File No. T1340/7008

The Canadian Human Rights Act

CANADIAN HUMAN RIGHTS TRIBUNAL

*BETWEEN*:

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

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

THE ATTORNEY GENERAL OF CANADA
(representing the Minister of Indian and Northern Affairs)

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL

Interested Parties

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Written Submissions of the Complainant, the Assembly of First Nations
(upon Respondent's Motion for an Order to Dismiss the Complaint)

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## ***OVERVIEW***

1. This complaint is brought by the Complainants, the Assembly of First Nations ("AFN") and the First Nations Caring and Family Society against the Respondent, the Minister of Indian and Northern Affairs Canada ("INAC"), to address long-standing, systemic discrimination against on-reserve First Nation children who are the intended recipients of child welfare programs and services which are funded and regulated by the Respondent.

## ***PART I: FACTS***

2. The AFN accepts and incorporates by reference the facts as stated by the Complainant, the First Nations Child and Family Caring Society.

## ***PART II: ISSUES***

3. The AFN will address the following four issues with respect to the Respondent's Motion to dismiss this complaint without a hearing:

    a. Does INAC have jurisdiction and a duty to provide Child Welfare services to on-reserve First Nations children?

    b. Does INAC's administration of the First Nations Child and Family Services Program constitute a service for the purposes of the *Canadian Human Rights Act*?

    c. Is the comparator group test applicable to the form of discrimination faced by on-reserve First Nation children?

    d. Does the repeal of section 67 of *Canadian Human Rights Act* expand the scope of prohibited discrimination in relation to on-reserve First Nation peoples?

## ***PART III: SUBMISSIONS***

### ***Issue 1: INAC has jurisdiction and a duty to provide Child Welfare services to on-reserve First Nations children***

4. AFN submits that federal parliament have exclusive legislative jurisdiction over Indians and lands reserved for Indians, under section 91(24), of the *Constitution Act, 1867*. This includes jurisdiction over Indian (First Nations) child welfare on reserve.

> *Constitution Act, 1867(U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5* ("Constitution Act")

5. AFN submits that Canada has a constitutional duty to provide child welfare services to First Nations. This duty arises as a result of the historical relationship between First Nations and the Crown, the unique constitutional status of First Nations, and the legislative and constitutional obligations owed to First Nations. A full hearing on the merits is required to determine the precise boundaries of this complex legal relationship.

6. In support of the Respondent Minister's motion to dismiss, they argue that (a) its role in the funding of the First Nations Child and Family Service program ("FNCFS") does not constitute discrimination and (b) despite its authority to legislate on Child Welfare matters on-reserve, its conduct here is only social policy pursuant to its spending power.

> Written submissions of the Attorney General of Canada, In Support of His Motion to Dismiss the Complaint ("AG Submission"), paras 4 & 31, Canada's Record, Tab 14.

7. The division of powers between the provinces and the federal government is much more legally complex than INAC purports to argue. Given that there is no agreed statement of facts and there are conflicts in the evidence, a full hearing on the merits is required to determine the complex, constitutional division of power arguments.

> *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)* 1998 CarswellNfld 113; paras 21 – 25.

*Historical Relationship between Canada and First Nations*

8. Should this honourable Tribunal opt to consider these complex, legal issues on a preliminary motion, it should be mindful that the two key legal instruments that protect Canadians from discrimination – the *Constitution Act* (the Charter) and the *Canadian Human Rights Act* – have created for First Nations a unique constitutional and legislative regime that sets them apart from other Canadians.

> *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 ("CHRA")

9. The historical relationship between the Federal Government and First Nations in Canada is complex, and has its roots in the historical nation-to-nation relationship recognized and embodied in treaties and other instruments, including the *Royal Proclamation* of 1763, the pre-confederation treaties entered into in the Maritimes, and the Treaty of Niagara of 1764. For example, by operation of the *Royal Proclamation* and the Treaty of Niagara, the British Imperial Crown actively protected Indian land from encroachment by settlers, recognized Indian land tenure, and secured Indian support in defeating the French and asserting colonial control over British North America.

> *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII 16991 (ON C.A.) at para. 46.

