Court wrote in *Withler*, "the probative value of comparative evidence…will depend on the circumstances„ (at paragraph 65).

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[23] Accordingly, nothing in these reasons should be taken to express any view concerning what relevance and significance, if any, the Tribunal should assign to any of the evidence placed before us in this appeal. These matters will be for the Tribunal to decide in accordance with proper legal principles.

E. Procedural fairness

[24] The Tribunal considered material outside of the formal record on the motion. Accepting, for the sake of argument, this material is "extrinsic„ I agree with the Federal Court that the Tribunal committed procedural unfairness in the circumstances of this important and hard-fought motion to dismiss the complaint. In these circumstances, the parties were entitled to know exactly what the Tribunal was considering and to have the opportunity to address it.

[25] The Attorney General submits that the respondents have not shown any prejudice arising from the Tribunal's consideration of extrinsic evidence and so the Federal Court should not have set aside the Tribunal's decision.

2013 FCA 75 (CanLII)

[26] The Attorney General is correct that in an appropriate case a court may find a lack of prejudice and, in its discretion, decide to leave the procedurally-flawed decision in place: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. However, on the facts before it, the Federal Court exercised its discretion to the contrary: Reasons, at paragraph 204. This Court can reverse the Federal Court's fact-based discretion only upon demonstration of palpable and overriding error or failure to give weight to all relevant considerations: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 at paragraph 43; *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37 at paragraph 31. No such error has been shown here.

F. Disposition

[27] The parties have agreed that there should be no costs. Accordingly, I would dismiss the appeal without costs.

"David Stratas"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Wyman W. Webb J.A."

2013 FCA 75 (CanLII)

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

2013 FCA 75 (CanLII)

DOCKET:	A-145-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MACTAVISH DATED APRIL 17, 2012, DOCKET NOS. T-578-11, T-630-11 AND T-638-11	
STYLE OF CAUSE:	The Attorney General of Canada v. Canadian Human Rights Commission *et al.*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 6, 2013
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Pelletier and Webb JJ.A.
DATED:	March 11, 2013

APPEARANCES:

Jonathan D.N. Tarlton Melissa Chan	FOR THE APPELLANT, Attorney General of Canada
Philippe Dufresne Daniel Poulin Samar Musallam	FOR THE RESPONDENT, Canadian Human Rights Commission
Nicholas McHaffie Sarah Clarke	FOR THE RESPONDENT, First Nations Child and Family Caring Society
David C. Nahwegahbow Stuart Wuttke	FOR THE RESPONDENT, Assembly of First Nations
Michael W. Sherry	FOR THE RESPONDENT, Chiefs of Ontario

Justin Safayeni	FOR THE RESPONDENT, Amnesty International
Christopher A. Wayland Steven Tanner	FOR THE INTERVENER, Canadian Civil Liberties Association

SOLICITORS OF RECORD:

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Nahwegahbow, Corbiere Rama, Ontario	FOR THE RESPONDENT, Assembly of First Nations
Michael W. Sherry Mississauga, Ontario	FOR THE RESPONDENT, Chiefs o Ontario
Stockwoods LLP Toronto, Ontario	FOR THE RESPONDENT, Amnesty International
McCarthy Tétrault LLP Toronto, Ontario	FOR THE INTERVENER, Canadian Civil Liberties Association

2013 FCA 75 (CanLII)

Court File No. A-158-13

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

AFFIDAVIT OF SPENSER CHALMERS
(sworn December 3, 2013)

I, **SPENSER CHALMERS**, of the City of Oshawa, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a law clerk with Hensel Barristers, counsel for the proposed intervener, the First Nations Child and Family Caring Society. As such, I have personal knowledge of the matters hereinafter deposed to, save and except for those matters stated to be on information and belief and where so stated, I believe them to be true.

2. Attached hereto as **Exhibit "A"** is a copy of the consent of the Respondents for the First Nations Child and Family Caring Society motion to intervene in this appeal.

3. Attached hereto as **Exhibit "B"** is a copy of a letter from Melissa Chan, counsel for the Appellant, advising the Appellant will not consent to the First Nations Child and Family Caring Society's motion to intervene.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on December 3, 2013.

Commissioner for Taking Affidavits

Sarah Clarke

Spenser Chalmers

This is Exhibit "A" to the affidavit of Spenser Chalmers, sworn before me this 3rd day of December, 2013

A Commissioner for taking Affidavits etc.

Sarah Clarke

Court File No. A-158-13 372

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

CONSENT

(MOTION FOR LEAVE TO INTERVENE)

The parties hereto, by their lawyers, hereby consent to the issuance of an order granting the First Nations Child and Family Caring Society leave to intervene in Court File No. A-158-13.

Date: December 3, 2013

per: with authority

Paul Champ
Champ and Associates
43 Florence Street
Ottawa, Ontario
K2P OW6

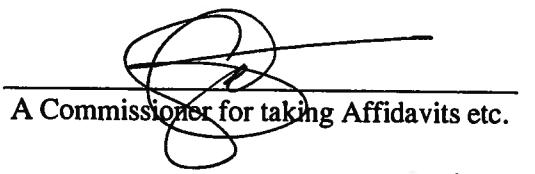
Lawyers for the Respondents,
Pictou Landing Band Council
and Maurina Beadle

Date: December 3, 2013

Johnathan D.N. Tarlton
Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke Street
Halifax NS B3J 1P3

Lawyers for the Appellant,
The Attorney General of Canada

This is Exhibit "B" to the affidavit of Spenser Chalmers, sworn before me this 3rd day of December, 2013



A Commissioner for taking Affidavits etc.

Sarah Clarke

Department of Justice Canada
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Our File: Notre dossier: AR-17-86309-1

Your file: Votre dossier: unknown

3/5

Via Facsimile

November 21, 2013

Sarah Clarke
Hensel Barristers
171 East Liberty Street, Suite 211
Toronto, Ontario
M5K 3P6

Dear Ms. Clarke:

Re: *Attorney General of Canada v Pictou Landing Band Council et al*
Court File No.: A-158-13

Thank you for your correspondence dated November 13, 2013 advising that the First Nations Child and Family Caring Society plans to seek leave to intervene in the above-noted matter.

I am writing to advise that the Attorney General of Canada will not be providing its consent to your motion to intervene, as we do not agree that the test for intervention has been satisfied.

Yours truly,

Melissa Chan
Counsel
Civil Litigation and Advisory Services

/snc

Canada

Court File No. A-158-13

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FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

MEMORANDUM OF FACT AND LAW OF THE PROPOSED INTERVENER FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

HENSEL BARRISTERS
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Lawyers for the Proposed Intervener,
First Nations
Child and Family Caring Society

TO: Jonathan D.N. Tarlton / Melissa Chan
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Counsel for the Appellant

AND TO: Paul Champ
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Ottawa, Ontario K2P 0W6
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Counsel for the Respondents

INDEX

PART I - STATEMENT OF FACT

A. Overview

1. The proposed intervener, the First Nations Child and Family Caring Society (the "Caring Society) is the only national organization with the specific mandate to promote the welfare of First Nations children and families. The Caring Society provides research, training, public education, networking and policy expertise in First Nations child welfare and children's rights, nationally and internationally.

2. The Caring Society seeks leave to intervene in this appeal to provide this Honourable Court with an important and unique perspective as to the interpretation and application of Jordan's Principle. The Caring Society was intimately involved in developing and drafting Jordan's Principle. As such, the Caring Society will provide insight and assistance to this Honourable Court with respect to the ramifications for First Nations children living primarily on reserve of narrowly construing Jordan's Principle as well as the implications for Canada pursuant to its obligations under the United Nations Convention on the Rights of the Child (the "CRC").

