File No. T-630-11

FEDERAL COURT

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Applicant

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

Respondents

A N D B E T W E E N:

Court File No. T-578-11

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

- and -

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

Respondents

A N D B E T W E E N:

Court File No. 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

MEMORANDUM OF FACT AND LAW
OF AMNESTY INTERNATIONAL CANADA
(APPLICATION FOR JUDICIAL REVIEW)

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MEMORANDUM OF FACT AND LAW
OF AMNESTY INTERNATIONAL CANADA

OVERVIEW

1. The First Nations Child and Family Caring Society (the "Caring Society"), the Assembly of First Nations (the "AFN") and the Canadian Human Rights Commission (the "Commission") (together, the "Applicants") bring this application for judicial review of a decision of the Canadian Human Rights Tribunal (the "Tribunal") on March 14, 2011 (2011 CHRT 4) dismissing a complaint brought by the Caring Society and the AFN (the "Complaint").[1] The Complaint alleges that the Government of Canada is discriminating against on-reserve children by providing them with less funding for child welfare services than received by off-reserve children.

2. Before the Tribunal, Amnesty International Canada ("Amnesty International") was granted "Interested Party" status, and made both written and oral submissions concerning Canada's obligations under international human rights law. On this application for judicial review, Amnesty International is therefore limiting its submissions to Canada's obligations under international human rights law and how this impacts on the proper interpretation of the *Canadian Human Rights Act* (the "*CHRA*").

3. The Tribunal's Decision turns on its erroneous interpretation of section 5(b) of the *CHRA*.[2] The Tribunal concluded that a finding of discrimination under s. 5(b) of the *CHRA* necessarily required a comparison between groups who received the *same* service from the *same* service provider. Since on-reserve children are funded by the federal government and off-reserve children are funded by the provincial government, the Tribunal concluded that, as a purely legal matter, discrimination could not exist.

4. Amnesty International submits that the Tribunal's failure to properly consider and respect the role of international law in interpreting the *CHRA* resulted in a Decision that runs contrary to Canada's legal obligations under both conventional and customary

[1] **Reasons for Decision**, Joint Applicants' Record ("JAR") Vol. I, Tab D.

[2] R.S.C. 1985, c. H-6, s. 5(b).

international human rights law. Under a number of international conventions and treaties, Canada has an obligation to provide adequate funding for child welfare services in a non-discriminatory manner to all children. This obligation binds Canada as a federal state, making the issue of which level of government technically provides funding to various groups of children completely irrelevant to the discrimination analysis.

5. The Tribunal must adopt an interpretation of the *CHRA* that complies with and respects Canada's international legal obligations. There is certainly no clear, unequivocal statutory language in the *CHRA* supporting an interpretation that conflicts with those obligations.

6. Furthermore, the Tribunal failed to respect Canada's international legal obligations by dismissing the Complaint without hearing any *viva voce* evidence or considering the merits of the Complaint. As an institution charged with the monitoring and oversight of Canada's international human rights responsibilities, the Tribunal has an obligation to provide a fair and effective forum for ensuring those responsibilities are being met. Given the importance of the rights at stake in this case, the Tribunal ought to have afforded the complainants a full hearing on the merits. Amnesty International submits that this provides a further basis upon which the Tribunal's Decision should be quashed.

PART I - FACTS

7. Amnesty International accepts and adopts the facts as set out in the memoranda of fact and law of the Applicants. Here, Amnesty International provides a supplementary factual overview, drawn from the record of the Applicants, that is most relevant to its submissions.

A. INAC's role in funding child welfare services on-reserve

8. Currently, the Department of Indian and Northern Affairs Canada ("INAC") administers and funds child and family welfare services to First Nations children resident on reserves through its First Nations Child and Family Services Program (the "FNCFS Program"). Through the FNCFS Program, INAC funds, oversees, monitors and controls

child welfare services to status Indian children and their families on-reserve through INAC-authorized First Nations Child and Family Services Agencies ("FNCFS Agencies").[3]

9. INAC's funding of child and family welfare services on-reserve is more than simply a transfer of funds. Rather, INAC controls the provision of child and family services on reserves through its FNCFS Program. For example, INAC dictates to FNCFS Agencies what services are eligible for reimbursement; it closely monitors and oversees agencies and the services they provide; and it decides how FNCFS Agencies will be governed.[4]

10. INAC's FNCFS Program adversely impacts First Nations children resident on reserves and their families. These children and families have access to fewer preventative child protection services and resources than children off-reserve. As a result, these children are apprehended from their homes far more frequently than non-First Nations children and First Nations children living off reserve.[5]

11. A number of reports have confirmed that INAC's FNCFS Program results in the inequitable treatment of First Nations children resident on-reserve. These include:

- The Joint National Policy Review Final Report (June 2000);
- Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report (December 2004);
- Wen:de We Are Coming to the Light of Day (2005);
- Wen:de The Journey Continues (2005);
- The 2008 Report of the Auditor General of Canada;
- The Standing Committee on Public Accounts reviewing INAC's implementation of the Auditor General's Report (2009); and
- Ombudsman and Child and Youth Advocate of New Brunswick (2010).[6]

B. The Complaint is dismissed on a preliminary motion

[3] **Affidavit of Cindy Blackstock** sworn February 11, 2010 ("Blackstock Affidavit"), JAR Vol. III, Tab E40 at paras. 10, 38; **Affidavit of Elsie Flette** sworn February 11, 2010 ("Flette Affidavit"), JAR Vol. VI, Tab E41 at paras. 33-44.

