File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

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

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OVERVIEW

1. The Canadian Human Rights Tribunal (the "Tribunal") has the requisite jurisdiction to consider this Complaint. Indian and Northern Affairs Canada's ("INAC") First Nations Child and Family Services Program ("FNCFS Program") is a "service" under section 5 of the *Canadian Human Rights Act* ("*CHRA*"). If this Tribunal narrowly interprets the term "service" as suggested by the Respondent, Attorney General of Canada ("Canada"), it will be in breach of Canada's international law obligations and will leave First Nations children without a forum in which to argue that their rights under international and Canadian law have been violated or a remedy for discriminatory policies and practices that have far-reaching consequences for the enjoyment of their human rights.

2. Indigenous Peoples around the world, including in Canada, have long suffered discrimination. Indigenous Peoples, including Indigenous children, have been and continue to be denied many of their basic human rights in violation of several international agreements, 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 Racial Discrimination* ("*ICERD*"), and the *Convention on the Rights of the Child* ("*CRC*"). There is an urgent need to eradicate the discrimination of Indigenous Peoples and to remedy the ongoing violation of their basic human rights.

3. The *CHRA* and the Tribunal are essential to the protection and promotion of human rights in Canada. The purpose of the *CHRA* is to give effect:

> to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability [...]

The Tribunal plays a vital role in giving effect to this principle by identifying discriminatory practices and, where discrimination exists, to provide an appropriate remedy. This mandate extends to First Nations peoples who experience discrimination.

> ***Canadian Human Rights Act,* R.S.C. 1985, c. H-6, s. 2, Book of Authorities of the Attorney General of Canada, Tab A1**

PART I - FACTS

4. The Complaint, filed jointly by the First Nations Child and Family Caring Society ("Caring Society") and the Assembly of First Nations ("AFN"), asserts that INAC's funding and administration of culturally-based welfare services for registered First Nations children resident on reserve is insufficient and is not comparable to those services received by First Nations children and non-First Nations children living off-reserve. The Complaint alleges that this funding is discriminatory and violates s. 5(b) of the *CHRA*, which 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,
>
> on a prohibited ground of discrimination.

> ***CHRA, supra***
>
> **Affidavit of Cindy Blackstock, Sworn February 11, 2010 ("Blackstock Affidavit"), paras. 9 and 10, Motion Record of the Attorney General of Canada ("Canada's Record"), Tab 3**

5. Currently, INAC administers and funds child and family welfare services to First Nations children resident on reserve through its FNCFS Program. Through this Program, INAC funds, oversee, 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").

> **Blackstock Affidavit, paras. 10 & 38, Canada's Record, Tab 3**

Affidavit of Elsie Flette, Sworn February 11, 2010 ("Flette, Affidavit"), paras. 33-44, Canada's Record, Tab 4

6. INAC's funding is based on funding formulas rather than the actual needs of First Nation children resident on reserve.

Blackstock Affidavit, paras. 45-53, 65-70, Canada's Record, Tab 3

7. In Ontario, INAC funds First Nation child and family welfare services pursuant to the "1965 Indian Welfare Agreement". Pursuant to this Agreement, INAC directly reimburses Ontario for the funding it provides for First Nations children living on reserve. Funding under this Agreement is not based on the actual needs of First Nations children living on reserve.

Blackstock Affidavit, paras. 65-71, Canada's Record, Tab 3

PART II - ISSUES

8. The issue to be determined on this motion is whether the FNCFS Program is a "service" pursuant to section 5 of the *CHRA*.

9. Amnesty International Canada accepts and adopts the submissions of the AFN and the Caring Society, and addresses only the specific issue of the application of international human rights law in the interpretation and application of the *CHRA* in these written submissions.

PART III - ANALYSIS

10. If this Tribunal allows Canada's motion and finds that INAC's FNCFS Program is not a "service" under s. 5 of the *CHRA,* this Tribunal would: (1) undermine the purpose of the *CHRA* which is closely aligned with Canada's international human rights obligations; (2) violate Canada's international obligation to provide non-discriminatory funding of child and family services to First Nations children resident on reserve; and (3) infringe Canada's international obligation to provide effective remedies where rights are violated.