10. At confederation, Canada was assigned exclusive legislative jurisdiction over Indians and Lands Reserved for Indians, under Section 91(24) of the *Constitution Act*. As explained by Charlotte Bell, a lawyer with the Federal Department of Justice:

> ...one of the purposes of section 91(24) is to manage the adverse impact upon Indians of the loss of their lands and way of life; both of which were given up to accommodate European settlement, and the building of a new nation. In order to do this government must legislate (and act) specifically and selectively for the benefit of Indians.

*Have you Ever Wondered Where S. 91.(24) Comes From? Or (for the Eurdite) the Content of S. 91(2) of the Constitution Act, 1867*. Charlotte A. Bell. National Journal of Constitutional Law 17 NJCL 285.

*Historical Relationship between Canada and First Nations Children*

11. Canada has taken on the responsibility of "Indians" but Canada has not managed this impact very well. The history of colonization has been particularly devastating for First Nations children and families, as Canada has continually removed First Nation children from their families, their communities and their culture.

*Indian Residential Schools*

12. In considering the certification of a national class action arising from the Indian Residential School ("IRS"), the Yukon Supreme Court described the effect of the IRS System as follows:

> The Indian Residential School system has been a dark period of Canadian history. The purpose of the system was to destroy the language and culture of the aboriginal people of Canada. The government of Canada and certain churches separated aboriginal children from their families and placed them in inadequately funded institutions where they were prohibited from speaking their languages and practising their cultures.
>
> *Fontaine et al. v. Canada et al*., 2006 YKSC 63 (CanLII), para 1.

13. The Royal Commission on Aboriginal Peoples ("RCAP") also observed that the churches and the federal government contributed to significant harms suffered by First Nations children while in IRS:

> ...there can be no dispute: the churches and the government did not, in any thoughtful fashion, care for the children they presumed to parent. While this is traceable to systemic problems, particularly the lack of financial resources, the persistence of those problems and the unrelieved neglect of the children can be explained only in the context of another deficit — the lack of moral resources, the abrogation of parental responsibility. The avalanche of reports on the condition of children — hungry, malnourished, ill-clothed, dying of tuberculosis, overworked — failed to move either the churches or successive governments past the point of intention and on to concerted and effective remedial action.
>
> The Royal Commission on Aboriginal Peoples, Volume 1, Chapter 10, Part 2 ; http://www.collectionscanada.gc.ca/webarchives/20071211055656/http://www.ainc-DIAND.gc.ca/ch/rcap/sg/sg30_e.html

14. The Federal Government has taken responsibility for the harms caused by the IRS, and on June 11, 2008, Canadian Prime Minister Steven Harper issued the apology for the Respondent's role in IRS. In doing so, he acknowledged the serious harms caused to First Nations communities as a result of these schools: "Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country."

> Statements by Ministers – Apology to Former Students of Indian Residential Schools, June 11, 2008, Hansard House of Commons Debates 142:110 39th Parliament, Session 2: http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3568890

*Sixties Scoop*

15. When provinces began providing child welfare services in the 1950's, they placed First Nations children in residential schools rather than the child welfare services which were provided to non-First Nation children, residing off reserve. The RCAP observed:

> In line with the general post-war trend of involving provinces in Indian affairs, provincial child welfare agencies co-operated in determining cases of neglect and in placing children in care. Residential schools were an available and apparently popular option within the wider child care system.
>
> Volume 1, Chapter 10, Part 1.2 http://www.collectionscanada.gc.ca/webarchives/20071211055732/http://www.ainc-DIAND.gc.ca/ch/rcap/sg/sg29_e.html

16. By the 1960's, social workers removed mass numbers of First Nations children placing them in either residential schools or foster homes. This is known as the "Sixties Scoop". The vast majority of foster home placements were non-First Nation and many children were placed there permanently. This was done without consideration of the multi-generational impacts of residential school and other forms of colonialism.

17. In his Report on Committee on Indian and Métis Adoptions in Manitoba, Justice Edwin Kimelman concluded that the 60's scoop practice amounted to cultural genocide.

> See: First Nations Child and Family Services National Program Manual (2005), section 1.15 filed as exhibit I in the affidavit of Dr. Blackstock.