3. Jordan's Principle is a child first principle ensuring First Nations children can access public services on the same terms as all other Canadian children. It states that where a government service is available to all other children and a jurisdictional dispute arises between Canada and the province/territory, or between departments in the same government, regarding payment for services to a First Nations child, the government of first contact pays for the services and can seek reimbursement from the other level of government/department after the child has received the service.

4. The Caring Society has a direct and substantial interest in the issues raised on this appeal, and in particular the interpretation and application of Jordan's Principle. The unique and historical status of First Nations peoples is such that many services ordinarily provided to Canadians by the provinces and territories are provided to First Nations peoples by the federal government, through agencies funded and controlled by Aboriginal Affairs and Northern Development Canada ("AANDC"). Jordan's Principle is a procedural mechanism developed to ensure that First Nations children living primarily on-reserve have access to, and receive, the

same public services and benefits on the same terms as other Canadian children. If Jordan's Principle is narrowly construed and limited, First Nations children will be precluded from accessing a procedural mechanism designed to redress any and all unfair, inadequate or discriminatory service provision. 380

5. The Caring Society also has a direct interest in the issues and outcome of this appeal as a party to current litigation. A complaint filed by the Caring Society with the Canadian Human Rights Commission in respect of certain social services provided by the federal government is currently before the Canadian Human Rights Tribunal (the "Complaint"). The Complaint also deals with the federal government's failure to adequately implement Jordan's Principle. This Honourable Court's decision in the present appeal is likely to have a direct and significant impact on the outcome of the Complaint.

6. If granted leave to intervene in this appeal, the Caring Society will provide submissions to this Honourable Court regarding the following issues:

(a) the interpretation and application of a "child-first" principle in the context of Jordan's Principle;

(b) the inappropriateness of narrowly construing Jordan's Principle, and the potential impact of such an approach on First Nations children living primarily on reserve; and

(c) the impact of narrowly construing Jordan's Principle on Canada's obligations under the CRC.

B. Mandate of the Caring Society

7. For more than ten years, the Caring Society has engaged in research, training, networking, policy expertise, and public engagement on behalf of First Nations agencies that serve the well-being of First Nations children, youth and families, including those living on reserve. As a national non-profit organization, the Caring Society provides quality resources to communities to draw upon and to assist them in developing community-focused solutions.[1]

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[1] Affidavit of Cindy Blackstock, sworn November 22, 2013 (the "Blackstock Affidavit"), at para. 5, Motion Record of the Proposed Intervener, the First Nations Child and Family Caring Society (the "Motion Record"), Tab 2, p. 9

8. The Caring Society works closely with First Nations communities, both through grassroots initiatives, such as its Touchstone of Hope program, and on issues of regional and national concern in collaboration with leadership organizations, including the Assembly of First Nations ("AFN"), the Assembly of Manitoba Chiefs ("AMC") and the Norway House Cree Nation ("Norway House").[2]

9. The Caring Society works with, and acts as a voice for, First Nations children and families, nationally and internationally. At the national level, the Caring Society has initiated Canada-wide research, youth-engagement, and family reconciliation initiatives, all aimed at improving the safety and well-being of First Nations children, youth and families.[3]

10. Internationally, the Caring Society has represented the interests of First Nations child and family service agencies in submissions to the United Nations Committee on the Rights of the Child (the "UNCRC"), the United Nations Permanent Forum on Indigenous Issues, the Committee on Economic, Social and Cultural Rights, and the Sub Group on Indigenous Child Rights. The Caring Society has also made presentations in South Africa, New Zealand, Norway, Ireland, Taiwan, Australia and the United States. The Caring Society has and continues to partner with international child welfare organizations, including the Child Welfare League of America and the National Indian child Welfare Association in the United States.[4]

11. The Caring Society's most important and urgent work, however, has been its research, policy work and public education and engagement to promote equitable, culturally based and evidence informed services for First Nations children. More particularly, the Caring Society seeks to remedy longstanding inequalities in the federal government's provision of child welfare, education and health services to First Nations children primarily resident on reserve as compared to what other children in Canada receive.

12. For instance, the Caring Society was granted intervener status at the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61, where the Caring Society made submissions regarding the inappropriateness of strictly requiring a formal comparator group

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[2] Blackstock Affidavit, paras. 10-12, 17, Motion Record, Tab 2, pp. 10-12
[3] Blackstock Affidavit, paras. 7, 9-12, Motion Record, Tab 2, pp. 9-11

for the purposes of the discrimination analysis under human rights legislation.[5] The Caring Society has also worked with First Nations, First Nations organizations and the family of the late Shannen Koostachin to promote Shannen's Dream.[6]

13. Shannen's Dream is an initiative to promote and secure access to equitable and culturally based education for First Nations children and youth. As a young leader, Shannen Koostachin of Attawapiskat First Nation dreamt of safe and proper schools and culturally based education for First Nations children and youth. She worked tirelessly to try to convince the federal government to give First Nations children proper schools and equitable education before her tragic death in 2010 at the age of 15 years old. The Caring Society promotes Shannen's Dream by calling on the federal government to implement the Shannen's Dream Motion 571, which was unanimously adopted by Parliament in 2012.[7]

C. Jordan's Principle

14. Jordan's Principle is named after Jordan River Anderson, a five-year-old child from Norway House in Manitoba who died in a Winnipeg hospital in 2005. Although cleared by doctors to return home, Jordan's illness meant he was unable to live at home without in-home care. The governments of Canada and Manitoba disagreed as to which of them should pay for Jordan's in-home care, given his on-reserve First Nations status. As a result of this disagreement, Jordan remained in a hospital room until he died at the age of five, never having the opportunity to live in a family home.[8]

15. In memory of Jordan, and in keeping with the non-discrimination provisions of the *Charter of Rights and Freedoms* as well as the CRC, the Caring Society worked with Jordan's family, Norway House, AMC, and AFN to develop and promote Jordan's Principle.[9] Recognizing the significant work done by Jordan's family, community and others to advocate for a child first policy to resolve these disputes, Dr. Cindy Blackstock, Executive Director of the

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[4] Blackstock Affidavit, para. 13, Motion Record, Tab 2, p. 11
[5] Blackstock Affidavit, at para. 14, Motion Record, Tab 2, p. 11; *Moore v. British Columbia (Education)*, 2012 SCC 61, Exhibit "A" to the Blackstock Affidavit, Tab 2-A, pp. 20-63
[6] Blackstock Affidavit, paras. 11, Motion Record, Tab 2, p. 10
[7] Blackstock Affidavit, at para. 12, Motion Record, Tab 2, pp. 10-11
[8] Blackstock Affidavit, at para. 16, Motion Record, Tab 2, pp. 11-12
[9] Blackstock Affidavit, at para. 17, Motion Record, Tab 2, p. 12

Caring Society, drafted the language now known as "Jordan's Principle". The Caring Society also hosts the Jordan's Principle website (www.jordansprinciple.ca).[10]

16. Jordan's Principle is a child first principle ensuring First Nations children can access public services on the same terms as all other Canadian children. It states that where a government service is available to all other children and a jurisdictional dispute arises between Canada and the province/territory, or between departments in the same government, regarding payment for services to a First Nations child, the government of first contact pays for the services and can seek reimbursement from the other level of government/department after the child has received the service.[11]

17. The Caring Society was significantly involved in the development and drafting of the motion presented in the House of Commons regarding Jordan's Principle. Dr. Blackstock worked closely with Jean Crowder, the Member of Parliament who prepared Private Members Motion 296 and introduced it to the House of Commons. On December 12, 2007, the motion passed unanimously.[12]

18. It is the Caring Society's position that the federal government has not implemented Jordan's Principle pursuant to Parliament's intentions and the language of Motion 296. As a result, First Nations children living primarily on reserve continue to be unjustly denied public services available to all other Canadian children or, at the very least, are required to meet additional eligibility criteria prior to receiving the service. In particular, Canada has tried to narrow Jordan's Principle by applying it only to children with complex medical needs with multiple service providers.[13]