A. INTERNATIONAL HUMAN RIGHTS LAW IS RELEVANT TO THE INTERPRETATION AND APPLICATION OF THE CHRA

11. It is well-established that the preferred approach to statutory interpretation is the purposive approach set out by Driedger and repeatedly endorsed by the Supreme Court of Canada:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> ***Bell Expressvu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, Book of Authorities of Amnesty International Canada ("AIC Authorities"), Tab 26**

12. The Supreme Court of Canada has held that the words of the *CHRA* must be given their plain meaning, but that it is equally important that the rights enunciated be given their full recognition and effect. Remedial statutes like the *CHRA* are to be given "such fair, large and liberal interpretation as will best ensure that their objects are attained". The use of international law as an interpretive tool is consistent with a 'large and liberal' interpretation of the term 'service'.

> ***C.N. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134, AIC Authorities, Tab 27**
>
> ***Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 89, AIC Authorities, Tab 28**
>
> ***Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1 at para. 16, AIC Authorities, Tab 29**

13. Domestic legislation, like the *CHRA*, is to be interpreted in a manner that conforms to Canada's binding obligations under customary and conventional international human rights law. As Sullivan explains:

> [...] 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.

> **Ruth Sullivan, *Driedger on the Construction of Statutes*, 4d ed (Toronto: Butterworths, 2002) at 422 as cited in *R. v. Hape*, [2007] 2 S.C.R. 292 at paras. 53-54, AIC Authorities, Tab 30**
>
> ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 65 and 70, AIC Authorities, Tab 31**
>
> ***R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175, AIC Authorities, Tab 32**

14. Non-binding international law also plays an important role in interpreting domestic legislation. Non-binding international legal sources provide authoritative interpretations of the treaty provisions. General Comments, which are interpretations of the treaty issued by the body charged with monitoring its implementation, offer important guidance regarding the obligation of States parties under the treaty. Also important are decisions of treaty bodies which determine whether States parties have complied with their international human rights obligations as well as periodic reports submitted by States parties which explain how the treaty is being implemented domestically.

15. 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*.

> ***Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at pp. 31-32, AIC Authorities, Tab 33**[1]
>
> ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, AIC Authorities, Tab 34**

16. Non-binding international legal sources have also been relied upon where domestic and international law are closely associated. For example, in *Mugesara v. Canada,* the Supreme Court relied heavily on the jurisprudence of international criminal tribunals in light of the close relationship between international law and domestic law in respect of those international crimes. Indeed, the Court reversed its prior decision in *R. v.*

[1] The Court relied 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.

Finta to align Canadian jurisprudence with the findings of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal of Rwanda.

> ***Mugesara v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 S.C.R. 40 at paras. 82, 133, 151-179, AIC Authorities, Tab 35**

17. International human rights law is highly relevant to interpreting the term "services" in s. 5 of the *CHRA*. Domestic human rights legislation and the institutions that enforce it, like the *CHRA* and this Tribunal, are essential means by which Canada implements its obligations to respect, protect and ensure human rights pursuant to the *ICCPR,* the *ICESCR,* the *ICERD,* and the *CRC*. In its periodic report to the Human Rights Committee, Canada relied on the *CHRA* and the Tribunal to demonstrate that Canada is implementing its international obligation to promote non-discrimination under the *ICCPR*.

> **Committee on Economic, Social and Cultural Rights, General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights U.N. Doc. E/C.12/1998/25 (1998) , AIC Authorities, Tab 8**
>
> **Canada, Core document forming part of the reports of State Parties: Canada (1998), (www.unhcr.org/refworld/country,HRI,CAN,4562d94e2,3de)dc9e4,0.html) at para. 130, AIC Authorities, Tab 9**

18. This Tribunal has also acknowledged the importance of the *CHRA* and its role in implementing Canada's commitment 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." Indeed, the Tribunal has 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*."