[4] **Blackstock Affidavit**, JAR Vol. III, Tab E40 at paras. 20, 58-62, 67; **Flette Affidavit**, JAR Vol. VI, Tab 41 at paras. 5, 33, 35, 38-41.

[5] **Blackstock Affidavit**, JAR Vol. III, Tab E40 at para. 31.

[6] **Blackstock Affidavit**, JAR Vol. III, Tab E40 at paras. 22-28; 31-33.

12. On February 26, 2007, the Caring Society and the AFN filed the Complaint with the Commission.[7] The Complaint alleges that the Government of Canada (through INAC) violated the *CHRA* by discriminating in its provision of child welfare services to First Nations children living on reserves. The Complaint states that the Government of Canada provided inequitable and insufficient funding to on-reserve child welfare agencies and, as a direct result, on-reserve child welfare services are not comparable to those services received by First Nations children and non-First Nations children living off-reserve.[8]

13. On September 14, 2009, the Tribunal issued an order granting Amnesty International and the Chiefs of Ontario "Interested Party status in the hearing of the [Complaint]" pursuant to s. 50 of the *CHRA*.[9]

14. On December 21, 2009, the Attorney General filed a preliminary motion to dismiss the complaint, which was heard by the Chairperson of the Tribunal on June 2 and June 3, 2010.[10] Amnesty International filed written submissions and participated in the hearing before the Tribunal. None of the parties had an opportunity to present *viva voce* evidence.[11]

15. Almost nine months later, the Tribunal released its Reasons for Decision dismissing the Complaint.[12] The Tribunal's Decision turned on whether s. 5(b) of the *CHRA* requires a comparison between different comparator groups and, if so, whether such a comparison must involve the same service provider.

16. Section 5(b) of the *CHRA* states:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,

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[7] **Affidavit of Cindy Blackstock in support of the judicial review application** sworn May 31, 2011 ("Blackstock Affidavit – Application"), JAR, Vol. VIII, Tab F at paras. 4-5.

[8] **Complaint**, JAR, Vol. I, Tab E1 at pp. 111-113.

[9] **Order of the Tribunal,** JAR Vol. I, Tab E12 at pp. 263-64.

[10] **Dismissal Motion**, JAR Vol. II, Tab E32 at pp. 471-472.

[11] **Blackstock Affidavit – Application**, JAR Vol. VIII, Tab F at paras. 46-51.

[12] **Reasons for Decision**, JAR Vol. I, Tab D.

on a prohibited ground of discrimination.[13]

17. The Reasons for Decision did not consider the impact of Canada's binding obligations under international human rights law. The Tribunal only adverts to the relationship between international law and the interpretation s. 5(b) in a single paragraph, without any analysis:

> 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. International covenants, such as the *UNDRIP*, may inform the contextual approach to statutory interpretation. However, effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament. Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue.[14]

18. The Tribunal went on to consider the language of the *CHRA* provisions and various lines of jurisprudence regarding comparator groups, but it did not revisit the subject of international law or its application to the interpretation of s. 5(b).

19. Based on the language of the statute and its reading of selective jurisprudence, the Tribunal held that in order to make out an instance of "adverse differentiation" under s. 5(b), "one has to compare the experience of the alleged victims with that of someone else receiving those same services from the same provider" (emphasis in original).[15] The Tribunal then determined that it could not compare the funding given to on-reserve FNCFS Agencies with the funding received by off-reserve child welfare agencies:

> 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 original].[16]

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[13] R.S.C. 1985, c. H-6, s. 5(b).

[14] **Reasons for Decision**, JAR Vol. I, Tab D at para. 112

[15] **Reasons for Decision**, JAR Vol. I, Tab D at para. 9

[16] **Reasons for Decision**, JAR Vol. I, Tab D at para. 11

20. Later, the Tribunal added:

> 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 department employers, and federal departmental funders with provincial departmental funders?[17]

21. Ultimately, after reasoning that s. 5(b) requires a comparison involving the same service provider and this case involves two different services providers, the Tribunal dismissed the Complaint.

PART II - ISSUES

22. Amnesty International accepts and adopts the legal submissions set out in the memoranda of fact and law of the Applicants, and will not repeat those submissions here. Rather, Amnesty International's legal submissions focus on addressing the following two issues:

(a) Is the Tribunal's conclusion on the interpretation of s. 5(b) of the *CHRA* incorrect (or, in the alternative, unreasonable) because it fails to respect Canada's obligations under international human rights law?

(b) Is the Tribunal's conclusion that it could decide the interpretation of s. 5(b) of the *CHRA* without a *viva voce* hearing on the merits incorrect (or, in the alternative, unreasonable) because it fails to respect Canada's obligations under international human rights law?

23. Amnesty International submits that both of these questions must be answered in the affirmative.

PART III - SUBMISSIONS

A. The Tribunal's interpretation of s. 5(b) is incorrect (and unreasonable)

[17] **Reasons for Decision**, JAR Vol. I, Tab D at para. 130

24. Amnesty International accepts and adopts the legal submissions of the Applicants that the appropriate standard of review for the Tribunal's Decision is correctness.[18] (In the event that this Court finds that the appropriate standard of review is reasonableness, then the following analysis would lead to the conclusion that the Tribunal's Decision is unreasonable.)

25. Amnesty International submits that the Tribunal's conclusion on the interpretation of s. 5(b) is incorrect, in the sense that it is legally wrong. The Tribunal failed to consider Canada's obligations under international human rights law when it interpreted s. 5(b). Domestic human rights statutes – designed, at least in part, to reflect and conform to Canada's obligations under international human rights law – should be interpreted having regard to those very obligations, absent a clear legislative intention to the contrary.