19. As a result, the Caring Society has been actively involved in promoting Jordan's Principle, stating that it ought to be implemented as it was intended, both on the national and international stage. Indeed, the Caring Society has been submissions to the Standing Committee on Aboriginal Affairs and Northern Development. The Caring Society also

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[10] Blackstock Affidavit, at para. 18, Motion Record, Tab 2, p. 12
[11] Blackstock Affidavit, at para. 19, Motion Record, Tab 2, p. 12
[12] Blackstock Affidavit, at paras. 15, 20 and 21, Motion Record, Tab 2, pp. 11-13
[13] Blackstock Affidavit, at para. 22, Motion Record, Tab 2, p. 13

monitors Canada's obligations to indigenous children under the CRC and recently presented a report to the UNCRC regarding the federal government's failure to implement Jordan's Principle.[14]

D. The Caring Society's Human Rights Complaint

20. As part of its public engagement and policy efforts, the Caring Society collaborated with the AFN to file a joint complaint (the "Complaint") with the Canadian Human Rights Commission (the "Commission") on February 23, 2007.[15]

21. The Complaint alleges that the Government of Canada discriminates by providing inequitable benefit in child welfare services to First Nations children living on reserve. This inequitable benefit is linked to the federal government's flawed and inequitable funding policies, practices and services for on-reserve child welfare agencies and First Nations children who are primarily resident on reserve. The Complaint asserts that the child and family service program funded and controlled by AANDC uses flawed and inequitable funding policies, practices and services resulting in inequitable child welfare services and benefits for on-reserve First Nations children compared to those services received by children living off reserve, contrary to the *Canadian Human Rights Act* (the "Act").[16]

22. The Complaint also alleges that the federal government's failure to fully and properly implement Jordan's Principle results in First Nations children being denied or delayed receipt of public services available to other children, contrary to the Act.[17]

23. While the Complaint was initially dismissed by the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal"), the Caring Society, along with the AFN and the Commission, successfully sought judicial review of the Chairperson's decision. The Attorney General appealed the Federal Court's decision, and the Federal Court of Appeal dismissed the

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[14] Blackstock Affidavit, at paras. 22 and 25, Motion Record, Tab 2, pp. 13-14
[15] Blackstock Affidavit, at para. 27, Motion Record, Tab 2, p. 14; Complaint, Exhibit "G" to the Blackstock Affidavit, Motion Record, Tab 2-G, pp. 167-170
[16] Blackstock Affidavit, at para. 27, Motion Record, Tab 2, p. 14
[17] Blackstock Affidavit, at para. 28, Motion Record, Tab 2, p. 14

appeal. The Complaint is currently being heard on its merits by the Tribunal and closing arguments are expected to be complete in the spring of 2014.[18]

PART II - POINTS IN ISSUE

24. It is respectfully submitted that the sole question raised by this motion is whether the proposed intervener, the Caring Society, satisfies the requirements of Rule 109 of the *Federal Court Rules* for leave to intervene.

PART III - SUBMISSIONS

A. The Test for Determining a Motion for Leave to Intervene

25. Rule 109 of the *Federal Court Rules* provides that a proposed intervener must (a) describe how the proposed intervener wishes to participate in the proceeding, and (b) how that participation will assist the determination of a factual or legal issue related to the proceeding. Rule 109 further provides that the Court shall give direction on the service of documents and the role of the intervener should leave be granted.[19]

26. The Federal Court recently reiterated the principles to be considered on a motion for leave to intervene. Relying on this Honourable Court's decision in *Boutique Jacob Inc. v. Paintainer Ltd.*, 2006 FCA 426, Chief Justice Crampton noted that it is necessary to consider the following factors in determining whether to allow a motion to intervene, although it is not necessary that all factors be met:

(a) Is the proposed intervener directly affected by the outcome?

(b) Does there exist a justiciable issue and a veritable public interest?

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention of the proposed third party?

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[18] Blackstock Affidavit, at para. 29-32, Motion Record, Tab 2, pp. 14-15

[19] Rule 109(2) and (3), *Federal Court Rules*, SOR/98-106

(f) Can the Court hear and decide the cause on its merits without the proposed intervener?[20]

27. In *Globalive Wireless Management Corp. v. Public Mobile Inc.* this Honourable Court also noted that a proposed intervener will assist the Court in a useful way and bring to bear a different perspective and expertise concerning the issues on which they seek to intervene.[21]

28. It is respectfully submitted that each of these criteria are amply met by the Caring Society in the present case and that the interests of justice will be better served should leave to intervene be granted to the Caring Society.

B. The Caring Society's Interest in this Appeal

29. The Caring Society and the community it represents have a direct and important interest in the outcome of this appeal. In particular, this Honourable Court may determine the breadth and applicability of Jordan's Principle. As set out further below, the determination of this issue would have significant implications not only for the Complaint, but also for the First Nations community as a whole.

1) The Complaint

30. The Caring Society has a direct stake in the present appeal, which raises the issue of the interpretation and application of Jordan's Principle. This question is one of the focal points of the Caring Society's complaint and is squarely before the Tribunal. This Honourable Court's decision on this issue will have a direct and significant impact on the outcome of the Complaint.

2) The First Nations Community

31. Because of their unique status under s. 91(24) of the *Constitution Act, 1867*, First Nations peoples receive numerous services from the federal government through agencies funded and controlled by AANDC, rather than from the provinces or territories, which provide and/or fund such services to other Canadians. Child welfare and certain health care services to on-reserve First Nations children are two such examples.[22]

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[20] *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583, paras. 50 and 51, Motion Record, Tab 5, p. 400
[21] *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119, Motion Record, Tab 6, pp. 403-405
[22] Blackstock Affidavit, at para. 37, Motion Record, Tab 2, p. 16

32. Where it is alleged that a service otherwise available to the public off reserve via the provinces/territories and is denied or adversely provided to primarily on-reserve First Nations children by the federal government, Jordan's Principle is the only procedural mechanism available to redress this inequality. Should leave to intervene be granted, the Caring Society will submit that it could not have been Parliament's intention to exclude on-reserve First Nations children from human rights protections when it unanimously passed Motion 296.[23]

33. It is therefore respectfully submitted that the outcome of this case will have significant ramifications not only in respect to the Complaint, but for all First Nations children, youth and families seeking redress for discrimination through the application of Jordan's Principle. From a national policy perspective, the First Nations community has no other means to have their interests represented before this Honourable Court and to ensure that this Honourable Court has the full opportunity to consider the impact of narrowly construing Jordan's Principle on the First Nations community.

C. The Different Perspective of the Caring Society

34. As the only national First Nations child welfare and child rights expert organization, the Caring Society brings a perspective different from those of the immediate parties. The Caring Society is the only party or proposed intervener seeking to make submissions regarding the interpretation and application of a "child-first" principle and how it applies to Jordan's Principle. Indeed, the Caring Society was intimately involved in drafting Jordan's Principle and can provide a unique perspective in this regard.

35. The Caring Society is also seeking to provide this Honourable Court with insight into the adverse and discriminatory effect of Canada's narrow interpretation of Jordan's Principle on First Nations communities. Finally, the Caring Society is the only party or proposed intervener seeking to make submissions on the impact of narrowly construing Jordan's Principle on Canada's obligation under the CRC.

36. The Caring Society has a long history of engagement and research on issues of discrimination affecting First Nations communities, on and off reserve, involving both federal

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[23]Blackstock Affidavit, at paras. 37-38, Motion Record, Tab 2, pp. 16-17

and provincial/territorial governments, and agencies providing a variety of services. The Caring Society is therefore well situated to provide useful input from this different perspective.