18. Based on the foregoing review, the AFN submits that this honourable Tribunal can and should acknowledge the fact that INAC has a history of assuming responsibility over First Nations matters and a particular history of interposing itself between First Nations people and their children.

*Federal Control over Child Welfare Programs delivered to on-reserve First Nations*

19. Beginning in the 1970's, First Nations child and family service agencies began operating on reserve, to prevent the removal and placement of First Nations children in non-First Nation homes.

20. By the 1980's the demand for the development of First Nations child welfare agencies grew, and in 1986 the Respondent placed a moratorium on their development to allow the Respondent to develop a national policy for First Nations Child and Family Services. The content spoke directly to nature and form of the service to be delivered. This policy which came into effect in 1990, included National Program Directive 20-1 ("Directive 20-1"). The Respondent made the implementation of this policy mandatory for First Nations agencies in order to receive any federal funding for child welfare services.

> Respondent's First Nations Child and Family Services National Program Manual (2005), section 1.1.6 filed as exhibit I in the affidavit of Dr. Blackstock.

*Canada's obligations to First Nation children*

21. In their submissions, Canada fails to meaningfully address the unique legal status of Indians and their differential legislative treatment under the *Indian Act*, the *DIAND Act* and the *Constitution Act*. Yet, it is precisely Canada's legal regime, that authorizes Canada to treat Indian children in a discriminatory fashion. The discrimination in receipt of child welfare services experienced by on-reserve Aboriginal children is a direct result of the actions of Canada and its exercise of legal jurisdiction pursuant to section 91(24) of the Constitution.

> *Indian Act* ("An Act respecting Indians"), R.S., 1951, c. I-5 ["*Indian Act*']
>
> *Department of Indian Affairs and Northern Development Act* R.S., c. I-7, s. 2 ["*DIAND Act*"]
>
> *Constitution Act*

22. To put it another way, this Tribunal should not allow Canada to shield itself from scrutiny by rendering neutral its role in constructing the legal realities that create the unique circumstances faced by on-reserve First Nations peoples. The legal bubble must be pierced. That piercing inevitably will involve examining the second class nature of the

treatment experienced by Aboriginal peoples to those available to all other Canadians. To do anything else is to preclude a full recognition of the scope of the discrimination.

23. Contemporary approaches to constitutional interpretation advance a purposive and contextual approach for s 91(24) which impose various obligations upon the Crown in relation to Indians, including the fiduciary duty and the honour of the Crown. In *R v. Badger*, the Supreme Court of Canada held that:

> ...the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.
>
> *R v. Badger*, [1991] 1 S.C.R. 771, para 41.

24. In *Haida Nation v. British Columbia Minister of Forests*, the Supreme Court of Canada further explained the principle of the honour of the Crown:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, at para 17.

25. The AFN submits that the principle of the honour of the Crown should be the guiding interpretative principle in respect of this honourable Tribunal's consideration of Canada's motion to dismiss the Complaint. Quite simply, it is not honourable for Canada to insulate itself from any accountability for its discriminatory actions against on-reserve First Nations children.

26. Canada's characterization of the administration of the FNCFS program as one of pure public policy, which is not justiciable, cannot be sustained. Even though Canada has not enacted specific child welfare legislation, Canada assumes responsibility to fund Indian Child Welfare because of its obligations under the *Indian Act* and the *DIAND Act*. Section 2 of the *DIAND Act* states that the Minister of Indian Affairs ("the Minister") is the head of

the Department of Indian Affairs, and Section 4 of the *DIAND Act* gives the Minister a broad statutory mandate relating to Indian Affairs:

> The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to (a) Indian affairs.
>
> *Department of Indian Affairs and Northern Development Act* R.S., c. I-7, s. 2 ["*DIAND Act*"]

27. The Federal Court has expressly assumed jurisdiction to judicially review the policy decisions made by the Minister in discharging his obligations under the *DIAND Act*. In *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, this Court found that the decision of the Minister to appoint a Third Party Manager to administer programs and services to a First Nation was a "decision" falling within the purview of section 18.1 of the *Federal Courts Act*. Justice O'Keefe rejected the Minister's arguments that the Minister's decision was one of pure public policy that was not derived from statute or regulation.