> ***Nealy v. Johnston*, (1989) C.H.R.R. D/10 (CHRT) at p. 37, AIC Authorities, Tab 36**
>
> ***Brown v. Canada (Royal Canadian Mounted Police)*, (2004) CanLII 30 (CHRT) at para. 81, AIC Authorities, Tab 37**

19. In light of the close relationship between the *CHRA* and international human rights law, this Tribunal in the past 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 decisions of the Human Rights Committee in a number of its previous decisions.

> ***Nealy, supra*, AIC Authorities, Tab 36**
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> ***Stanley v. Canada (Royal Canadian Mounted Police)*, (1987) CanLII 98 (CHRT), AIC Authorities, Tab 38**
>
> ***Bailey and Canada (Minister of National Revenue)*, 1980 CanLII 5 (CHRT), AIC Authorities, Tab 39**
>
> **Canadian Human Rights Commission, Annual Report 2001 (Ottawa: Minister of Public Works and Government Services, 2002), AIC Authorities, Tab 10**

20. This Tribunal must consider international law in interpreting the term "services" under section 5 of the *CHRA* and determining the proper scope of the Tribunal's jurisdiction to consider this Complaint. This Tribunal must interpret section 5 in a manner that conforms to Canada's binding obligations under the *ICCPR*, the *ICESCR*, the *CRC* and the *ICERD*. To determine the nature and scope of Canada's obligations, the Tribunal must refer to the relevant General Comments and decisions issued by each of the treaty bodies: the Human Rights Committee, the Economic, Social and Cultural Rights Committee ("ESCR Committee"), the Committee on the Rights of the Child ("CRC Committee"), and the Committee on the Elimination of Racial Discrimination ("CERD").

21. The *U.N. Declaration on the Rights of Indigenous Peoples ("UNDRIP")* is also relevant to the interpretation of s. 5 of the *CHRA*. While the *UNDRIP* does not create any direct legal obligations, it is not necessarily without any legal effect. Many provisions of the *UNDRIP* reflect existing or emerging norms of customary international law. As emphasised by the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the *UNDRIP* "represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law." Thus, the *UNDRIP* "does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather

elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples." As a widely-accepted international declaration containing numerous existing or emerging norms of customary international law, the *UNDRIP* is therefore relevant to the interpretation and application of existing human rights obligations as they apply to Indigenous peoples.

> **Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, U.N. Doc. A/HRC/9/9, at paras. 40 & 85, AIC Authorities, Tab 11**

B. CANADA HAS COMMITTED TO NON-DISCRIMINATORY FUNDING OF CHILD AND FAMILY WELFARE SERVICES TO FIRST NATIONS CHILDREN RESIDENT ON RESERVE

22. Excluding INAC's FNCFS Program from the definition of "services" in s. 5 of the *CHRA* would remove a key means by which Canada implements its international obligation to protect and promote economic, social and cultural rights in a non-discriminatory manner and to provide a meaningful remedy where those rights are violated.

i) Canada is obligated to take all appropriate means to implement its human rights obligations, including through the allocation of financial resources

23. 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, and to do so in a non-discriminatory manner. Effective implementation of these treaty rights means that Canada must undertake all 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.

24. Each of these treaties explicitly requires States 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. Indeed, many have emphasized the necessity of allocating resources to appropriate

services and programs for the implementation and realization of many human rights, especially economic, social and cultural rights.

> ***ICCPR, supra,* Article 2(2), AIC Authorities, Tab 1**
>
> ***ICESCR, supra,* Article 2(1), AIC Authorities, Tab 2**
>
> ***ICERD, supra*, Article 2, AIC Authorities, Tab 3**
>
> ***CRC, supra*, Article 4, AIC Authorities, Tab 4**

25. 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]

> ***ICCPR, supra,* Article 2(2), AIC Authorities, Tab 1**

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

> 1. States 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. States 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]

> ***ICERD, supra*, Article 2, AIC Authorities, Tab 2**

27. 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]
>
> ***ICESCR, supra,* Article 2(1), AIC Authorities, Tab 2**

28. The 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." 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].

> **ESCR Committee, General Comment No. 9: The domestic application of the Covenant, U.N. Doc. E/C.12/1998/24, at para 5 (1998) , AIC Authorities, Tab 12**
>
> **ESCR Committee, General Comment No 3: The nature of States' parties obligations, U.N.Doc. E/1991/23, at para. 7 (1990), AIC Authorities, Tab 13**

29. 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]
>
> **ESCR Committee, General Comment No. 3, *supra*, at para. 10, AIC Authorities, Tab 13**

30. 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 reserve. For example, Article 10 guarantees the right to protection and assistance to family, and requires that children should be accorded special measures of protection and assistance. 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. States parties like

Canada must provide funding in order for these positive rights to be effectively implemented.