D. Submissions to be Advanced by the Caring Society

37. In the decision below, the Federal Court held that Jordan's Principle requires that the first agency contacted must respond with "child-first decisions", leaving jurisdictional and funding decisions to be dealt with later.[24] The Court found that Jordan's Principle is not to be narrowly construed and that the absence of a monetary dispute will not be determinative where both levels of government "maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute."[25]

38. Conversely, the Appellant, the Attorney General of Canada, takes the position that Jordan's Principle ought to be narrowly construed and engaged only when the following four criteria are met: (i) the First Nation's child is living on a reserve (or ordinarily resident on reserve); (ii) the First Nation's child has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; (iii) the case involves a jurisdictional dispute between a provincial government and the federal government as to who should pay for a service; and (iv) the case involves services to a child that are comparable to the standard of care set by the province in a similar geographic area (known as "the normative standard of care").[26]

39. It is the Caring Society's position that narrowly construing Jordan's Principle, as suggested by the Appellant, will not only directly affect the Respondents' rights, it will deny all First Nations children living primarily on-reserve from a procedural mechanism designed specifically to ensure that these children have equitable access to every public service and benefit available to all other Canadian children.

40. It could not have been Parliament's intention to exclude First Nations children living primarily on reserve from human rights protections when it unanimously passed Motion 296. It

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[24] *Pictou Landing Band Council and Maurina Beadle v. Attorney General of Canada*, 2013 FC 342 at para. 106, Motion Record, Tab 7, p. 438

[25] *Ibid*, at para. 86, Motion Record, Tab 7, p. 433

[26] Appellant's Memorandum of Fact and Law, at para. 12

is the Caring Society's position that Jordan's Principle ought to be interpreted as it was intended: to ensure that primarily on-reserve First Nations children have access to public services on the same terms as all other Canadian children.

41. The Caring Society is of the view that the CRC, as the most ratified human rights treaty in history, is binding on the Government of Canada. The UNCRC has criticized Canada regarding its failure to fully implement its obligations under the CRC, including its failure to address the overrepresentation of Aboriginal children in out-of-home care. The UNCRC has directed Canada to ensure that "Aboriginal children have full access to all government services and receive resources without discrimination".[27] Jordan's Principle must be fully and properly implemented by the federal government to demonstrate that Canada is committed to fulfilling its obligations to indigenous children under the CRC.

42. If granted intervener status, the Caring Society would not seek to make submissions regarding the findings of fact in this case, nor would it seek to make arguments in respect of the characterization of the evidence. Rather, if granted the right to intervene, the Caring Society would make new and different submissions regarding the interpretation and application of Jordan's Principle. These would include:

(a) the interpretation and application of a "child-first" principle in the context of Jordan's Principle;

(b) the inappropriateness of narrowly construing Jordan's Principle, and the potential impact of such an approach on First Nations children living primarily on reserve; and

(c) the impact of narrowly construing Jordan's Principle on Canada's obligations under the CRC.[28]

43. These submissions will be different from those of the parties directly affected by the particular outcome of this case, as they will provide this Honourable Court with a broader picture of the wider impact of narrowly construing Jordan's Principle.

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[27] Blackstock Affidavit, at paras. 24-26, Motion Record, Tab 2, pp. 13-14
[28] Blackstock Affidavit, at para. 42, Motion Record, Tab 2, pp. 17-18

E. The Caring Society Will Not Delay These Proceedings

44. The Caring Society has brought this appeal now and not earlier so as to review the written submissions made by the Appellant and the Respondents before this Court. The Caring Society has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.

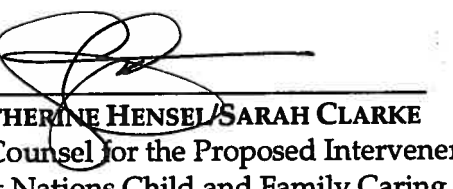
45. The Caring Society will abide by any schedule set by this Court for the delivery of written materials and for oral submissions at the hearing.

46. If granted leave to intervene, the Caring Society will seek no costs and would ask that no costs be awarded against it.

PART IV - ORDER SOUGHT

47. The Caring Society therefore respectfully requests an order granting it leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Court Rules*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2013.



KATHERINE HENSEL/SARAH CLARKE
Of Counsel for the Proposed Intervener,
First Nations Child and Family Caring Society

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583
2. *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119
3. *Pictou Landing Band Council and Maurina Beadle v. Attorney General of Canada*, 2013 FC 342

SCHEDULE "B"
RELEVANT STATUTES

1. Rule 109(2) and (3), *Federal Court Rules*, SOR/98-106

Leave to intervene

- **109.** (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
- Contents of notice of motion

  (2) Notice of a motion under subsection (1) shall

  - (*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
  - (*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
- Directions

  (3) In granting a motion under subsection (1), the Court shall give directions regarding

  - (*a*) the service of documents; and
  - (*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

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Case Name:

Cami International Poultry Inc. v. Canada (Attorney General)

Between
Cami International Poultry Inc., Applicant, and
Attorney General of Canada, Respondent

[2013] F.C.J. No. 790

[2013] A.C.F. no 790

2013 FC 583

Docket T-2105-12

Federal Court
Ottawa, Ontario

Crampton C.J.

Heard: March 6, 2013.
Judgment: May 31, 2013.

(62 paras.)

Administrative law -- Judicial review and statutory appeal -- Practice and procedure -- Parties -- Motion by Chicken Farmers of Canada (CFC) for order adding it as party, or alternatively, for leave to intervene allowed -- Underlying proceeding involved judicial review of refusal of import permit to Cami -- Cami sought to import live chickens for processing and sale with heads and feet attached in accordance with traditional Chinese custom -- Party status refused, as CFC was not directly affected by relief sought given lack of impact on chicken supply management scheme until any permit was issued -- CFC granted intervenor status on discrete issue of availability of poultry products desired by Canadians -- Federal Courts Rules, Rule 104(1)(b).

Civil litigation -- Civil procedure -- Parties -- Adding or substituting -- On own motion -- Intervenors -- Motion by Chicken Farmers of Canada (CFC) for order adding it as party, or alternatively, for leave to intervene allowed -- Underlying proceeding involved judicial review of refusal of import permit to Cami -- Cami sought to import live chickens for processing and sale with heads and feet attached in accordance with traditional Chinese custom -- Party status refused, as CFC was not directly affected by relief sought given lack of impact on chicken supply management scheme until any permit was issued -- CFC granted intervenor status on discrete issue of availability of poultry products desired by Canadians -- Federal Courts Rules, Rule 104(1)(b).

Motion by the Chicken Farmers of Canada (CFC) for an order adding it as a party respondent, or alternatively, for leave to intervene. In the underlying proceeding, Cami International Poultry sought judicial review of a decision by the Minister of International Trade refusing its application for a supplementary import permit. Cami was an Ontario company which sought a permit to import live chickens to be processed and sold within Canada with heads and feet attached in

accordance with a traditional Chinese custom. The product, a Hong Kong Dressed Chicken, was sold to the Chinese community in Ontario. CFC was a statutory corporation comprised of members appointed by provincial chicken marketing boards and stakeholder organizations in the chicken processing and food services sectors. CFC's functions related to the marketing of chicken in interprovincial and export trade and included establishing quota allocations and monitoring market trends and pricing. In response to Cami's application, CFC advised the Minister that that it was not satisfied with Cami's position that the chickens could not be supplied domestically. Cami had taken the position that whole eviscerated birds could not be substituted for Hong Kong Dressed Chicken. The Minister advised Cami that its application was refused. Cami sought judicial review. CFC sought to be added as a party or intervenor.

