Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

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FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

- and -

ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (REPRESENTING THE MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA)

Respondent

- and -

CHIEFS OF ONTARIO

- and -

AMNESTY INTERNATIONAL

Interested Parties

RULING

Shirish P. Chotalia, Q.C.,
Chairperson

2011 CHRT 4
2011/03/14

I. DECISION SUMMARY

[1] Indian and Northern Affairs Canada (INAC) provides funding to First Nations Service Providers who provide child welfare Services (child welfare) to First Nations Children residing on reserves. The First Nations Child and Family Caring Society of Canada (the Society) and the Assembly of First Nations (AFN) assert that INAC does more than fund. They say INAC provides child welfare directly or indirectly to these children. They say the funding is inadequate when compared to the funding that provinces provide to other children residing off reserve. They say this funding differentiates adversely against these First Nation children contrary to section 5(b) of the *Canadian Human Rights Act* (*CHRA or Act*).

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

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

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

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

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

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

A. Services

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

[6] INAC's funding is complex. INAC's funding supports 108 First Nations child welfare Service Providers to deliver child welfare to approximately 160,000 children and youth in approximately 447 of 663 First Nations. There may be at least 50 to 60 funding agreements and memoranda relating to Directive 20-1 alone that are involved.(not yet filed) There are provincial and territorial differences in funding schemes and differences in service models: e.g. self-managed reserves versus other First Nation reserves. What are the terms and conditions of these various funding agreements? What are the terms and

conditions of each of the various memoranda of understanding? Does INAC control the type of child welfare delivered through any or each of the funding terms and conditions? Do these terms and conditions define the content of child welfare? As well, do INAC's auditing measures go beyond simply ensuring accountability of funds? Do INAC's auditing measures in fact constitute an action by INAC demonstrating that INAC is delivering child welfare? Again, even if the transfer payments are on the whole only transfer payments, is there a discrete subset of the program administration wherein INAC can be said to control the content of child welfare? The Crown has not met its onus. The material facts are not clear, complete and uncontroverted. This is due in part to the scope and breadth of this complaint that exceeds any complaint filed with the Tribunal to date. In this case, the Commission did not conduct an investigation of the relevant facts before referring the complaint to the Tribunal for a hearing. Rather, it wrote that the "main arguments being adduced are legal and not factual in nature and are not settled in law".

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

B. Comparator

[8] However, on the evidence and submissions filed, I can decide the comparator issue. I can determine whether the allegation of *adverse differentiation* is legally deficient. Section 5(b) of the *CHRA* states that a service provider may not *adversely differentiate* against an individual in providing services customarily available to the public. Whether these words in the *CHRA* require a comparison, and if so, the manner of comparison, are pure questions of law. The Crown has met its onus of demonstrating that this is a pure question of law that may be decided now. The parties have had full and

ample opportunity to be heard on this question of law. There is no further evidence that the complainants can file that will further their position.

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

[10] Regarding the issue of choice of comparator, the parties agree that INAC does not fund or regulate child welfare for off-reserve children. The provision of child welfare to off reserve children is entirely a provincial matter falling with section 92 of *Constitution Act, 1867*. Can federal government funding be compared to provincial government funding to find adverse differentiation as set out in section 5(b) of the *Act*? The answer is "no".

[11] 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 Nation 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.

[12] Let us look at how the *Act* works. As an example, the *Act* allows an Aboriginal person who receives lesser service from a government to file a complaint if a non-Aboriginal person receives better service from the same government. However, the *Act* does not allow an Aboriginal person, or any other person, to claim differential treatment if another person receives better service from a different government.

[13] Were it otherwise, the far-reaching impact of the proposed reasoning would also extend to employment. As another example, the *Act* allows an Aboriginal employee who

receives different treatment from an employer to file a complaint if a non-Aboriginal employee receives better treatment from the same employer. However, the Act does not allow an Aboriginal employee, or any other employee, to claim differential treatment if another employee receives better treatment from a different employer.