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

> States 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, States Parties shall undertake such measures to the maximum extent of their availaCle resources and, where needed, within the framework of international co-operation. [emphasis added]

The CRC Committee has also recognized the financial nature of these measures. Indeed, the CRC Committee has confirmed that the obligation to provide "financial resources" applies to States parties in the implementation of the rights of children notwithstanding the involvement of other non-state actors.

> **CRC Committee, General Comment No. 5: General measures of implementation October 3, 2003, U.N. Doc. CRC/GC/2003/5, at paras. 9 & 41 (2003), AIC Authorities, Tab 14[2]**

32. Resource allocation is critical 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." 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", 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 States parties "in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the

[2] The Committee reiterates that in all circumstances the State which ratified or acceded to the Convention remains responsible for ensuring the full implementation of the Convention throughout the territories under its jurisdiction. In any process of devolution, States parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention.

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." All require States parties to allocate resources for their effective implementation.

ii) Canada is obligated to allocate financial resources for the implementation of its human rights obligations in a non-discriminatory manner

33. Notably, the measures that Canada undertakes to protect and promote these rights, including the allocation of resource to appropriate social services and programs, must respect the principle of non-discrimination. Non-discrimination is a principle of fundamental importance for the implementation of all of the rights guaranteed in each of these treaties. Since the effective implementation of many of these rights require resources, it follows that Canada's allocation of resources must respect the non-discrimination provisions of each of these treaties.

> **See for example, International Expert Group Meeting on Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption, 4-5 March 2010 Tsleil Waututh Community Centre, North Vancouver British Columbia at paras. 77-79; 96, 104, 106, 108-109, Complainants' Book of Authorities**

34. 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.

It also requires that States 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."

> ***ICCPR, supra,* Article 26, AIC Authorities, Tab 1**

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, AIC Authorities, Tab 15

35. The *ICESCR* also imposes an obligation on States parties to ensure that economic, social and cultural rights, including the funding thereof, are enjoyed without discrimination. Article 2(2) 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."

***ICESCR, supra,* Article 2(2), AIC Authorities, Tab 2**

36. The ESCR Committee has repeatedly emphasized the importance of non-discrimination in the protection and promotion of economic, social and cultural rights. It 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." Accordingly, any funding associated with the States 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 of residence cannot be legitimate ground of discrimination and that disparities in the enjoyment of rights must be eliminated by ensuring the even distribution in the availability and quality of services.

ESCR Committee, General Comment No. 20: Non-Discrimination in economic, social and cultural rights, U.N. Doc. E/C.12/GC/20 at para. 34 (2009), AIC Authorities, Tab 16

ESCR Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights, U.N. Doc. E/C.12/2005/4 at para. 3 (2005), AIC Authorities, Tab 17

37. Similarly, the *CRC* prohibits discrimination in the implementation of its provisions. Article 2 requires States 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."

38. The CRC Committee has stressed the importance of States 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:

> States parties have a responsibility to monitor and combat discrimination in whatever forms it takes and wherever it occurs - within families, communities, schools or other institutions. Potential discrimination in access to quality services for young children is a particular concern, especially where health, education, welfare and other services are not universally available and are provided through a combination of State, private and charitable organizations. As a first step, the Committee encourages States parties to monitor the availability of and access to quality services that contribute to young children's survival and development, including through systematic data collection, disaggregated in terms of major variables related to children's and families' background and circumstances. As a second step, actions may be required that guarantee that all children have an equal opportunity to benefit from available services. More generally, States parties should raise awareness about discrimination against young children in general, and against vulnerable groups in particular. [emphasis added]
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> **CRC Committee, General Comment No. 7: Implementing Child Rights in Early Childhood, U.N. Doc. CRC/C/GC/2003/7/Rev.1 at para. 12 (2006), AIC Authorities, Tab 18**