> *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, (2002), [2003] 1 C.N.L.R. 153, paras. 83 – 84.

28. Justice O'Keefe's finding in *Pikangikum* is consistent with the principle that statutes and treaties related to First Nations should be liberally construed and doubtful expressions resolved in favour of the First Nations. The AFN submits that this principle extends to interpreting what duties and obligations are owed to First Nations.

> *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

29. As such, there is no merit to the Respondent's submission that "INAC views the funding of the delivery of child welfare for Residents as a matter of social policy pursuant to the federal spending power". INAC provides the child welfare services only to First Nations children, setting them apart for differential treatment, and INAC provides such services pursuant to its constitutional and legislative obligations under the *Indian Act* and *DIAND Act*.

30. AFN submits that a preliminary motion to dismiss is not the proper forum for resolving the precise nature and scope of INAC's duty to First Nations children. It would be a very grave error to dismiss this complaint at this early stage, without giving the parties the

opportunity to fully explore the complex jurisdictional space which First Nations children are in.

***ISSUE 2: Does INAC's administration of the First Nations Child and Family Services Program constitute a service for the purposes of the* Canadian Human Rights Act*?***

31. While on-reserve First Nations children receive child welfare programming administered by INAC, all other children receive these services through the provinces or territories.

32. Canada has been meeting its obligations to on-reserve First Nations children through a complex series of financial and policy arrangements with provincial/territorial governments and FNCFS agencies administered by INAC. The record as it presently stands reveals an inconsistent pattern of decision-making authority which lacks transparency:

> Q: And how are those terms and conditions conveyed or communicated to the First Nations Agencies?
>
> A: *At the moment it's verbal.* We will, however, in terms of the reporting requirements, identify reporting requirements which go out in the national reporting guide and those are referenced in the funding agreements.[emphasis added]
>
> Cross-Examination of Odette Johnston, at question 31 (page 9).

33. INAC does provide direct funding to the provinces yet it executes agreements and engages in discussions directly with FNCFS agencies. INAC also sets out terms and conditions for the provision of service by FNCFS agencies, policies regarding service delivery, audit requirements and approves or denies the budgets and conditions of renewal for individual agencies. This activity speaks to a measure of control of the services delivered by FNCFS agencies that is well beyond a simple transfer of funding.

34. A full hearing is required to explore whether INAC's obligations, policies, jurisdiction, funding and the measure of control it exercises in relation to the activities of FNCFS agencies constitutes a service pursuant to the *Canadian Human Rights Act*.

*Federal Off-Loading to the Provinces*

35. In spite of its constitutional and statutory obligations to First Nations, Canada characterizes as purely discretionary the exercise of its jurisdiction over First Nations peoples in areas that fall under provincial jurisdiction for all other Canadians. These

include its activities in the area of education, health, housing and water service delivery. See for example:

> First Nations Jurisdiction over Education in British Columbia Act, 2006, c. 10 F-11.7. See also: Non-Insured Health benefits Program, First Nations, Inuit and Aboriginal Health, Health Canada at http://www.hc-sc.gc.ca/fniah-spnia/nihb-ssna/index-eng.php
>
> Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves, (2007-2008) 39 Ottawa L. Rev 63-97

36. The federal government cannot rely on the division of powers and the legal regime it controls to deny First Nations children on-reserve access to equal service and access to human rights remedies that would otherwise be available to non-First Nations children. The Complainant supports the submission of Amnesty International regarding the responsibility of the federal government in this regard.

37. The fractured delivery of services to First Nations children in Canada is a direct result of the colonial legacy that has resulted in legislation which specifically treats First Nations peoples differently because of their race and culture. It is not open to Canada to ignore its fundamental role in constructing the very *legal* conundrum that has fostered the discrimination in question in this complaint.