26. Amnesty International submits that the Tribunal's failure to properly consider and respect the role of Canada's obligations under international human rights law when interpreting s. 5(b) contributed to the Tribunal's error in formulating the test for discrimination under s. 5(b) and, ultimately, to the dismissal of the Complaint. Simply put, the Tribunal was incorrect to conclude that discrimination under s. 5(b) requires a comparison between groups receiving services from the same provider.

27. Furthermore, the Tribunal's decision-making process does not satisfy the requirements of "justification, transparency and intelligibility" with respect to its formulation of the test for discrimination under s. 5(b). The Reasons for Decision fail to explain why the Tribunal did not consider the applicable presumptions relating to international law when undertaking its interpretive analysis.[19]

(i) The Tribunal's Decision failed to consider international law

[18] See the Commission's factum at paras. 30-44, the Caring Society's factum at paras. 48-52, and the AFN's factum at para. 7. For ease of reading, Amnesty International's submissions generally refer to the Tribunal's Decision only as "incorrect".
[19] *Ibid.*

28. It is clear that Canada's obligations under international human rights law played no role in the Tribunal's final interpretation of s. 5(b). As explained above, the Reasons for Decision briefly advert to some of the general legal principles regarding international law and then ignore them entirely. The Tribunal never directs itself to the crucial question of how the interpretation of the *CHRA* is to be properly reconciled with international human rights law (in particular, the presumptions discussed below).

(ii) International law plays an important role in the interpretation of domestic statutes, and particularly the CHRA

29. The Supreme Court of Canada has affirmed the relevance of international human rights law, both binding and non-binding, in interpreting domestic legislation such as the *CHRA*. Adopting the statement of the applicable principles as set out by Professor Ruth Sullivan in her leading text on statutory interpretation, the Supreme Court held that there are two important interpretive presumptions at play when dealing with the impact of international law:

> …there are two aspects to the presumption of compliance with international law. First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing among possible interpretations, therefore, courts avoid an interpretation that would put Canada in breach of its international obligations. Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, an interpretation that reflects these values and principles is preferred. [Emphasis added].[20]

30. Both presumptions are directly engaged by the issue of how s. 5(b) should be interpreted. Canada is a signatory to several binding international instruments, which give rise to certain obligations concerning the protection of children's rights under conventional international law.[21] Equally relevant in this case is the key principle of customary

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[20] Ruth Sullivan, *Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths, 2002) at 422, as cited in ***R. v. Hape***, [2007] 2 S.C.R. 292 at paras. 53-54; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at paras. 65 and 70; ***R. v. Sharpe***, [2001] 1 S.C.R. 45 at para. 175.

[21] Discussed further in Part III.A.iv of these submissions. A list of the relevant conventions and treaties is set out in para. 35.

international law that a federal state bears ultimate responsibility for meeting its international obligations.[22]

31. Additional sources of international law, though technically not binding in and of themselves, are also important for the question of statutory interpretation. The *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), formally endorsed by Canada in November 2010, is an important indication of the Government of Canada's commitment to treating First Nations peoples fairly and equitably. It is also a reflection of emerging norms in international law regarding the rights of Indigenous peoples.

32. Other sources can provide authoritative interpretations of the relevant treaties, conventions or principles of customary international law. General Comments, which are interpretations of the treaty issued by the body/committee charged with monitoring its implementation, offer important guidance regarding the obligation of State parties under the treaty. Also important are the views of treaty bodies concerning whether State parties have complied with their international human rights obligations, as well as the Concluding Observations of those treaty bodies following their review of periodic reports submitted by State parties, which examine how the treaty is being implemented domestically.

33. These non-binding international legal sources have guided courts and tribunals in determining the legislative intent underlying certain sections of domestic legislation. Indeed, the Supreme Court of Canada has relied on these sources in assessing the legislative objective underlying the *CHRA*.[23]

34. The presumptions regarding international law, as well as the importance of non-binding international legal sources, apply with special force to *quasi*-constitutional domestic human rights legislation and the institutions that enforce it, like the *CHRA* and the Tribunal. As one provincial human rights tribunal put it, "international instruments can prove to be reliable tools for interpreting our domestic standards, particularly in the area of

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[22] Discussed further in Part III.A.v of these submissions.

[23] ***Canada (Human Rights Commission) v. Taylor***, [1990] 3 S.C.R. 892 at pp. 31-32 (relying on decisions of the Human Rights Committee and several provisions of the European Convention of Human Rights to affirm that the eradication of discrimination includes preventing harms caused by hate propaganda); ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, [2004] 1 S.C.R. 76.

human rights."[24] The same view is reflected in the Commission's 2001 Annual Report, which notes that "[i]nternational human rights standards are becoming an increasingly important source of interpretation for Canadian human rights law."[25]

35. Such an approach recognizes that legislation like the *CHRA* and institutions like the Tribunal are the essential means through which Canada implements its binding legal obligations to respect, protect and ensure human rights pursuant to treaties it has ratified (or acceded to), including the *International Covenant on Civil and Political Rights ("ICCPR"),* the *International Covenant on Economic, Social and Cultural Rights ("ICESCR"),* the *International Convention on the Elimination of all forms of Racial Discrimination ("ICERD")* and the *Convention on the Rights of the Child ("CRC")*, as well as relevant customary international law.[26] In its periodic report to the Human Rights Committee, for instance, Canada relied on the *CHRA* and the Tribunal to demonstrate that Canada is implementing its international obligation to promote non-discrimination under the *ICCPR*.[27]