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

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

[16] On this issue, the parties have had a full and ample opportunity to file affidavits, cross-examine on affidavits, appear before the Tribunal with their lawyers, and submit arguments. Further, the parties were granted an opportunity to file submissions until August 23, 2010 and December 23, 2010, (See Appendix "A") respectively with respect to three new decisions. These were *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 (*NBHRC v. PNB*) released on June 3, 2010, and two decisions of the Supreme Court of Canada being *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), and C*ommunications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, [2010] 2 S.C.R. 737 (*Native Child and Family Services of Toronto*) rendered together on November 4, 2010. They were also granted the opportunity to file submissions with respect to *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*). No further evidence in a further hearing with witnesses can make this legal issue any clearer. Indeed, a further hearing may result in the devotion of time and resources to a protracted and lengthy fact finding exercise that is irrelevant to the legal flaw identified. Any further hearing would be moot. The complaint cannot succeed on this legal point.

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

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

[18] It is important to understand that the name of the *CHRA* is misleading. Even though its name imports a notion that the *CHRA* and the Canadian Human Rights Tribunal may cure a range of human rights violations, the Tribunal's mandate is restricted to remedying discrimination on the legislated grounds in legislated areas such as employment, services, residential accommodation, to name a few. Thus, Canada's First Nations people, and their fellow Canadians, are restricted from obtaining broader human rights remedies that do not involve a discriminatory practice within the meaning of the *Act*. Unless the subject matter of the complaint falls within a section of the anti-discrimination statute, it cannot succeed.

[19] Finally, I am mindful of the constitutional quagmire that Canada's First Nations peoples find themselves in. However, the legal tools for contesting allegedly inequitable

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

II. WHAT IS THIS COMPLAINT ABOUT?

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

[21] Specifically, the complaint alleges that a funding formula, Directive 20-1, Chapter 5 ("Directive 20-1") contravenes s. 5 in that registered First Nations children and families resident on reserve are provided with inequitable levels of child welfare because of their race and national, ethnic origin as compared to non-Aboriginal and other children residing off reserve. The particulars / pleadings filed by the complainant group broaden the discrimination allegation to include the INAC First Nations Child and Family Services Program (Funding Program), that includes both Directive 20-1 and the

Enhanced Prevention-Focused Approach funding ("EPFA"), and the funding INAC provides in Ontario pursuant to the Memorandum of Agreement Respecting Welfare Programs for Indians known as the 1965 Welfare Agreement ("1965 Agt").

III. WHAT IS THIS MOTION ABOUT?

A. Crown Says Tribunal Has No Jurisdiction to Hear the Complaint

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

B. What are the Issues in This Motion?

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

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

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

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

C. Can the Tribunal Decide the Issues in This Motion based on the materials filed Without A Viva Voce Hearing?

[24] The essence of this motion involves whether or not the complainants should be able to proceed to a *viva voce* hearing or whether this Tribunal may decide the complaint now, based on the materials before it without a viva voce hearing?. The parties have

widely diverging views on the Tribunal's authority to decide the issues raised in the motion at this stage.

(i) Summary of the Positions of the Parties

The Crown

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

The Commission

[26] The Commission's position is also multifaceted: First, the Commission alleges that the Tribunal may only dismiss a complaint after a hearing on the merits, unless it can be demonstrated that to pursue the inquiry would be an abuse of process. Even in the context of abuse of process, the power of summary dismissal must only be exercised with a great deal of caution, and only in the clearest of cases. The threshold to prove abuse of process is extremely high—the proceedings must be unfair to the point that they are contrary to the interests of justice. Second, the Commission asserts that the issue before

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

The Society

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

are myriad and complex, and where the facts will inform the Tribunal's jurisdictional analysis.