> Kerry Wilkins, "Still Crazy After All These Years": Section 88 of the Indian Act at Fifty," (2000) 38 Alta. L. Rev. 458-503
>
> Andrew Orkin, "When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law," (2003) 41 Osgoode Hall L.J. 445-463

***Issue 3: Is the comparator group test applicable to the form of discrimination faced by on-reserve First Nation children?***

*Denying First Nations relief against discrimination is incompatible with human rights legislation*

38. The Respondents argue that the Complainants have failed to provide a proper comparator group to use within a proper discrimination analysis, as outlined in *Singh* ([1989] 1 F.C. 430 (C.A.)). At para. 91 of Canada's factum the formula, extracted from *Singh* is as follows: "It is a discriminatory practice for A, in providing services to B, to differentiate on prohibited ground in relation to C". AFN will refer to this as the "Singh formula."

39. AFN takes no issue with the test in standard discrimination analysis, and it may well function for those cases involving allegations of discrimination taking place on-reserve by First Nations governments. However, AFN takes issue with the application of the Singh formula to circumstances where the service being questioned is provided by the Canadian government to on-reserve First Nations peoples.

40. If we apply the Singh formula to the circumstances of this case, Canada would constitute "A"' (service provider) and on-reserve First Nations children receiving child welfare services through the FNCFS Program constitute "B" (service recipient). The "service" which is provided is characterized by Canada's excessive exercise of control over the funding once it is received by "B", including the imposition of imitations on discretion in the use of such funding. This Complaint alleges that "A" – Canada – has discriminated in the provision of a funding because it is provided at a considerably lower amount than other jurisdictions, and the resulting funding combined with the subsequent actions of the Canada result in lower quality services to First Nations children.

41. It is clear that component "C" of the *Singh* formula is not applicable to this Complaint because Canada's only provides services to Indians, pursuant to its jurisdiction under section 91(24), there can be no effective comparison to provincial service recipients because Canada has no jurisdiction over provincial child welfare recipients. All other Canadians receive these services through the operation of provincial authority pursuant to section 92 of the *Constitution*. The constitutional division of powers regime has formally isolated on-reserve First Nations children from other Canadian children in any area where the Federal government chooses to exercises its authority.

42. The Respondent's argument that a comparator group is required in order to conduct a discrimination analysis, although superficially compelling, must fail. Naturally, there can be no comparator group when the very source of the discrimination is race-based legislation and the unique constitutional status of Indians, leading to equal treatment of Indians *qua* Indians, but not *qua* Canadians. This legal impediment does not exist in any other case where the s.5 analysis under the *CHRA* has been developed and applied.

43. In view of the recent amendments to the *CHRA* to review discrimination in relation to the Indian Act, and because this is the first complaint before the CHRT that addresses whether INAC programs constitute a "service", AFN urges this honourable Tribunal to be

mindful of the purposes of human rights legislation in considering the requirement of a "Comparator group". As stated by Chief Justice Dickson:

> I recognize that in the construction of such legislation, the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.
>
> *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.) at 1134 (emphasis added)
>
> See also: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)* [2000] 1 S.C.R. 665 at paras. 30-31.

44. Similarly, the Supreme Court of Canada observed that:

> accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment...and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary--and it is for the courts to seek out its purpose and give it effect.
>
> *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 pages 546 – 547

45. As such, the Respondent's submission that a comparator group is required to conduct human rights analysis is not an accurate reflection of the purpose of human rights legislation. Indeed, this approach was expressly rejected by the Supreme Court of Canada in *Corbiere*, which considered on-reserve residency as a requirement for voting in Indian band elections. The Supreme Court of Canada rejected Canada's argument that residency was not a prohibited ground, and found that the new analogous ground, "Aboriginal-residency", should be created to advance the purposes of Section 15 of the Charter. Justice L'Heureux-Dubé explains this rationale:

> The second stage [of the s. 15(1) inquiry] must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.

46. Furthermore, while the Supreme Court has emphasized the importance of the comparator group to ensuring a proper equality analysis is undertaken by a reviewing court, the

Supreme Court of Canada has also cautioned against a too mechanistic or narrow approach that would fail to consider both the purpose and impact of the legislation.