39. Indeed, the CRC Committee has explicitly recognized that funding by States parties is necessary for the effective implementation of the human rights of Indigenous children. The CRC Committee has urged States parties to undertake positive and special measures in order "to eliminate conditions that cause discrimination and to ensure 'indigenous children' enjoyment of the rights of the Convention on equal level with other children." This obligation extends to putting in "safeguards to ensure that decentralization or devolution does not lead to discrimination in the enjoyment of rights by children in different regions."

> **CRC Committee, General Comment No. 11: Indigenous children and their rights under the Convention, U.N. Doc. CRC/C/GC/11 at paras. 25-26 (2009), AIC Authorities, Tab 19**
>
> **CRC Committee, General Comment No. 5, *supra*, at para. 41, AIC Authorities, Tab 14**

40. The *ICERD* also requires that state resources be allocated without discrimination. Article 5(e) of the *ICERD* specifically requires States 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. 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.

***ICERD, supra*, Article 5(e), AIC Authorities, Tab 3**

41. The *UNDRIP* explicitly 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 that based on their indigenous origin or identity." Similarly, the *UNDRIP* requires States parties to take all "appropriate measures" to effectively implement these rights.

***UNDRIP*, Article 2, 21(2), 38 and 39, AIC Authorities, Tab 6**

iii) Canada's obligation not to discriminate in the provision of funding extends to contexts where it cooperates with other levels of government and non-governmental actors in the implementation of its human rights obligations

42. The requirement to allocate resources where necessary to implement human rights obligations regardless of whether the services are delivered by the provincial government or a non-state actor confirms Canada's obligation to allocate resources to child and family services on reserve. As explained further in section D below, the practice of cooperation with other levels of government and non-governmental actors in the implementation of human rights obligations is encouraged by the treaty bodies. Most importantly, it may amount to an obligation in contexts involving decisions affecting the rights and interests of minority communities, such as those of First Nation communities. In addition, Canada remains obligated to ensure non-discriminatory enjoyment of human rights in contexts where it provides services through another actor. Accordingly, to interpret the term "services" as excluding schemes such as the FNCFS Program whereby Canada funds, oversees, monitors and controls child welfare services through INAC authorized First Nations Child and Family Services Agencies would lead to the undesirable result of Canada being able to do indirectly what it cannot do directly. Whether or not Canada directly provides a service itself or does so through another actor, it must respect the

human rights of the individual beneficiaries of these services, including their right to non-discriminatory enjoyment of economic, social and cultural rights.

iv) Conclusion

43. The scope of the term "services" must include the FNCFS Program in order to comply with Canada's international human rights obligations. In ratifying these treaties, Canada has undertaken to protect, respect and ensure the rights of First Nations children. Canada's obligations in this regard extend to providing appropriate child welfare services to these children in a non-discriminatory manner.

C. CANADA IS OBLIGATED TO PROVIDE EFFECTIVE REMEDIES WHERE HUMAN RIGHTS ARE VIOLATED

44. The *CHRA* and this Tribunal play an essential role in monitoring and enforcing human rights and in providing individuals with an effective remedy where these rights are breached. In doing so, the *CHRA* and the Tribunal give effect to Canada's international obligation to fully and effectively implement human rights by providing a remedial framework to address human rights violations.

45. International human rights law requires States parties to monitor and enforce individual human rights domestically and to provide effective remedies where these rights are violated.

> ***Universal Declaration of Human Rights,*** **GA Res. 217A (III), 3 U.N. GAOR, U.N. Doc A/810 at 71 (1948), Article 8, AIC Authorities, Tab 5**
>
> ***Vienna Declaration and Programme of Action,*** **World Conference on Human Rights U.N. Doc. A/CONF.157/23 at para. 27(1993), AIC Authorities, Tab 7**

46. As discussed above, States parties must use all appropriate "means" or "measures" to fully and effectively implement their international human rights obligations. These "means" and "measures" include judicial or administrative bodies which monitor and enforce human rights and provide remedies where rights are violated. The ESCR Committee has explicitly recognized the need for domestic legal remedies for violations of economic, social and cultural rights.