HELD: Motion allowed. CFC was not directly affected by the relief sought by Cami. The only direct consequence of the relief sought would be to quash the refusal of the requested import permit and remit the matter to the Minister for re-determination. Until the permit was issued, there was no adverse impact upon the existing chicken supply management scheme administered by CFC. Once a permit was issued, it was open to CFC to seek judicial review if it was able to demonstrate it was directly affected by the decision. CFC's participation as a party was not necessary for determination of the matter, as there was nothing that prevented it from providing affidavit evidence through the Crown. The CFC's role in the permit process was purely administrative and confined to conducting market surveys without providing advice. There was, however, a justiciable issue and veritable public interest that would benefit from the participation of CFC as an intervenor on the discrete issue of the availability of poultry products desired by Canadians.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Export and Import Permits Act, RSC, 1985, c E-19,

Farm Products Agencies Act, RSC, 1985, c F-4,

Federal Courts Act, RSC 1985, c F-7, s. 18.1(1)

Federal Courts Rules, SOR/98-106, Rule 104(1)(b), Rule 109(2), Rule 301(1)(a), Rule 303(1), Rule 306, Rule 307, Rule 314

Counsel:

Ronald Caza and Alyssa Tomkins, for the Applicant.

David Cowie, for the Respondent.

David K. Wilson and Adam Huff, for the Moving Party.

REASONS FOR ORDER AND ORDER

1 **CRAMPTON C.J.**:-- This Motion was brought by Chicken Farmers of Canada [CFC] for an order adding it as party respondent or, in the alternative, granting it leave to intervene in the within application, with broad rights of participation.

2 In the within application, Cami International Poultry Inc. [Cami] seeks judicial review of a decision by the Minister of International Trade to refuse Cami's application for a supplementary import permit to import into Canada live chicken to be processed and sold with their heads and feet attached. Chicken sold in this manner, and prepared according to traditional Chinese custom, is known as Hong Kong dressed chicken [HK Dressed Chicken].

3 For the reasons that follow, the alternative relief sought in this Motion will be granted, although with more restricted rights of participation than what CFC has sought.

1. The Parties

4 Cami is an Ontario company that is a specialist chicken processor. Its products include HK Dressed Chicken, which is sold to the Chinese community in Ontario.

5 The Minister is responsible for, among other things, determining whether to exercise his or her discretion to grant applications for supplementary import permits pursuant to section 8 of the *Export and Import Permits Act*, RSC, 1985, c E-19.

6 CFC is a statutory corporation established by a Proclamation by the Governor in Council in 1978, pursuant to what is now the *Farm Products Agencies Act,* RSC, 1985, c F-4, as contemplated by the 2001 Federal-Provincial Agreement for Chicken. CFC's members are appointed by the provincial chicken marketing boards in each of the ten provinces, as well as by downstream stakeholder organizations in the processing, further processing and restaurant/food services sectors.

7 CFC performs a number of functions relating to the marketing of chicken in interprovincial and export trade, including but not limited to establishing provincial quota allocations to match domestic supply with demand. As part of its mandate, CFC continually monitors data on chicken quota utilization and storage stocks, and analyzes market trends and chicken supply and disappearance, imports and exports, and pricing.

2. Background

8 On September 20, 2012, Cami submitted to the Department of Foreign Affairs and International Trade [DFAIT] an application for authorization for supplementary imports of live chicken to be processed and sold as HK Dressed Chicken. In that application, Cami indicated that it was not able to source such live chicken from seven identified suppliers in Canada.

9 The following day, a representative of DFAIT wrote to Mr. Jimmy Lee, President Live Procurement at Cami, to inform him that his application had to be sent to CFC, for the purpose of surveying the domestic market to ascertain the availability of the requested product. The letter added that Cami would be informed of the results of this survey within three working days from the time the application was received by CFC. In addition, the letter noted that "pursuant to the sourcing provision of the domestic shortage policy, the sourcing results can include any commercially reasonable substitute product (e.g., eviscerated birds substitution for live bird) that can be used by the applicant to produce the identified end product (i.e.; from a technical, quality, as well as economic point of view)."

10 On October 5, 2012, Cami resubmitted its application together with a cover letter which explained that the live chicken in question was being sought to supply HK Dressed Chicken to the Chinese community in Ontario. That letter further explained that the application was "only a temporary measure due to the newly implemented Central Canada allocation agreement which prevents Cami International from sourcing its previous live chickens of 600,000 kg from Quebec." The letter added: "This interim solution is a last resort until a satisfactory solution can be negotiated between Cami, [Chicken Farmers of Ontario] and [the Association of Ontario Chicken Processors]." As instructed in the aforementioned letter from DFAIT, Cami also sent a copy of its application to CFC.

11 On October 11, 2012, CFC responded with the sourcing list that included three potential suppliers of eviscerated chickens.

12 According to an affidavit sworn by Mr. Lee, Cami then contacted the three suppliers in question to inquire as to whether the chickens in question could be used for HK Dressed Chicken. It appears that one of the potential suppliers confirmed that it could not supply such chickens, and that no response was received from the other two suppliers.

13 Accordingly, a representative of Cami contacted the Minister's office to advise that Cami was not satisfied with the sourcing results because the suppliers identified by CFC could not supply chicken that could be processed and sold as HK Dressed Chicken.

14 In response, a representative of DFAIT sent an e-mail to Mr. Lee dated October 22, 2012. Among other things, it was noted in that e-mail that CFC initiated the sourcing process for the requested live chickens on October 5, 2012 and that the results, which reflected a willingness of three different sources to supply a total of 725,000 kg of whole eviscerated chickens, were sent to Cami on October 11, 2012. The e-mail proceeded to state the following:

> As per the supplemental policy, Cami must contact each supplier identified within one working day to negotiate price and delivery with the suppliers. The applicant is normally expected to purchase the sourced product up to the level of the requested quantity. The applicant shall notify the CFC as soon as procurement from domestic sources has been completed.

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15 Based on the foregoing, the e-mail stated that DFAIT "considers that your request has been filled and the file on this is closed." This is the decision [Decision] that is the subject of Cami's application for judicial review.

16 Later that day, Mr. Lee responded to that e-mail stating, among other things, that whole eviscerated birds cannot be substituted for HK Dressed Chicken, and that CFC's sourcing confirmed that there were no available chickens that could be processed and sold as HK Dressed Chicken.

17 The following day, the same representative of DFAIT replied. Among other things, he referred to a number of prior letters that DFAIT had sent to Cami expressing the view that "eviscerated birds are considered to be a commercially reasonable substitute for live birds." In addition, he stated that "DFAIT does not consider that there is a nationwide market shortage of chicken in Canada."

18 On November 8, 2012, Mr. Robert de Valk, General Manager of the Further Poultry Processors Association, made additional submissions to DFAIT on behalf of Cami. In reply, a representative of the Minister stated, among other things, that DFAIT's response to Cami's application "is consistent with the established policy pertaining to supplemental authorizations and is in-keeping with past precedent on the application of the policy."

3. The Supplemental Import Policy

19 DFAIT's policy with respect to supplementary imports of chicken and chicken products is set forth in its *Notice to Importers - Items 96 to 104: Chicken and Chicken Products - Supplementary Imports* (Notice No. 793) [Guidelines].

20 Section 5.1 of the Guidelines stipulates that the Minister "may, at his discretion, authorize the importation of chicken and chicken products in excess of the import access quantity, particularly if he judges that the importation of these products is required to serve overall Canadian market needs." The import access quantity in question is equal to approximately 7.5% of domestic chicken production in the previous year. This is also known as the tariff rate quota [TRQ] limit. The TRQ limit is distributed to holders of import quotas, to whom import permits are issued to enable chicken and chicken products to be imported at low "within access commitment rates" of duty.

21 Section 5.2 of the Guidelines states that applications for an authorization for supplementary imports should follow the applicable procedures set forth in the Guidelines.

22 Section 6 of the Guidelines set forth procedures to be followed when processing applications for authorization for supplementary imports due to market shortages.