> *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497 at para 57
>
> *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at para. 50

47. AFN submits that the discrimination analysis of s.5 of the *CHRA*, must be adapted to the unique legal conundrum created and maintained by the federal government with regards to on-reserve First Nations peoples. To do otherwise, is to enable the Federal government to create its own standards which are of lesser quality for the provision of services to First Nations peoples and allow it to avoid scrutiny.

48. The Human Rights Complaint at issue alleges that the services received by First Nations children on-reserve is not equal to that required by all other children who are not subject to the administrative regime of the *Indian Act* or over whom the Federal government has not chosen to exercise its authority. The federal government would ask to be able to sustain a racial construction of discrimination that would entrench the unequal treatment of on-reserve First Nations children.

49. The best method to identify the scale of the deprivation is to be able to compare the treatment between services received by children who are the subject of a federally restrictive regime because of their race to that received by children not subject to such a regime. This is consistent with the discussion of the Supreme Court in *Hodge* which spoke of the flexibility required when it stated:

> In either case, the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified. I use the phrase "potentially entitled" because the legislative definition, being the subject matter of the equality rights challenge, is not the last word. Otherwise, a survivor's pension restricted to white protestant males could be defended on the ground that all surviving white protestant males were being treated equally. The objective of s. 15(1) is not just "formal" [page370] equality but *substantive* equality (*Andrews, supra*, at p. 166).
>
> *Hodge v. Canada (Minister of Human Resources and Development*), [2004] 3 S.C.R. 357 at para 25

50. Mr. Justice Sopinka speaking on behalf of the Court in *Gibbs* set some boundaries to the construction on comparator groups which are instructive in this case. In that case he found

it appropriate to compare services received by persons with physical disabilities with those with mental disabilities despite the distinctions between the natures of the disabilities. He noted that comparison with persons not in care would not be appropriate.

> *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566 at para.32

51. The Complainant recognizes that each service has a unique public. In this case, the public is vulnerable Canadian children requiring child welfare services. The provision of services is provincial in nature for non-reserve children giving rise to some potential differences in service delivery. However, the control and jurisdiction exerted by the federal government in the child welfare service delivery process creates a collectivity of children identified by race and culture who cross provincial boundaries as described in the Complaint. The geographic homogeneity that is foundational in other cases is distorted by the very legislative system maintained by the federal government.

52. One alternative to construct the comparator group that would meet the *Singh* formula might be on-reserve First Nations children who are receiving services through the provincial child welfare system through an appropriate arrangement.

53. The AFN would ask the Tribunal to note that this use of the comparator group methodology would still entrench discrimination against on-reserve First Nations children. It is well established that it is the combination of the historical legacy of colonialism and the ongoing economic and legal relationship of inequality that significantly contributes to the impoverishment of First Nations peoples. First Nations children on-reserve experience compounded inequality which results in a higher level of vulnerability.

54. The AFN rejects any comparator group that would compare on-reserve First Nations children in different contexts to each other. This would completely fail to address the inherent discrimination of the reserve system maintained by Canada that has resulted in First Nations children being the poorest and most vulnerable children in the country.

55. The appropriate comparator group must enable a proper evaluation of the discrimination and enable First Nations children to achieve parity in the receipt of services with their non-First Nations counterparts. By definition, the latter will not be residing on-reserve. The

federal government is asking the Tribunal to entrench a “separate but equal” analysis that would forever disentitle First Nations on-reserve children from ever being treated in an equal fashion to children in receipt of child welfare service who are not subject to the federally controlled legislative regime.

56. The AFN rejects the federal government argument that treatment experienced by First Nations children on-reserve cannot be compared to that of non-First Nation children off reserve as seriously flawed. At the heart of this complaint in the provision of services to Aboriginal children on the basis of their race and culture which is entrenched in the regime of the reserve system controlled by the Federal government’s *Indian Act*.

57. In fact, the AFN is asking for equality in the receipt of child welfare services. This case is in the spirit of *Eldridge* where the decision to provide the service was already made and no positive obligation was being implied. The issue was the regulation of access to the service. In this case, the government has an obligation to ensure that children receive equal treatment. International law does not recognize the jurisdictional distinction upon which the federal government is purporting to rely.

*Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624

*Multi-Dimensional Discrimination faced by Indian Children requiring Welfare Services*

58. The comparator group of First Nations children on-reserve with non-First Nations children off-reserve who are in receipt of child welfare services from the province, would meet the reasonable restrictions set out in *Gibbs* and sustained in later jurisprudence. The characteristics that these groups would have in common include: (a) being children who require child welfare services (b) age and (c) being in receipt of very similar forms of treatment or service subject to individual characteristics of the child/youth client or treatment protocol. The comparator group is specific to the discrimination alleged and does not encompass all children off reserve regardless of their receipt of child welfare services.

59. In the context of this complaint, the children who are in receipt of the service reflect a combination of intersectional characteristics giving rise to their heightened vulnerability to discrimination in addition to their race/culture/ethnic origin as First Nations people. This

includes, their age, socio-economic status/poverty; and disability (psychological and physical harm that may have arisen from neglect).

***Issue 4: The repeal of section 67 of* Canadian Human Rights Act *expands the scope of prohibited discrimination in relation to on-reserve First Nation peoples***

60. The *CHRA* was first enacted by Parliament in 1977 with the following provision:

> s. 67 Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to the Act.

61. The enactment of section 67 affected mainly First Nations people governed under the *Indian Act*. In 1977, then Minister of Justice, the Honourable Ronald Basford stated that section 67 was an interim measure to allow the federal government time to make changes to the *Indian Act* in consultation with First Nation leadership.

> Canadian Human Rights Commission, *A Matter of Rights: A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act* (Ottawa: Minister of Public Works and Government Services, 2005) at 5.
>
> See also: Wendy Cornet, "First Nations Governance, the *Indian Act,* and Women's Rights" in Judith F. Sayers et al., eds., First Nations Women, Governance and the *Indian Act:* A Collection of Policy Research Reports (Ottawa: Status of Women Canada, 2001) 117 at 124-26.

62. Canada has the authority and mandate to legislate in respect of Indians and lands reserved for Indians, and has had over 31 years to make changes to the *Indian Act* in consultation with First Nation leadership. Yet, there has been little to no progress in amending the *Indian Act* with respect to child welfare.

63. INAC has relied on section 67 to shield it from the purview of the *CHRA* and continues to argue against the application and jurisdiction of the *CHRA* in addressing complaints against INAC.

> Written submissions of the Attorney General of Canada, In Support of His Motion to Dismiss the Complaint (“AG Submission”), paras 50-106, Canada’s Record, Tab 14.

64. On June 28, 2008, Parliament repealed section 67 in passing *An Act to amend the Canadian Human Rights Act* and thereby sent clear indication that Parliament intends for the CHRA to apply to decisions with respect to the *Indian Act*.

*An Act to amend the Canadian Human Rights Act,* S.C. 2008, c. 30.

65. Parliament included a 36 month transitional phase in the repeal so that challenges cannot be launched against First Nation governments until June 19, 2011. No such transitional phase was granted to against complaints made in respect of INAC's provision of services to First Nations. As such, Parliament's intention in repealing s. 67 is to permit complaints with respect to the *Indian Act* and INAC.

*An Act to amend the Canadian Human Rights Act,* S.C. 2008, c. 30, s. 3.

66. First Nations legal and historical situations are unique as evidenced by the amendment of the CHRA in the following clauses: the acknowledgement and protection of Aboriginal and treaty rights (s. 1.1); the interpretive clause respecting First Nations legal traditions and customs (s. 1.2); and the transition period for First Nation government's (s. 3). The AFN submits this uniqueness must be given due regard with respect to the definition of service in order that First Nations have access at minimum to the same standards and protections as enjoyed by all Canadians.

*An Act to amend the Canadian Human Rights Act,* S.C. 2008, c. 30, ss. 1.1, 1.2, 3.

67. If Canada is successful on this motion, Parliament's intentions as set out in *An Act to amend the Canadian Human Rights Act* will be contravened. In fact, Canada's motion to dismiss this Complaint without a full hearing on the basis that the Tribunal does not have jurisdiction contradicts INAC's earlier position of urging First Nations to turn to the *CHRA* for relief against discrimination arising from the *Indian Act*. In March 2007, then Minister of Indian Affairs, Jim Prentice, made representations to the Parliamentary Standing Committee on Aboriginal Affairs stating that the *CHRA* could be a basis for reviewing INAC programs and services to ensure compliance with human rights obligations:

> The repeal of section 67 will provide first nation citizens, in particular first nation 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 first nation 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, such as membership, I assume, as well.