ESCR Committee, General Comment No. 9: *supra*, paras. 3 & 9, AIC Authorities, Tab 12

47. This important oversight role is often fulfilled by national human rights institutions/bodies like this Tribunal. These bodies are an essential means by which States parties fully and effectively implement their international human rights obligations. The ESCR Committee has confirmed the necessity of these 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.

ESCR Committee, General Comment No. 10, *supra* at para. 3, AIC Authorities, Tab 8

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

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, U.N. Doc. CRC/GC/2002/2 at paras. 1 & 25 (2002), AIC Authorities, Tab 20

CRC Committee, General Comment No. 5: *supra* at para. 65, AIC Authorities, Tab 14

49. 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 States parties to fully and effectively implement the principle of non-discrimination, the principle must be "appropriately monitored and enforced through judicial and administrative bodies."

CRC Committee, General Comment No. 11, *supra* at para. 23, AIC Authorities, Tab 19

50. Article 40 of the *UNDRIP* confirms the importance of oversight in the protection and promotion of the rights of Indigenous peoples.

***UNDRIP*, Article 40, AIC Authorities, Tab 6**

51. This Tribunal plays an essential role in implementing Canada's obligation to provide effective remedies. To exclude the FNCFS Program from the definition of "services" under section 5 would thus remove a key means of implementation of human rights from the oversight jurisdiction of the Tribunal. Indeed, to interpret "services" under s. 5 of the *CHRA* to not include INAC's FNCFS Program would allow Canada to indirectly engage in discriminatory practices and would leave First Nations children resident on reserve without an effective remedy. An interpretation of the term "services" which includes the FNCFS Program is the only interpretation that will enable the Tribunal to fulfill its oversight role and to do all it can for the protection and promotion of children's rights in accordance with international law.

D. CANADA IS RESPONSIBLE FOR THE BREACH OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

52. It is a well-established 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 or a private actor. Thus, Canada is ultimately responsible for the funding of child and family services of First Nations children resident on reserve.

Article 27, Vienna Convention on the Laws of Treaties 1155 U.N.T.S. 331, entered into force 27 January 1980, AIC Authorities, Tab 21

Article 4(1) ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UNGA Res. 56/83 (Annex), 12 December 2001, AIC Authorities, Tab 22

***Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at p. 87, para. 62, AIC Authorities, Tab 23**

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, AIC Authorities, Tab 24

53. This principle is explicitly recognised in both the *ICCPR* and the *ICESCR*. 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."

54. The ESCR Committee has confirmed that the ultimate obligation to comply with the *ICESCR* rests with the federal government.

ESCR Committee, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, U.N. Doc. E/C.12/1/Add.31 at para. 52 (1998) , AIC Authorities, Tab 25 [3]

55. 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. The Committee noted that "[i]n any process of devolution, States parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention."

CRC General Comment No. 5, *supra* at paras. 40-41, AIC Authorities, Tab 26

[3] 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.

56. Rather than relieve States parties from their obligations under international human rights law, Amnesty International Canada submits that collaboration with other levels of government should be encouraged as a best practice for the effective implementation of human rights. 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.

CRC General Comment No. 5, *supra* at para. 27, AIC Authorities, Tab 2

57. To allow Canada's motion and to find that INAC's FNCFS Program is not a "service" under s. 5 of the *CHRA* would undermine the purpose of the *CHRA* and would violate Canada's human rights obligations as it would leave the complainants in this case without a forum to consider and remedy their Complaint that this Program is discriminatory. Such a decision would perpetuate the historical discrimination suffered by First Nations people and First Nations children in particular, contrary to Canada's international human rights obligations.

PART IV - ORDER REQUESTED

58. Amnesty International Canada respectfully requests that this Tribunal:

i) Interpret section 5 of the *CHRA* to include INAC's FNCFS Program; and

ii) Dismiss the motion by the Respondent Attorney General of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 14, 2010

Counsel for Amnesty International Canada