23 Section 6.3.2 states that applications must be sent to CFC, with a copy to DFAIT.

24 Section 6.3.3 stipulates, among other things, that applicants "shall demonstrate that normal supply sources have been exhausted before applying for an authorization for supplementary imports."

25 Section 6.5.3 adds that the sourcing results from CFC's survey "can include any commercially reasonable substitute product (e.g., eviscerated birds substitution for live bird) that can be used by the applicant produce the identified end product (i.e., from a technical, quality, as well as economic view point)."

26 Section 6.6.1 further adds that if an applicant is not satisfied with the sourcing results, the applicant may continue the application process using the form *Application for Authorization for Supplementary Imports - Continuation of Application*. It appears to be common ground between the parties that Cami did not continue its application in this manner before filing its application for judicial review of the Decision. This is a matter that may be raised in the within application.

4. The relief sought by Cami in its Application for Judicial Review

27 In its Application for Judicial Review, Cami seeks an Order quashing the Decision and referring the matter back to the Minister for a redetermination in accordance with such directions as this Court may deem to be appropriate. In addition, Cami seeks an Order for costs of the within application and such further and other relief as this Court deems just.

5. Relevant legislation

28 Rule 303(1) of the *Federal Courts Rules*, SOR/98-106 addresses the circumstances in which an applicant must name another party as a respondent. That Rule states as follows:

> 303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(*b*) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

* * *

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

29 The authority of the Court to order that a person or entity be added as a party is set out in Rule 104(1)(b), which provides as follows:

104. (1) At any time, the Court may

...

(*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

* * *

104. (1) La Cour peut, à tout moment, ordonner :

...

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

30 With respect to motions for leave to intervene, Rule 109(2) states:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Marginal note: Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

* * *

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109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Note marginale : Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

6. Analysis

A. *CFC's request to be added as a party*

31 Pursuant to Rule 104(1)(b), this Court may add CFC as a party to these proceedings if one or both of the following conditions are met:

1. CFC ought to have been joined as a party; or
2. CFC's presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined.

(i) The first branch of Rule 104(1)(b)

32 During the hearing, CFC stated that it was relying primarily on this branch of Rule 104(1)(b). It submits that it will be directly affected, within the meaning of Rule 303(1), by the order being sought by Cami in the within application. In this regard, it makes the following assertions:

1. the within application implicates the domestic market survey conducted by CFC in accordance with the whole bird substitution policy;
2. unplanned imports pursuant to supplementary import permits directly impact CFCs ability to plan the level of production need to meet demand;
3. import controls, including the regime in respect of supplementary imports, were established to support CFC's supply management operations; and
4. certainty with regard to imports is crucial to the stability of the domestic industry and the ability of chicken farmers represented by CFC to earn adequate returns.

33 I do not agree that CFC would be directly affected if this Court grants the relief sought by Cami in the within application.

34 If this Court grants such relief, the only direct consequence of its Order will be to (i) quash a decision which essentially refused to issue the requested supplementary import permit, and (ii) remit the matter back to the Minister for a redetermination in accordance with this Court's directions. There will be no direct impact on CFC or its members, financially or otherwise; and they will not be bound by any of the relief that Cami has sought and that may be granted by the Court (*Havana House Cigar & Tobacco Merchants Ltd v Jane Doe*, [1998] F.C.J. No. 411 (QL), at para 4; *Early Recovered Resources v Gulf Log Salvage Co-operative Assn,* [2003] F.C.J. No. 716 (QL), at paras 6-7).

35 Unless and until the Minister decides to issue the requested permit, there can be no adverse impact upon the existing chicken supply management scheme administered by CFC in Canada, because Cami will not be authorized to import any additional chicken into Canada. Accordingly, the impact on CFC and its members of any decision that the Minister might make if the matter is referred back for a redetermination is speculative at this point in time.

36 The same is true with respect to the potential precedent that may be established and its impact on the whole bird substitution policy, if the Minister ultimately decides to grant a supplementary import permit to Cami - something which Mr. Michael Dungate, Executive Director of CFC, stated is his principal concern in this matter (*Cross-Examination of Michael Dungate*, January 30, 2013, at p 55).

37 Of course, if the requested supplementary import permit is granted, it will presumably be for dates different from those that were set forth in Cami's initial application. (This issue does not appear to be the subject of dispute between the Parties in the within application.)

38 If and when the Minister issues the supplemental import permit that Cami has requested, it will be open for CFC or its members to seek judicial review of that decision in this Court, provided that they are able to demonstrate that they are "directly affected" by that decision, as contemplated by subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

39 In the meantime, as recognized by the Mr. Dungate on cross-examination, CFC can convey to the Minister its views regarding the potential impact of such a decision on the chicken supply management scheme in Canada, and on producers, processors or others, through the Tariff Quota Advisory Committee [TQUAC] of which CFC is a member (*Cross-Examination of Michael Dungate*, January 30, 2013, at p. 43). In this latter regard, in the previously mentioned communication to Cami from the Minister's office, dated November 8, 2012, the Minister's representative stated as follows:

> ... [W]e welcome the opportunity to point out that in making its decisions with respect to the application of the existing policy, the department considers the advice of the [TQUAC]. Parties can raise issues of concern with the [TQUAC], by seeking the placement of discussion items on the Committee's agenda. Items for discussion can be added to the agenda either by associations on behalf of their member companies or by the Department in response to issues raised by companies.

40 Given that CFC will not be directly affected by the decision, it cannot be said that it "ought to have been joined as a party," within the meaning of Rule 104(1)(b), and as contemplated by Rule 301(1)(a).

(ii) The second branch of Rule 104(1)(b)

41 The Court may Order that a person be added as a party where that person's presence is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined by the Court.

42 CFC submits that its participation as a party in the within proceeding meets this test for several reasons. First, it states that Cami seeks to contest the results of the domestic market survey that CFC conducted in accordance with the Guidelines. Second, it asserts that its evidence will show that Cami's evidence contains serious gaps and inconsistencies. Third, it maintains that its evidence will show that the level of supply of products such as HK Dressed Chicken is heavily influenced by the private business decisions of Canadian chicken processors, including Cami. Fourth, it submits that its participation will ensure that the Court has the benefit of a complete, accurate and balanced record on relevant matters, including particulars respecting the Canadian market for chicken and related marketing regulations that fall outside the purview and expertise of the Minister.

43 In my view, CFC's participation in this proceeding is not necessary to ensure that any of these matters are appropriately addressed in the within proceeding, or to ensure that all matters in dispute in the proceeding may be effectually and completely determined by the Court. In this regard, counsel to the Attorney General conceded during the hearing of this Motion that "it is technically possible that [CFC] could participate in this proceeding through the Attorney General." When pressed on this point during cross-examination, Mr. Dungate acknowledged that he was not aware of anything that would prevent CFC from providing affidavit evidence through the Attorney General (*Cross-Examination of Michael Dungate*, January 30, 2013, at pp 48-49).

44 In brief, I am not satisfied that the issues that have been raised in the within application cannot be effectually and completely decided unless CFC is added as a party (*Air Canada v Thibodeau*, 2012 FCA 14, at para 24 [*Thibodeau*]; *Canada (Fisheries and Oceans) v Shubenacadie Indian Band*, 2002 FCA 509, at para 8 [*Shubenacadie*]). The fact that CFC may have some relevant evidence to adduce on some of the issues that have been raised is not a sufficient basis upon which to conclude that its participation in these proceedings is necessary, in the sense contemplated by Rule 104(1)(b). The same is true with respect to CFC's interest in a particular outcome of the within application, and with respect to its concern that the Attorney General may not advance the relevant arguments adequately (*Thibodeau*, above, at para 11; *Shubenacadie*, above).