The Ont. Chiefs

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

(ii) The CHRA Does Not Require A *Viva Voce* Hearing in Every Case

Material Facts Are Clear and Uncontroverted or Questions of Pure Law

[29] The Tribunal is a creature of statute and exists as part of a larger legislative scheme for identifying and remedying discrimination. Accordingly, the question as to the appropriateness of *the motion* for summary dismissal requires an examination of the Act. By examining all relevant aspects of the Tribunal's enabling statute, one may determine

precisely what forms of case disposition Parliament intended the Tribunal to carry out. Any ambiguities in the enabling legislation must be interpreted in a manner that furthers, rather than frustrates the objectives of the *CHRA* (*Bell Canada v. C.T.E.A.* [2003] 1 S.C.R. 884 at para 42).

[30] The Tribunal is an independent body established by the Act to hold inquiries into complaints referred to it by the Commission. The Act provides that the Tribunal may hold two types of inquiries, one with a viva voce hearing and one without. Under s. 50(1), the assigned member shall inquire into the complaint and "shall" give all parties a "full and ample opportunity", in person, or through counsel, to appear at the inquiry, present evidence and make representations. Section 50(3) authorizes the member presiding over a hearing of the inquiry to summon witnesses, compel them to give evidence and produce such documents and things as are necessary, administer oaths, receive such evidence and other information, on oath, by affidavit, or otherwise that the member sees fit, and decide procedural and evidentiary questions. In *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81, [2004] 2 F.C.R. 581, aff'd 2004 FCA 363 (*Cremasco),*at para 76, the Federal Court made clear that the inquiry is distinct from the "hearing" and is not coextensive with the term "hearing", as that word is used in s. 50(3). In *Cremasco,* the Federal Court held that Parliament's use of the term "inquiry" in subsection 50(1) and the term "hearing" subsection 50(3) clearly indicates that the referral of a matter to the Tribunal does not necessarily have to result in a hearing in every case. Thus, while dismissal of the complaint requires an inquiry, it does not "necessarily" require a hearing.

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

[32] The repeated use of the word "shall" in these provisions strongly suggests the imposition of two mandatory duties on the Tribunal: on one hand, it must conduct its process as informally and expeditiously as natural justice will permit. On the other hand, it must ensure that in every inquiry the Tribunal accords a full and ample opportunity for the parties to participate as described. In this aspect, the Act is exceptional in codifying the common law duty of adherence to the principles of natural justice as well as the common law principles that administrative tribunals operate informally and expeditiously and neatly juxtaposes them as countervailing duties in s. 48.9(1). It is for the Tribunal to find the judicial fulcrum in each case.

[33] The instruction in s. 48.9(2) to proceed with informality and expedition is subject to two important limits: the principles of natural justice and the Tribunal's rules of procedure.

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

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

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

(1) The "procedural" onus of convincing the Tribunal that the issues raised can be properly adjudicated in the context of a motion (as opposed to a *viva voce* hearing) and in full compliance with the Tribunal's statutory obligation to provide all parties a full and ample opportunity to be heard.
(2) The "substantive" onus of convincing the Tribunal that the reasons for dismissal are valid.

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

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

(iii) Does Using A Motion Forum To Decide a Complaint Based on Uncontroverted Facts or A Legal Issue Comply with Natural Justice?

Does the motion forum in this case comply with natural justice?

[39] Parties have the right to a fair hearing. (*Baker v. Canada (Minister of Citizenship and Immigration)*, (*Baker)*, at para 22 and 28; *See also Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398, [2007] 4 F.C.R. 101at para 26.]

[40] The factors affecting the content of the duty of fairness were discussed by the Supreme Court in *Baker* at para 22-27 and include the nature of the decision being made

and the process followed in making it, the nature of the statutory scheme and the terms of the statute, the importance of the decision to the individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when it has expertise and the statute gives it procedural discretion. Each of these five factors are not to be routinely applied to a given process but must be adapted to the particular context. (*Uniboard*, supra). A case by case analysis is required to meet the requirements of procedural fairness. (E.g. *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195. (*Ha*))

(i) Consider The Nature Of The Decision Being Made And The Process – How Judicial Is It?

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

(ii) Consider the statutory scheme and the terms of the statute – How Final Is the Decision?