> Canada, Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings and Evidence, (*March 22, 2007).
>
> http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2786776&Language=E&Mode=1&Parl=39&Ses=1

68. It defies reason that legislation meant to uphold human rights protection is the tool used by INAC to shield it from discriminatory practices. Section 67 acted as a shield and further protected discriminatory decisions as a matter of legislation and was upheld by law over the last 31 years. It is INAC's intention, if successful on this motion, to continue to rely on the *CHRA* to shield it from application of human rights protection by First Nation people which is afforded to all other Canadians. This also defies Parliament's intention in repealing section 67 and should not be allowed to continue.

69. Denying on-reserve First Nations children access to the federal human rights regime for a remedy to the discrimination they face in this case would return us to the early treatment afforded First Nations peoples by Canada which legally enforced their second class citizenship. The Supreme Court of Canada recognized the leavening effect of human rights principles on government action in 1970 in the *Drybones* decision where it utilized the *Canadian Bill of Rights* to render inoperative the actions of the Federal government that treated First Nations peoples differently because of their race. Justice Ritchie, for the majority, concluded:

> The present case discloses laws of Canada which abrogate, abridge and infringe the right of an individual Indian to equality before the law and in my opinion if those laws are to be applied in accordance with the express language used by Parliament in s. 2 of the *Bill of Rights,* then s. *94(b)* of the *Indian Act* must be declared to be inoperative.
>
> *The Queen. v. Drybones*,[1970 ] S.C.R. 282 at page 299.

***CONCLUSION***

*First Nations children have no recourse to provincial tribunals*

70. Canada's exercise of its jurisdiction in the provision of these services has always been piecemeal and has fallen short of the equivalent services provided to other Canadians who receive such services from their respective province. Yet, in order for First Nations to access such services, they are required to leave their reserves, their communities and their cultural base which is badly in need of preservation, support and rejuvenation. This

assimilationist consequence of the FNCFS program and funding structure is extremely problematic from a human rights perspective.

71. While the issues of the historically racist service delivery in the area of education has been the subject of national concern through political process such as the formation of the RCAP, First Nations peoples are entitled to pursue their claims through the appropriate human rights mechanism. In this case, that forum is the Canadian Human Rights Tribunal. The operation of section 91(24) of the Constitution precludes on-reserve First Nations children from obtaining a remedy through any provincial regime.

72. An added complication, especially for cases arising on reserve, is lack of clarity on whether the Canadian Human Rights Commission (CHRC) or the provincial human rights commissions have jurisdiction. Our legal research has determined that, for most cases arising on reserve, the CHRC would have jurisdiction because most cases concern a federal body, a Band Council, or an entity that is substantially controlled by a Band Council. This mandates federal jurisdiction because s. 91 (24) of the *Constitution Act of* gives the federal government exclusive legislative authority over "Indians, and lands reserved for Indians."

> A Framework and Action Plan for the Investigation and Resolution of Human Rights Complaints from Mi'kmaq and other Aboriginal People in Nova Scotia: Executive Summary September 19, 2007 online at http://www.gov.ns.ca/humanrights/pubs/exec-summary-english.pdf

73. The Tribunal must also take cognizance that there is no recourse to provincial human rights legislation for on-reserve First Nations children in the absence of the enactment of a specific provincial legislative regime. Indians and lands reserved for Indians are the unique and sole jurisdiction of the Federal Government. The Federal government must affirmatively cede its jurisdiction to the provincial domain before a provincial regime can apply.

***PART IV: RELIEF SOUGHT***

74. Based on the foregoing, the Complainant, the Assembly of First Nations, respectfully requests that their Complaint proceed to a full hearing, and that the Respondent's motion to dismiss this Complaint be dismissed, with costs.

75. All of which is respectfully submitted.

May 15, 2010

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