45 I agree with Cami's position that CFC's role in the Minister's exercise of discretion to issue specific supplementary import permits to import chickens into Canada is purely administrative, and is confined to conducting the market surveys described in the Guidelines. There does not appear to be any screening or analysis involved in this function.

CFC merely conveys the results of its surveys to the Minister, without providing advice. Once it does so, it role in the process is complete.

46 I acknowledge that Cami's Notice of Application and Mr. Lee's affidavit refer to CFC. However, those references simply describe the role that CFC played in the process that led to the Decision, and are not directly related to the issues that have been raised in the within application. The facts at issue in the within application are distinguishable from those in *Apotex Inc v Canada (Attorney General),* [1994] F.C.J. No. 879 (QL), at para 17. There, Merck & Co and its Canadian affiliate [collectively Merck] were added as parties because their rights in other proceedings would have been directly affected if certain of the remedies sought by Apotex were granted by the Court. In addition, certain passages in an affidavit filed on behalf of Apotex suggested bad faith on Merck's part. As a matter of fairness, the Court concluded that Merck should have an opportunity to respond to those allegations. No similar or other allegations have been made against CFC in the within application.

47 The present situation is also distinguishable from the facts in *Nu-Pharm Inc v Attorney General,* 2001 FCT 973, at paras 20 and 24. There, Merck was added as a party because, as the owner of the patent and exclusive licenses for the drug enalapril, it was found to have a direct, pressing and legitimate interest in the proceedings, which directly related to that patent. In addition, the Court concluded that Merck's presence was necessary to ensure that all matters in dispute in the within application could be effectually and completely determined.

48 CFC also suggests that it ought to be added as a party because the determination of the within application will directly affect its and its members' rights. For the reasons discussed above, the effect of the within application on the rights of CFC and its members are speculative at this point in time.

B. *CFC's request to be granted intervener status*

49 In the alternative to being granted full party status in the within proceedings, CFC requests that it be granted intervener status.

50 In determining whether to allow a motion to intervene, it is necessary to consider the following factors:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third-party?
6. Can the Court hear and decide the cause on its merits without the proposed intervener?

Boutique Jacob Inc v Paintainer Ltd, 2006 FCA 426, at para 19 [*Boutique Jacob*]; *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd,* [2010] 1 FCR 226 at para 8, F.C.J. No. 220 (QL).

51 It is not necessary that all of the foregoing factors be met before a request to intervene may be granted (*Boutique Jacob*, above, at para 21).

52 As discussed above, CFC will not be directly affected by the outcome of the within application. In addition, there is no lack of other reasonable or efficient means to adduce the evidence that it proposes to submit. As previously noted, the Attorney General has conceded that "it is technically possible that [CFC] could participate in this proceeding through the Attorney General," and Mr. Dungate has acknowledged that he was not aware of anything that would prevent CFC from providing affidavit evidence through the Attorney General. With this in mind, I am satisfied that the Court could hear and decide the within application on its merits without the participation of CFC as an intervener.

53 However, I am satisfied that there is a justiciable issue and a veritable public interest that could benefit from the participation of CFC in this proceeding. Given the nature of that public interest, namely, the availability of poultry products desired by Canadians, I am also satisfied that the interests of justice would be better served by granting CFC intervener's status in this proceeding. In addition, while I am satisfied that CFC's position would likely be adequately represented by the Attorney General, I accept the Attorney General's position that CFC's participation in these proceedings would be helpful, at least with respect to certain issues that have been raised by Cami and are identified below.

54 Balancing the three factors that weigh against granting intervener's status to CFC against the three factors that weigh in favour of granting such status to CFC, I consider it appropriate to exercise my discretion in favour of CFC, particularly given the public interest dimension of the within application. I am satisfied that the advantages of granting such status to CFC outweigh the disadvantages, including the potential delay and the increased costs to the parties that this might cause. In this regard, I note that CFC has represented that it will not delay or otherwise disrupt the proceeding, and that it is prepared to file and serve its affidavit evidence and its record in accordance with any timelines set by this Court.

55 I accept Cami's position that CFC does not have any expertise with respect to the various issues that Cami has raised under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [*Charter*], or with respect to whether members of the Chinese community consider eviscerated chickens to be acceptable substitutes for HK Dressed Chicken.

56 However, contrary to Cami's vigorous submissions during the hearing of this motion, the issues that it has raised in this proceeding do not appear to be limited to those two issues.

57 In its Notice of Application, Cami devotes less than two pages, at the very end of the document, to the *Charter* issues. At the outset of that section of the document, it states that, in exercising his discretion, the Minister is also bound to do so in a manner consistent with the *Charter*.

58 Earlier in the Notice of Application, Cami raises other issues, including with respect to whether eviscerated birds are a commercially reasonable substitute for live birds and whether "there is an unmet market in Ontario for a distinct product in a distinct market that will not compete with chicken processed for the mainstream commodity market." In addition, Cami makes representations with respect to various procedures set forth in the Guidelines, the purpose of the supplementary import regime, and previous exercises of discretion by the Minister to issue a supplementary import permit. These are all matters that are also addressed in the affidavit of Robert de Valk, which was filed by Cami in this proceeding. Likewise, Mr. Lee states in his affidavit that "[t]here is presently a significant shortage of Hong Kong-dressed chickens in the marketplace, particularly during the times of Chinese festivals such as the Chinese New Year, the Winter Festival and the Moon Festival." He adds: "If this shortage continues, there is a real risk that people will go underground to the farmers' market and purchase live chickens to slaughter for themselves at home."

59 I am satisfied that it would be in the interest of justice for CFC to be able to make representations directly to the Court with respect to these issues, and to cross-examine Messrs. de Valk and Lee on the statements referred to or quoted immediately above. In this regard, I note that CFC's interest in these issues may not be entirely aligned with that of the Attorney General and I accept that CFC may be uniquely positioned to address at least some of those issues. However, given its absence of expertise with respect to the two issues identified at paragraph 55 above (*Cross-examination of Michael Dungate*, above, at pp 60-62), which Cami has stated are central to this proceeding, CFC will not have any rights to make representations, cross-examine affiants, or otherwise participate in respect of those issues.

7. Conclusion

60 CFC does not meet either of the tests set forth in Rule 104(10(b) for being added as a party to the within application. Its request for an Order granting it such status will therefore be denied.

61 However, I am satisfied that it is appropriate to exercise my discretion in favour of granting CFC's request, in the alternative, for intervener's status in this proceeding. That said, CFC's rights of participation will be more restricted than what it requested in its Notice of Motion.

62 Given that each of CFC and Cami were partially successful on this Motion, there will be no Order with respect to costs.

ORDER

THIS COURT ORDERS as follows:

1. Chicken Farmers of Canada [CFC] is hereby added as an intervener in this proceeding.
2. CFC shall have the right to introduce affidavit evidence, cross-examine Cami's affiants, participate in any pre-hearing motions and/or case conferences, and make oral and written submissions, solely with respect to the statements referred to or quoted in paragraph 58 of the attached Reasons for Order. For greater certainty, CFC shall not have any participation

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rights with respect to the issues that Cami has raised under the *Charter* or with respect to whether members of the Chinese community consider eviscerated chickens to be acceptable substitutes for HK Dressed Chicken.

3. The schedule established in the Rules is amended as follows:

(a) CFC shall be subject to the same deadlines applicable to the respondent in this proceeding;
(b) The applicant shall comply with Rule 306 within 7 days of the date of this order;
(c) The timelines proscribed by Rules 307 to 314 will then run from the date that the proof of service referred to in Rule 306 was filed with the Court.

CRAMPTON C.J.

cp/e/qlaim/qlrdp

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Case Name:

Globalive Wireless Management Corp. v. Public Mobile Inc.