[42] The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates" need to be examined in view of the degree of finality of the decision in question. While it is true that a Tribunal decision dismissing a complaint under the *CHRA* is not subject to appeal, it is not protected by a privative clause either, and Tribunal decisions are reviewable without leave, by the Federal Court, followed by an appeal as of right to the Federal Court of Appeal. (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 52, 64, 123, 143; *Federal Courts Act*, R.S.C. 1985, c. F-7 as am., ss.18, 27, 28) I note that in *Ha v. Canada (Minister of Citizenship and Immigration)*,

2004 FCA 49, [2004] 3 F.C.R. 195 the Court held that judicial review cannot be equated to full appeal rights because the reviewing judge's authority may be limited with respect to the substantive issues of the case. This is not to say that the availability of judicial review has no relevance whatsoever, especially as in case here where there is no privative clause, no leave is required and the judicial review proceeds directly to the Federal Court. *Ha* is a case in point: it is grounded in the examination of the particular statutory scheme of the Immigration and Refugee Protection Act, 2001, c. 27, s. 72 wherein leave is required for judicial review.

(iii) Consider The importance of the decision to the individual or individuals affected

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

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

iv Consider the legitimate expectations of the parties – Did They Reasonably Expect a *Viva Voce* Hearing?

[45] The legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. This factor raises the question of whether the complainant group in this motion had a reasonable expectation that the merits of the case would be dealt with exclusively by means of a *viva voce* "trial-type" hearing. Of significant relevance to this issue are the Tribunal's informal rules of procedure, of which Rule 3 (discussed above) provides a broad opportunity for the bringing of motions, the presentation of evidence in support thereof, and in answer thereto, and flexibility in the options for disposition. The rules may not have the status of statutory instruments, but that does not diminish their ability to assist parties and members of the public to predict how the Tribunal may likely proceed. (See *Thamotharem*, *supra*, at para. 55-56.) Another consideration affecting the legitimate expectations of the parties in this case would be the absence of any firm promises made to them that all substantive matters would be dealt with in a formal hearing under s. 50(3).

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

[47] Since early November of 2009, through case management discussions, the parties have been aware that there was a serious possibility that the "trial model" would not be dogmatically adhered to in this case. As well, the Tribunal offered the parties new and

innovative ways to work towards agreement concerning issues, facts and the presentation of evidence in dispute through the assignment of another Tribunal Member to act as a process mediator in January 2010. Finally, the complainant group had been aware of the Crown's intention to address these issues in this motion as threshold issues through the Crown's filing in November 2008 of a judicial review application of the Commission's referral decision. I will address the orders of Prothonotary Aronovitch and the appeal decision in respect of those orders below in another context.(which were only rendered on November 24, 2009 and March 30, 2010 respectively.) All in all, abbreviation of the process, if appropriate, could have been reasonably anticipated. At the very least, it was not unforeseeable.

(v) Consider the choice of procedure made by the Tribunal – Does the Act Give the Chairperson Discretion and Does That Person Have the Expertise To Make That Decision?

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

Conclusion – Hearing The Crown's Arguments in This Motion Meets Natural Justice

[49] A summary of the five *Baker* factors leads to the conclusion that while the duty of fairness (and consequently the principles of natural justice) requires much more than an administrative review or "paper hearing" of the issues at stake, the procedural protections need not be identical to those existing in a formal trial. In the current case the parties were able to file documentary evidence, affidavit evidence, as well as the transcribed cross-examinations of the affiants, and were granted a full opportunity to attend before the Tribunal to make oral arguments. The Tribunal record on this motion alone consists of more than10,000 pages. Additional opportunities were sought and granted to present additional legal authorities and make submissions thereon as mentioned above. From the stand point of s. 48.9 (1), I believe that the relatively informal and expeditions summary proceeding opted for by the Crown in this case does not offend the rules of natural justice. All parties have been accorded procedural fairness with regards to the presentation of the Crown's motion for dismissal.