36. The same logic extends to non-binding sources of international law, which may represent the dynamic development of international legal norms, or serve to further illuminate the substance of Canada's binding legal obligations. Indeed, the Tribunal has relied on non-binding international human rights law such as resolutions of the U.N. Economic and Social Council, recommendations of the International Labour Organisation, and views of the Human Rights Committee in a number of its previous decisions.[28]

(iii) CHRA *contains no clear intention to default on Canada's international obligations*

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

[25] Canadian Human Rights Commission, Annual Report 2001 (Ottawa: Minister of Public Works and Government Services, 2002), accessed online on October 12, 2011, (www.chrc-ccdp.ca/publications/2001_ar/page6-en.asp?lang=en&url=%2Fpublications%2F2001_ar%2Fpage6-en.asp).

[26]. Canada has ratified, or acceded to, the ICCPR, ICESCR, ICERD and CRC. For an example of how these instruments rely on institutions like the Tribunal for their implementation, see: Committee on Economic, Social and Cultural Rights, General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights

[27] Canada, Core document forming part of the reports of State Parties: Canada (1998) at para. 130.

[28] ***Nealy v. Johnston***, (1989) C.H.R.R. D/10 (CHRT); ***Stanley v. Canada (Royal Canadian Mounted Police)*** (1987), (1987) CanLII 98 (CHRT); ***Bailey and Canada (Minister of National Revenue),*** 1980 CanLII 5 (CHRT).

37. While it is acknowledged that the presumptions outlined above are not insurmountable, the jurisprudence has established an appropriately high threshold for overcoming them. In *R. v. Hape,* LeBel J. put the test as follows:

> The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. … The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. [Emphasis added].[29]

38. Professor Sullivan adopts a similarly stringent standard: "The question to be asked is… whether, having regard to all the evidence, it is plain that the legislature intended to enact a provision that is inconsistent with international law."[30]

39. The language in the *CHRA* does not satisfy this high threshold of a "clear", "plain" and "unequivocal" intention on the part of Canada to default on its international obligations.

40. The statutory language supports the interpretation put forward by the Applicants in their submissions, which complies with Canada's obligations under international human rights law. And, at the very least, the language of s. 5(b) does not *compel* an interpretation at odds with Canada's treaty obligations and customary international law.

41. Moreover, there are several reasons to doubt that the Tribunal's interpretation is based on clear or unequivocal language in s. 5(b) or the *CHRA* scheme, including the fact that the Tribunal[31]:

(a) Does not reconcile the French and English versions of the phrase "differentiate adversely"[32];

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[29] [2007] 2 S.C.R. 292 at para. 53.

[30] Ruth Sullivan, *Driedger on the Construction of Statutes*, 5th ed. (Toronto: Butterworths, 2008) at p. 549.

[31] These points are all developed further in the Applicants' submissions.

[32] **Reasons for Decision**, JAR Vol. I, Tab D at paras. 113-114.

(b) Creates an illogical distinction between individuals who have been completely denied a service (under s. 5(a)) and those who have experienced adverse differentiation with respect to a service (under s. 5(b));

(c) Relies on a line of reasoning concerning comparator groups that the Supreme Court explicitly rejected in *Withler v. Canada (Attorney General)* (albeit in the context of a s. 15 *Charter* claim);[33] and

(d) Admits that "[n]either 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."[34]

42. Importantly, the Tribunal does not suggest that this is a case involving statutory language so clear and unequivocal that it compels an interpretation at odds with Canada's obligations under international law. Rather, the Reasons for Decision simply fail to consider whether the language of the statute has the requisite degree of clarity to overcome the applicable presumptions.

(iv) Canada has a binding obligation to provide adequate funding for child welfare services in a non-discriminatory manner

43. As a signatory to several binding international instruments, Canada has an obligation to devote adequate resources to services related to child welfare, and to do so in a non-discriminatory manner. The Reasons for Decision completely ignore this obligation and, in the result, the Tribunal's interpretation of s. 5(b) cannot be reconciled with Canada's responsibilities under international human rights law.

Obligation to provide adequate funding for child welfare services

44. Canada has ratified a number of international human rights treaties, including the *ICCPR,* the *ICESCR,* the *CRC,* and the *ICERD*, which require Canada to respect, protect and ensure the rights of all children, particularly First Nations children, in a non-discriminatory manner. These same commitments arise under the *UNDRIP*. Effective implementation of these treaty obligations means that Canada must undertake all

[33] 2011 SCC 12.

[34] **Reasons for Decision**, JAR Vol. I, Tab D at para. 128.

appropriate measures, whether legislative, administrative *or financial*. Thus, Canada's funding and administration of child and family welfare services is a necessary component of its overall international obligations to First Nations children.

45. Each of these treaties explicitly requires State parties to use all appropriate "means" or "measures" to implement their human rights obligations. A number of treaty bodies have explained that these "means" or "measures" include resource allocation. Many have emphasized the necessity of allocating resources to appropriate services and programs for the implementation and realization of human rights, especially economic, social and cultural rights.

46. First, Article 2(2) of the *ICCPR* requires states to adopt necessary measures to give effect to protected rights:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. [Emphasis added].[35]

47. Second, Article 2 of the *ICERD* requires states to undertake all appropriate means, including special and concrete measures, to eliminate racial discrimination:

> 1. State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, [...]
>
> 2. State parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms… [Emphasis added].[36]

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[35] **International Covenant on Civil and Political Rights**, article 2(2).