Between
Globalive Wireless Management Corp., Appellant, and
Public Mobile Inc., Attorney General of Canada and Telus Communications Company, Respondents

[2011] F.C.J. No. 483

[2012] A.C.F. no 483

2011 FCA 119

420 N.R. 46

Docket A-78-11

Federal Court of Appeal
Ottawa, Ontario

Stratas J.A.

Heard: In writing.
Judgment: March 28, 2011.

(11 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Requirement of interest -- Courts -- Stare decisis -- Use of precedents -- Motion by three associations for intervenor status in appeal from judgment quashing decision by Governor in Council allowed -- Appeal dealt with whether Governor in Council acted outside mandate in according paramount importance to increasing competition in telecommunications to prejudice of non-commercial objectives of legislation -- No reason to depart from Federal Court's decision to grant intervenor status -- Parties provided relevant and useful submissions, had interest in outcome and could bring distinct perspective and expertise to appeal -- Federal Courts Rules, Rules 53, 109.

Media and communications law -- Telecommunications -- Telecommunications policy -- Canadian ownership and control -- Motion by three associations for intervenor status in appeal from judgment quashing decision by Governor in Council allowed -- Appeal dealt with whether Governor in Council acted outside mandate in according paramount importance to increasing competition in telecommunications to prejudice of non-commercial objectives of legislation -- No reason to depart from Federal Court's decision to grant intervenor status -- Parties provided relevant and useful submissions, had interest in outcome and could bring distinct perspective and expertise to appeal -- Telecommunications Act, ss. 7, 16.

Motion by Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada and Friends of Canadian Broadcasting for leave to intervene in Globalive's appeal. The Crown and Globalive opposed the motion. The issue in the appeal was whether the Governor in Council acted within its statutory mandate under the Telecommunications Act. The Federal Court quashed the Governor in Council's decision, finding it acted outside its mandate. The moving parties had been granted leave to intervene in the Federal Court on the issue of whether the Governor in Council failed to consider, to give effect to, or acted inconsistently with the non-commercial objectives of the Act. They took the position that the Governor in Council improperly accorded paramount importance to increasing competition in the telecommunications sector to the prejudice of the Act's non-commercial objectives.

HELD: Motion allowed. The moving parties were granted leave to intervene on the same issues they had addressed in the Federal Court. There was no reason for the Federal Court of Appeal to exercise its discretion to grant leave differently than the Federal Court. There was no fundamental error in granting the moving parties intervenor status. It was clear from the Federal Court's decision that the moving parties provided relevant and useful submissions. The moving parties possessed a genuine interest in the litigation, specifically, a commitment to the strict interpretation of the foreign ownership restrictions in the Act. Their interest went beyond a mere jurisprudential interest. The moving parties would be able to assist the court in a useful way, bringing a distinct perspective and expertise concerning the issues.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, Rule 53(1), Rule 109(3)

Telecommunications Act, S.C. 1993, c. 38, s. 7, s. 7(a), s. 7(h), s. 7(i), s. 16(3)

Counsel:

Written representations by:

Steven Shrybman, for the proposed interveners.

Malcolm M. Mercer, for Globalive Wireless Management Corp.

Robert MacKinnon and Alexander Gay, for the Attorney General of Canada.

Stephen Schmidt, for the Respondent, Telus Communications Company.

REASONS FOR ORDER

1 **STRATAS J.A.**:-- The moving parties, Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada, and Friends of Canadian Broadcasting (the "moving parties"), move under rule 109 for leave to intervene in this appeal.

2 The Attorney General of Canada, supported by Globalive Wireless Management Corp., opposes the motion. TELUS Communications Company consents to the motion, provided that no change will be made to the deadline for filing the respondents' memoranda of fact and law.

3 The issue in this appeal is whether the Governor in Council, in its decision (P.C. 2009-2008 dated December 10, 2009), acted within its statutory mandate under the *Telecommunications Act*, S.C. 1993, c. 38. The Federal Court found (at 2011 FC 130) that the Governor in Council acted outside of its statutory mandate. It quashed the Governor in Council's decision.

4 In the Federal Court, the moving parties were permitted to intervene: see the order of Prothonotary Tabib and the order of Prothonotary Aronovitch, dated April 13, 2010 and June 8, 2010, respectively. The moving parties' intervention was restricted to the issue whether the Governor in Council, in applying subsection 16(3) of the *Telecommunications Act*, failed to consider, failed to give effect, or acted inconsistently with the non-commercial objectives of the Act set out in the opening words of section 7 and subsections 7(a), (h) and (i). The thrust of the moving parties' submission in the Federal Court was that the Governor in Council improperly accorded paramount importance to increasing competition in the telecommunications sector to the prejudice of the Act's non-commercial objectives.

5 I grant the motion for leave to intervene in the appeal in this Court for the following reasons:

a. In my view, absent fundamental error in the decision in the Federal Court to grant the moving parties leave to intervene, some material change in the issues on appeal, or important new facts bearing on the issue, this Court has no reason to exercise its discretion differently from the Federal Court. No one has submitted that there is fundamental error, material change or important new facts.

b. It is evident from the reasons of the Federal Court that the moving parties' submissions were relevant to the issues and useful to the Court in its determination.

c. It is not necessary for the moving parties to establish that they meet all of the relevant factors in *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (T.D.), affirmed [1990] 1 F.C. 90 (C.A.), including whether the moving parties will be directly affected by the outcome: *Boutique Jacob Inc. v. Paintainer Ltd.*, 2006 FCA 426 at paragraph 21, 357 N.R. 384. I am satisfied that the moving parties in this public law case possess a genuine interest - namely, a demonstrated commitment to the strict interpretation of the foreign ownership restrictions in the *Telecommunications Act*. This interest is beyond a mere "jurisprudential" interest, such as a concern that this Court's decision will have repercussions for other areas of law: see, *e.g.*, *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, a 2000 decision of this Court, belatedly reported at [2010] 1 F.C.R. 226. Further, the moving parties will be able to assist the Court in a useful way in this public law case, bringing to bear a distinct perspective and expertise concerning the issues on which they seek to intervene: *Rothmans Benson and Hedges Inc.* (F.C.A.), *supra* at page 92. It is in the interests of justice that the moving parties be permitted to intervene in this public law case.

6 This Court, acting under rules 53(1) and 109(3), will attach terms to the order granting the moving parties leave to intervene.

7 The moving parties' written and oral submissions shall be limited to the subject-matters set out in paragraph 4, above. Those submissions shall not duplicate the submissions of the other parties and shall not add to the factual record in any way.

8 This appeal has been expedited and a schedule has been set. That schedule shall not be disrupted.

9 The moving parties support the result reached by the Federal Court. Accordingly, the deadline for their memorandum of fact and law should be set around the time set for the memoranda of fact and law of the parties who also are supporting the result reached by the Federal Court, namely TELUS Communications Company and Public Mobile Inc. So that the moving parties can be sure that their submissions do not duplicate those of any of the other parties, the deadline for their memorandum of fact and law should be just after TELUS Communications Company and Public Mobile Inc. have filed their memoranda of fact and law (May 2, 2011). Therefore, the deadline for the service and filing of the moving parties' memorandum shall be May 5, 2011.

10 The moving parties' memorandum shall be limited to 12 pages in length. The moving parties shall be permitted to make oral submissions at the hearing of the appeal for a total of no more than 20 minutes. No costs will be awarded for or against any of the interveners.

11 The style of cause shall be amended to reflect the fact that the moving parties are now interveners.

STRATAS J.A.

cp/e/qlecl/qlvxw/qlced/qlecl

Federal Court  Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[18] Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

(ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,

(iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,

(iv) care in homes for special care,

(v) social services, including family counselling, homemakers, home care and home nursing services,

(vi) rehabilitation services;

[Emphasis added]

Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

...

> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

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Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

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Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

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[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children...

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations*. She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, less the time his

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family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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