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

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

[52] On the whole, hearing the Crown`s motion in the present case facilitates, rather than impedes access to justice. It allows the parties to consider where and how to best expend their resources and whether for example, a constitutional challenge or other avenues, may constitute a more appropriate means to address their concerns. It prevents the inflation of unrealistic expectations. It aims to address fundamental objections appropriately prior to parties dedicating significant resources to *viva voce* hearings, which

may themselves run for years together. Indeed, the Federal Court of Appeal has chastised this Tribunal for mismanagement of the hearing process in allowing a complex case to consume exceptional amounts of time and resources. (*Canada Post)* In that case, the Applications Judge had noted "a legal hearing without discipline and timelines both delays and denies justice."(para. 145) In my view, given the expansive nature of the present complaint, it did and does require disciplined case management. This is why I provided the parties with an innovative tool, being process mediation, whereby I appointed a Member of the Tribunal in January 2010, to work with them to narrow the issues in dispute. It is, in my view, incumbent upon the Tribunal to actively manage its inquiry process from the receipt of the Commission referral to the conclusion of either settlement or decision by utilizing all available administrative tools. This may include working with counsel and the parties to narrow the issues of fact and law that are truly in dispute actively prior to any hearing, and addressing and disposing of issues that may both be efficiently and fairly addressed prior to a full *viva voce* hearing. In this sense, the Tribunal, with his unique statutory framework has greater flexibility than the courts do to manage its process, and also, may I add, has a greater responsibility. It is a specialized Tribunal that can and should identify the unique access issues in its field of expertise: e.g. costs and delay. It is the raison d'être of administrative tribunals to craft unique solutions to improve access, limited only by imagination and fairness within its statutory parameters.

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

(iv) Other Arguments Raised By The Parties Addressing Whether Motion Forum is Sufficient

a. The Crown Argues that the Complaint Raises a Real Question of Jurisdiction Which Should Be Heard in A Motion

[54] In its motion, the Crown has described its application as one to dismiss the complaint for lack of jurisdiction. In *Canada (Attorney General) v. Watkin*, 2008 FCA

170, (*Watkin*) the Court of Appeal stated that, whether or not the action complained of was a "service" is "a true question of jurisdiction or *vires*".

[55] It is true that historically, there was an attempt in the case law to identify and isolate preliminary questions which had to be answered in advance of a *viva voce* hearing, because they defined the jurisdiction of a Tribunal to proceed with a case (see *Bell v. Ontario Human Rights Commission* [1971] S.C.R. 756, p. 775; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048,at para. 110. However that trend has been reversed for some time now (see *C.U.P.E., Local 963 v. New Brunswick Liquor Corp., 1979 CanLII 23 (S.C.C.), [1979] 2 S.C.R. 227, Bibeault, supra, paras. 111-126*). As the Newfoundland and Labrador Court of Appeal made clear in *Newfoundland (Human Rights Commission) v. Newfoundland (Health)* (1998), 164 Nfld. & P.E.I.R. 251; 31 C.H.R.R. 405; and, 13 Admin. L.R. (3d) 142, not all jurisdictional questions lend themselves to preliminary determination:

> I find myself in agreement with Hoyt J.A. in Re New Brunswick Council of Hospital Unions et al and the Queen in Right of New Brunswick et al. (1986), 35 D.L.R. (4th) 282 (N.B.C.A.) at p. 286, when he concluded that "whether the preliminary jurisdictional question will be considered initially is, in my view, a question for the chairman to decide in his properly exercised discretion."