[36] **International Convention on the Elimination of all forms of Racial Discrimination,** article 2.

48. Article 2(1) of the *ICESCR* also requires states to adopt all appropriate means to realize economic, social and cultural rights:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. [Emphasis added].[37]

49. The Economic, Social and Cultural Rights Committee ("ESCR Committee") has explained that the "means" used by a State "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party."[38] Thus, a wide range of "means" are included under Article 2(1) and "may be legislative, judicial, administrative, *financial*, education, or social" in nature (emphasis added).[39]

50. The ESCR Committee has emphasized that the funding of certain basic social services is a fundamental obligation incumbent upon all States:

> On the basis of the extensive experience gained by the Committee…the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. [Emphasis added].[40]

51. Resource allocation is essential to give effect to many of the specific rights protected by the *ICESCR*, including Canada's obligation to provide culturally appropriate child welfare services to First Nations children resident on reserves. For example, Article

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[37] **International Covenant on Economic, Social and Cultural Rights,** article 2(1).

[38] ESCR Committee, General Comment No. 9: The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24 (1998), at para 5.

[39] ESCR Committee, General Comment No 3: Nature of States' Parties Obligations, at para 7.

[40] ESCR Committee, General Comment No. 3: Nature of States' Parties Obligations, at para. 10

10 guarantees the right to protection and assistance to family, and requires that children should be accorded special measures of protection and assistance.[41] Article 11(1) guarantees the right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions.[42] State parties like Canada must provide funding in order for these positive rights to be effectively implemented. Otherwise, they are illusory.

52. Article 4 of the *CRC* also links resource allocation with the implementation of human rights:

> State parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, State parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation. [Emphasis added].[43]

53. The CRC Committee has also recognized the financial nature of these measures, and has confirmed that the obligation to provide "financial resources" applies to State parties in the implementation of the rights of children through any "devolved authorities".[44] This would include provincial authorities or non-state actors.

54. Resource allocation is of critical importance to give effect to the rights of the child, including many that are relevant to this Complaint. For example, Article 20(1) of the *CRC* provides that a child "temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."[45] Article 24 recognizes the right of children "to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."

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[41] **International Covenant on Economic, Social and Cultural Rights,** article 10.

[42] **International Covenant on Economic, Social and Cultural Rights,** article 11(1).

[43] **Convention on the Rights of the Child,** article 4.

[44] CRC Committee, General Comment No. 5: General Measures of Implementation, U.N. Doc. CRG/GC/2003/5 (2003) at paras. 9 & 41 ("The Committee reiterates that in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. In any process of devolution, State parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention.")

[45] **Convention on the Rights of the Child,** article 20(1).

Article 26 recognizes the right of children to benefit from social security, including social insurance. And Article 27, guaranteeing the right of every child to an adequate standard of living, provides that State parties "in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."[46]

55. All of these commitments require State parties to allocate resources for their effective implementation. Indeed, the CRC Committee has expressly noted that in order to meet its obligations under the *CRC,* Canada must "prioritiz[e] budgetary allocation so as to ensure implementation of the economic, social and cultural rights of children, in particular those belonging to marginalized and economically disadvantaged groups, to the maximum of available resources."[47]

56. Echoing Canada's binding legal obligations under the *ICCPR, ICERD*, *ICESCR* and *CRC*, the *UNDRIP* states that Indigenous peoples "have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia,* in the areas of… housing… health and social security."[48] In meeting this responsibility, UNDRIP sets out that states must take "effective measures, and where appropriate, special measures to ensure the continuing improvement of [Indigenous people's] economic and social conditions", and emphasizes that "[p]articular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."[49]

Obligation to provide adequate funding in a non-discriminatory manner

57. Importantly, the measures that Canada undertakes to protect and promote the foregoing rights, including the allocation of resource to appropriate social services and programs, must respect the fundamental principle of non-discrimination. Non-

[46] **Convention on the Rights of the Child,** articles 24, 26 and 27.
[47] CRC Concluding Observations: Canada (2003), U.N. Doc. CRC/C/15/Add.215, at para. 18
[48] **United Nations Declaration on the Rights of Indigenous Peoples,** article 22(1).
[49] **United Nations Declaration on the Rights of Indigenous Peoples,** article 22(2).

discrimination is a principle of paramount importance for the implementation of all of the rights guaranteed in each of the aforementioned treaties. Since the effective implementation of many of these rights requires resources, it follows that Canada's allocation of resources must respect the non-discrimination provisions of each of these treaties.

58. Article 26 of the *ICCPR* prohibits discrimination in a general manner:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[50]

59. It also requires that State parties allocate resources without discrimination. The Human Rights Committee directly addressed the issue of discriminatory funding in *A.H. Waldman v. Canada*. At issue was whether the public funding of Roman Catholic schools in Ontario but not schools of the Jewish faith violated article 26 of the *ICCPR*. In concluding that article 26 was violated, the Committee held that where a "State party chooses to provide public funding to religious schools, it should make this funding available without discrimination."[51]

60. The *ICESCR* also imposes an obligation on State parties to ensure that economic, social and cultural rights, including the funding thereof, are enjoyed without discrimination. Article 2(2) of the *ICESCR* guarantees that the rights included within it "must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[52]

61. The ESCR Committee has repeatedly emphasized the importance of non-discrimination in the protection and promotion of economic, social and cultural rights. It

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[50] **International Covenant on Economic, Social and Cultural Rights,** article 26.