[56] The Court of Appeal went on to note at paragraph 21 that a tribunal may choose to entertain an application to decide a point of law, but that generally this would occur where there was an Agreed Statement of Fact. Furthermore, while the tribunal could receive affidavit evidence or oral evidence and make findings of fact thereon, doing so would not be practical "…where the issues of fact and law are complex and intermingled. <u>In that event, it would be more efficient to await the full hearing before ruling on the "preliminary" point</u>". [emphasis added]

[57] Thus characterizing the grounds of the Crown's motion as "jurisdictional" or "going to jurisdiction" does not assist in the determination of whether the issues raised should be considered in the context of a motion. With regards to preliminary jurisdictional questions, the Supreme Court of Canada has made it clear that it does not "…wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued

the jurisprudence in this area for many years" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59).

b. The Crown Argues that The Complaint Raises an Abuse of Process Issue that Can Be Dealt With In a Motion

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

[59] That having been said, from the perspective of the complainant group, it argues that early dismissal is only appropriate in such cases as contemplated by this Tribunal's ruling in *Harkin v. Canada* 2009 CHRT 6. In *Harkin* the Member interpreted *Cremasco* to restrict the Tribunal`s ability to hear summary dismissal motions to those involving a breach of natural justice, such as delay, an abuse of process, or where the issues have been heard and conclusively resolved in another forum. Inasmuch as *Harkin* purports to

establish an exhaustive list of scenarios in which summary dismissal is permitted, I respectfully disagree. While the Tribunal in *Harkin* restricts *Cremasco* to its facts, *Harkin*, did not directly consider the statutory language in s. 48.9(1) of the Act ("informally and expeditiously"). Further, I do not view *Cremasco* itself as setting out an exhaustive list of scenarios where summary dismissal is appropriate. On the contrary, the Court at one point speaks in quite general terms of entertaining "…preliminary motions to clear the procedural underbrush." As I have said above, I believe that the most sound and practical approach is simply for the Tribunal to review the motion record on an issue by issue basis and ensure that it adheres to the parliamentary directions of s.48.9(1) and 50(1) of the Act.

c. The Complainants Argue that the Test is the "Plain and Obvious" Test That Comes from the Courts and Therefore a Motion is Not Appropriate

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

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

[62] I return to the test as being that if the objection can be fully and amply answered in a motion on the basis of the record generated by the motion and without having

recourse to a full *viva voce* hearing, then the motion will be decided on such a basis. I find that the Act authorizes the Tribunal to deal with the Crown's objections in the context of a motion at this stage by determining—on an issue by issue basis—if the motion process was sufficient to accord the parties their rights to present their case, in particular their *evidence,* as contemplated by the Act.

d. The Complainants Argue that The Earlier Federal Court Decision Requires the Tribunal to Go to A *Viva Voce* Hearing

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

[64] I do not read these comments as detracting from the statutory direction of s. 48.9(1) and 50(1) and restricting in any manner, the obligation of this Tribunal to hear the Crown's motion and determine the appropriate manner of procedure in the circumstances of this case, and based upon the evidentiary record before it. Nor does the Tribunal's *de novo* exercise

of its mandate in entertaining a motion to dismiss constitute a review of the Commission's referral as it is grounded in the *CHRA.* Indeed, as seen above, the motion forum provides a legitimate forum for an inquiry in appropriate cases. [*Cremasco*] Finally, I note in passing that the net effect of the Federal Court decision is that the Crown's motion to judicially review the Commission's referral decision is deferred pending the completion of the hearing by this Tribunal

e. The Crown Argues that the Complainants have the Burden to File the Requisite Evidence

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

of the motion, it is the moving party who is seeking a specific form of relief from the Tribunal—it is for the moving party to satisfy the Tribunal that it is entitled to the specific form of relief sought (i.e. an order for summary dismissal). For these reasons, I believe that reversing the burden of proof would run afoul of the requirements of the Act and of procedural fairness.

D. Addressing Services In A Motion Forum – Are the Material Facts Clear, Complete and Not in Dispute

(i) Summary of the Positions of the Parties

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

[67] The Crown also argues that funding decisions are not justiciable and argues that INAC's funding policy is an expression of pure executive policy that is not impeachable under the CHRA. Yet, the Crown concedes that government funding has been held to be a service where the government's role extends beyond providing funds to encompass significant obligations specific to the provision of the service itself. [para 66 /p. 712 Crown written submissions].