[51] Communication No. 694/1996, *A.H. Waldman v. Canada* (Views adopted on 3 November 1999), in U.N Doc. GAOR, A/55/40 (II), at para. 1.2.

[52] **International Covenant on Economic, Social and Cultural Rights,** article 2(2).

has confirmed that "non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights."[53] Accordingly, any funding associated with the State parties' implementation of economic, social and cultural rights must respect the ICESCR's non-discrimination provisions. In doing so, the ESCR Committee has most notably held that place or residence cannot be legitimate ground of discrimination and that disparities in the enjoyment of rights must be eliminated.[54]

62. Similarly, the *CRC* prohibits discrimination in the implementation of its provisions. Article 2 requires State parties to protect, respect and ensure the rights set out in the *CRC* "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[55]

63. The CRC Committee has stressed the importance of State parties implementing economic, social and cultural rights of children without discrimination. The CRC Committee, in emphasizing that non-discrimination obligations extend to access to child services, has suggested that the provision of funding must be free from discrimination:

> Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum-seekers. State parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions. Potential discrimination in access to quality services for young children is a particular concern, especially where health, education, welfare and other services are not universally available and are provided through a combination of State, private and charitable organizations. As a first step, the Committee encourages State parties to monitor the availability of and access to quality services that contribute to young children's survival and development, including through systematic data collection, disaggregated in terms of major variables related to children's and families' background and circumstances. As a second step, actions may be required that

[53] ESCR Committee, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009).

[54] ESCR, General Comment No. 16, 11 August 2005, U.N. Doc. E/C.12/2005/4 at para. 3.

[55] **International Covenant on Economic, Social and Cultural Rights**, article 2(2).

> guarantee that all children have an equal opportunity to benefit from available services. More generally, State parties should raise awareness about discrimination against young children in general, and against vulnerable groups in particular. [Emphasis added].[56]

64. Indeed, the CRC Committee has explicitly recognized that funding by State parties is necessary for the effective implementation of the human rights of Indigenous children. The CRC Committee has urged State parties in general, and Canada in particular, to undertake positive and special measures in order "to eliminate conditions that cause discrimination and to ensure [Indigenous childrens'] enjoyment of the rights of the Convention on equal level with other children."[57] In its recent Concluding Observations, the CRC Committee commented that full integration of the right to non-discrimination required:

> …that this right be effectively applied in all political, judicial and administrative decisions and in projects, programmes and services that have an impact on children, in particular children belonging to minority and other vulnerable groups such as children with disabilities and Aboriginal children. [Emphasis added].[58]

65. The *ICERD* also requires that state resources be allocated without discrimination. Article 5(e) of the *ICERD* specifically requires State parties to eliminate discrimination in the protection and promotion of certain economic, social and cultural rights including the right to public health, medical care, social security, social services, and the right to education and training.[59] As these rights clearly impose an obligation on State parties to allocate resources to the fulfillment of these rights, it follows that the elimination of discrimination extends to the allocation of these resources.

66. Finally, the *UNDRIP* recognizes that Indigenous peoples and individuals have the "right to be free from any kind of discrimination, in the exercise of their rights, in particular

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[56] CRC, General Comment No. 7: Implementing child rights in early childhood, U.N. Doc CRC/C/GC/7 at para. 12

[57] Committee on the Rights of the Child, General Comment No. 11: Indigenous children and their rights under the Convention, 12 February 2009 CRC/C/GC/11 at paras. 25-26, 30, 46. See also: CRC Concluding Observations: Canada (2003), *supra*, at paras. 25, 59.

[58] CRC Concluding Observations: Canada (2003), ***supra,* at para. 22.**

[59] **International Convention on the Elimination of all forms of Racial Discrimination,** article 5(e).

that based on their indigenous origin or identity." *UNDRIP* also requires State parties to take all "appropriate measures" to effectively implement these rights.[60]

(v) Canada is responsible for breaches of its international obligations

67. Canada is ultimately responsible for its international legal obligation to provide adequate funding of child welfare services in a non-discriminatory manner to all children. Whether that funding is delivered via INAC or a provincial organ is irrelevant; for the purposes of Canada's obligations under international human rights law *there is only one service provider* – the federal Canadian state.

68. It is a basic principle of customary international law that a State party is ultimately responsible for the breach of an international obligation, whether or not that breach is attributable to the actions or omissions of a federal or provincial government within that State.[61] In Canada, customary international law is automatically incorporated into domestic law in the absence of conflicting legislation.[62]

69. A long line of jurisprudence from the International Court of Justice demonstrates that this is a foundational principle in customary international law. In the seminal *Polish Nationals in Danzig* case of 1932, the Court declared that "a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[63] In *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, the Court concluded that "[a]ccording to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state."[64] (Commentators have noted that this holding "would clearly cover

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[60] **United Nations Declaration of the Rights of Indigenous Peoples,** article 2, 21(2), 38 and 39**.**

[61] **ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts**, articles 2, 4(1) and 32, UNGA Res. 56/83 (Annex), 12 December 2001; Commentaries to the Draft articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (UN Doc A/56/10), Yearbook of the International Law Commission, 2001, Vol. II, Part II, at pp. 85, 89 and 90; ***Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights***, I.C.J. Reports 1999 at p. 87, para. 62; Malcolm N. Shaw, *International Law*, 5th Edition, Cambridge: Cambridge University Press, 2003 at p. 125, citing ***Polish Nationals in Danzig Case*** [1932] PCIJ, Series A/B, No. 44, pp. 21, 24; the ***Georges Pinson*** case, 5 RIAA, p. 327.

[62] ***R. v. Hape, supra,*** at para. 39.

[63] ***Polish Nationals in Danzig****, supra,* at p. 21.

[64] ***Difference Relating to Immunity from Legal Process of a Special Rapporteur,*** *supra,* at para. 62.

units and sub-units within a state."[65]) Most recently, in the *LaGrand* decision, the Court applied this same line of reasoning in determining that the United States had breached its international obligations under the *Vienna Convention on Consular Relations,* notwithstanding the fact that U.S. officials were following federal law in denying a German citizen the ability to raise alleged violations of the Convention.[66]

70. In addition to forming a part of customary international law, the principle of ultimate federal responsibility is also explicitly recognised in the *ICCPR*, the *ICESCR* and the *Vienna Convention on the Laws of Treaties* (the "*Vienna Convention"*)*,* all agreements that Canada has ratified and by which Canada is bound. Article 50 of the *ICCPR* and Article 28 of the *ICESCR* both provide that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." The ESCR Committee has confirmed that the ultimate obligation to comply with the *ICESCR* rests with the federal government.[67] Article 27 of the *Vienna Convention* reflects the same principle, stipulating that a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[68]

71. Although the CRC does not include an equivalent "federal clause," the CRC Committee has confirmed that the "decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its jurisdiction, regardless of the State structure." This extends to the funding associated with implementing these rights, with the Committee noting that "[i]n any process of devolution, State parties have to make sure that the devolved authorities do have the necessary financial, human and other

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[65] Shaw, *supra,* at p. 702.

[66] ***LaGrand (Germany v. United States of America),*** I.C.J. Reports 2001.

[67] ESCR Committee, Concluding Observations on the Government of Canada, UN Doc. E/C.12/1/Add.31 (4 December 1998) at para. 52 ("The Committee, as in its previous review of Canada's report, reiterates that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the federal government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.").

[68] **Vienna Convention on the Laws of Treaties,** article 27, 1155 U.N.T.S. 331, article 27, entered into force 27 January 1980

resources effectively to discharge responsibilities for the implementation of the Convention."[69]

72. Rather than relieve State parties from their obligations under international human rights law, different levels of government are required to collaborate in order to effectively implement a country's human rights obligations. As the CRC Committee explained:

> …effective implementation of the Convention requires visible cross-sectoral coordination to recognize and realize children's rights across Government, between different levels of government and between Government and civil society - including in particular children and young people themselves. Invariably, many different government departments and other governmental or quasi-governmental bodies affect children's lives and children's enjoyment of their rights. Few, if any, government departments have no effect on children's lives, direct or indirect.[70]

73. With respect to Canada's efforts to implement its obligations under the *CRC*, the CRC Committee has expressed concerns that the Canadian federalist structure "may lead, in some instances, to situations where the minimum standards of the Convention are not applied to all children", and has urged the Federal Government to ensure that the *CRC* is fully implemented "in all provinces and territories through legislation and policy and other appropriate measures."[71]

74. Instead, the Tribunal's interpretation of the *CHRA* – that discrimination under s. 5(b) cannot exist where group "A" receives services from the federal government and group "B" receives services from the provinces – allows Canada to use federalism as a shield to avoid its obligations under international human rights law, both customary and conventional. This interpretation is fundamentally at odds with the principle of ultimate federal responsibility, as well as the provisions of the *ICCPR, ICESCR,* the *Vienna Convention* and the *CRC* (including the comments of the CRC Committee).

75. Accordingly, the Tribunal's interpretation of s. 5(b) is incorrect and cannot stand.

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[69] CRC General Comment No. 5, *supra*, at paras. 40-41.

[70] CRC General Comment No. 5, *supra,* at para. 27.

[71] CRC Concluding Observations: Canada (2003), *supra*, at paras. 8-9

(vi) Proper interpretation of s. 5(b) would not preclude the Complaint from proceeding on the merits

76. Amnesty International adopts and accepts the submissions of the Applicants on the proper approach to interpreting s. 5(b) of the *CHRA*.

77. A finding of discrimination under s. 5(b) does not require a comparator group analysis in every case. As the Supreme Court recognized in *Withler*, the discrimination inquiry must be contextual and focus on substantive inequality – an approach that is fundamentally incompatible with a strict, rigid adherence to a comparator group analysis.[72] The reasoning in *Withler* applies with equal force in the context of the *CHRA*, as there is no principled reason to hold claimants seeking redress for discrimination under domestic human rights legislation to a higher standard than claimants pursuing a remedy under s. 15(1) of the *Charter*.

78. Moreover, even where a comparator analysis is applied, s. 5(b) cannot be interpreted so strictly as to always require a comparison between groups receiving the same services *from the same service provider*. This is particularly true where the different service providers are different levels of government, rather than distinct private enterprises. Federalism cannot be used to automatically defeat an inquiry by the Tribunal into whether a particular group has suffered discrimination.

79. The interpretation of s. 5(b) put forward by the Applicants conforms to Canada's binding obligations under international human rights law, respects Canada's endorsement of the *UNDRIP,* and is faithful to various non-binding sources of international law that have clarified the scope and meaning of these instruments. If it were adopted and applied by the Tribunal, the Complaint would have proceeded to a full hearing on the merits.

B. Proper monitoring and enforcement of Canada's international human rights obligations required a *viva voce* hearing on the merits in this case

[72] *Withler, supra,* at paras. 39-40. Abandoning the need for a formal comparative analysis is consistent with the direction of international jurisprudence. The European Court of Human Rights is moving away from a strict comparator group requirement: see "Handbook on European non-discrimination law", European Court of Human Rights Publication 10.2811/11978, 2011 at 25. Similarly, the U.S. Supreme Court has not required a comparator group analysis to ground a finding of discrimination: see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989)/

80. By dismissing the Complaint in the context of a preliminary motion, without giving the parties a chance to present their evidence, Amnesty International submits that the Tribunal failed to respect Canada's international obligation to provide an effective forum for monitoring and enforcing its responsibilities under international human rights law. In other words, the Tribunal was incorrect (or, in the alternative, unreasonable) in determining that the Complaint could be fairly and effectively decided in the absence of a *viva voce* hearing.

81. International human rights law requires State parties to monitor and enforce individual human rights domestically and to provide effective remedies where these rights are violated.[73]

82. This important oversight role is often fulfilled by national human rights institutions/bodies like the Tribunal. As discussed above, such institutions are an essential means by which State parties implement and ensure compliance with their international human rights obligations.

83. The ESCR Committee has confirmed the necessity of national human rights institutions for the promotion and protection of human rights and has highlighted their important role in considering alleged infringements of applicable economic, social and cultural rights standards within the State.[74]

84. The CRC Committee has also confirmed the important role of oversight bodies, like national human rights institutions. The CRC Committee has noted that it "considers the establishment of such bodies to fall within the commitment made by State parties upon its ratification to ensure the implementation of the Convention and advance the universal realization of children's rights." The role of national human rights institutions in the protection and promotion of the rights of the child is "to monitor independently the State's

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[73] **Universal Declaration of Human Rights,** article 8*;* **Vienna Declaration and Programme of Action,** World Conference on Human Rights, at para. 27.

[74] Committee on Economic, Social and Cultural Rights, General Comment No. 10, *supra,* at para. 3; Committee on Economic, Social and Cultural Rights, General Comment No. 2, para. 40.

compliance and progress towards implementation and to do all it can to ensure full respect for children's rights".[75]

85. The CRC Committee has emphasized that effective remedies must be available where the rights of Indigenous children have been violated. The CRC Committee has confirmed that for State parties to fully and effectively implement the principle of non-discrimination, the principle must be "appropriately monitored and enforced through judicial and administrative bodies."[76]

86. Similarly, Article 40 of the *UNDRIP* confirms the importance of oversight in the protection and promotion of the rights of Indigenous peoples.[77]

87. The Tribunal itself has acknowledged the importance of the *CHRA* and its role in overseeing Canada's international commitments to non-discrimination. Referring to its role, the Tribunal explained that "Canada's international obligations in the field of human rights have been worked out domestically…through…the creation of human rights bodies charged with the administration of anti-discrimination laws."[78] The Tribunal also noted that "[m]uch of the impetus for the passage of the *Canadian Human Rights Act* came from international sources, such as the *Charter of the United Nations,* and the *Universal Declaration of Human Rights*."[79]

88. As reflected in the language of international conventions, the comments of the committees that drafted those instruments and the decisions of the Tribunal itself, the Tribunal is designed to play a critical role in implementing Canada's obligation to provide effective oversight and enforcement of its responsibilities under international human rights law. Dismissing the Complaint in the context of a pre-hearing motion, and without an

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[75] CRC Committee, General Comment No. 2: The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, CRC/GC/2002/2 at paras. 1 & 25; CRC Committee, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) at para. 65**.**

[76] CRC Committee, General Comment No. 11, *supra*, at para. 23.

[77] **United Nations Declaration of the Rights of Indigenous Peoples**, article 40.

[78] ***Nealy v. Johnston***, *supra,* at p. 37.

[79] ***Brown v. Canada (Royal Canadian Mounted Police)***, (2004) CanLII 30 (CHRT) at para. 81.

opportunity to consider any *viva voce* evidence on the merits, defaults on this international obligation.

89. This case engages the complicated and sensitive history between the Crown and First Nations peoples. It involves a host of complex factual and expert evidence on funding structures and the impact of those structures on historically disadvantaged groups. Perhaps most importantly, it raises serious allegations of discrimination with far-reaching practical implications for tens of thousands of First Nations children receiving on-reserve child welfare services. In these circumstances, determining whether Canada is meeting its international responsibilities in this case required a full *viva voce* hearing. A summary dismissal of the Complaint does not respect the Tribunal's crucial role in providing effective oversight and monitoring of Canada's international human rights obligations.

PART IV - ORDER REQUESTED

90. Amnesty International respectfully requests that the application for judicial review be granted, the decision of the Canadian Human Rights Tribunal be quashed and the Complaint remitted to a differently constituted Tribunal for a hearing on the merits.

91. Amnesty International does not seek costs and submits that costs should not be ordered against as it is pursuing a public interest mandate in these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 18, 2011

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Court File Nos.T-630-11 / T-578-11 / T638-11

FEDERAL COURT

B E T W E E N :

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Applicant

- and -

ATTORNEY GENERAL OF CANADA, ET AL

Respondent

A N D B E T W E E N :

CANADIAN HUMAN RIGHTS COMMISSION

Applicant

- and -

ATTORNEY GENERAL OF CANADA, ET AL

Respondents

A N D B E T W E E N :

ASSEMBLY OF FIRST NATIONS

Applicant

- and -

ATTORNEY GENERAL OF CANADA, ET AL

Respondents

MEMORANDUM OF FACT AND LAW OF AMNESTY INTERNATIONAL CANADA
(RESPONDENT'S MOTION FOR AN ORDER TO DISMISS THE COMPLAINT)

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