[68] Regarding the Supreme Court's recent decision in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), the decision confirms the Crown's position that child welfare is a matter

within provincial legislative authority. The Crown argues that child welfare is not a "matter" coming within section 91 of the *Constitution Act, 1867*, but rather falls squarely within s. 92. Further, the Crown argues that the ordinary activities of child welfare organizations do not touch on issues of Indian status or rights, encapsulated within s. 91(24) of the Constitution. By drawing an analogy from the labour relations issue in *NIL/TU,O*, the Crown gains more support for its position that child welfare is a provincial matter. Its position is supported by both the majority and minority view in *NIL/TU,O*. The funding of child welfare services to Indians on reserve is a matter that is integrally tied to the provincial scheme and cannot form the basis of a human rights complaint before the CHRT.

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

[70] Regarding *NIL/TU,O* , the complainants reply that the decision is inapplicable and distinguishable from the circumstances in the present case. They say that the decision deals exclusively with jurisdiction over labour relations, and it does not address the service or comparator issues. The complainants claim that INAC's involvement in on-reserve child welfare services is an administrative exercise of federal jurisdiction under section 91(24) of the *Constitution Act, 1987*; or, in the alternative, an exercise of the

federal spending power. For that reason, the complainants assert that it is Canada, and not the provinces, who determines which child welfare services are available to First Nations children on reserve.

(ii) What is the Law Regarding "Services"?

[71] The first step to be performed in applying section 5(b) is to determine whether the actions complained of are "services". (see *Gould*, supra, per La Forest J., para.60; *Watkin*) "Services" contemplate something of benefit being "held out" as services and "offered" to the public". Thus, enforcement actions do not constitute services as they are not "held out" or "offered" to the public, and are not the result of a process which takes place "in the context of a public *relationship*".[*Watkin, supra*, para. 31 and *Gould v. Yukon Order of Pioneers*, [1996] 1 R.S.C. 571, para.16, 55 and 60. The mere fact that an action is undertaken in the public interest does not make it a "service". (*Watkin, supra*, at para. 22). A service does not have to be available to all members of the general public in order to be "customarily available to the general public." (*Watkin*, supra; *Canada (Attorney General) v Rosin*, 1 F.C. 391; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353)

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

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

[74] The question of whether government funding constitutes a "service" has not been resolved under the *CHRA*. Some helpful principles arise out of jurisprudence from other jurisdictions where discrimination in the provision of a "service" or "services" is also captured by human rights legislation. For example, it has been held that the relationship or relationships between the alleged service provider and service recipient must be examined to determine whether or not any terms or conditions are imposed on the funding such as to control the content of the service. (See *Bitonti v. British Columbia,* [1999] B.C.H.R.T.D. No. 60, para.314-315 ("*Bitonti*") and *Donna Martyn v. Laidlaw Transit Ltd. o/a Yellow Cab Ltd., Alberta Co-op taxi Line Ltd., Edmonton taxi commission, City of Edmonton, Alberta transportation,* (2005), 55 C.H.R.R. D/235 (Alta. H.R.P.) at paras. 356-369 So for example, in *HMTQ* v. *Moore* et al, 2001 BCSC 336, at paras. 19-26, where, apart from the provision of any funding, the Minister could make orders: (a) governing the provision of educational programs; (b) determining general requirements for graduation; (c) determining the general nature of education programs for use in schools, and (d) preparing a process for the assessment of the effectiveness of educational programs, the Court held that allegations of discrimination against the Ministry should not be limited to the use or misuse of the Ministry's funding power.

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

(iii) Analysis – Based on the Facts

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

First Nation Service Providers Receive Funding But are Not the Recipients of Child Welfare

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

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

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

1. The terms and conditions of the funding throughout INAC's complex funding scheme and whether INAC engages in control, and/or delivery of child welfare in any discrete area through such terms and conditions

2. Whether INAC defines the content of child welfare; for example, whether INAC dictates what kinds of child welfare interventions short of maintenance are available to children and families

3. Whether INAC has a supervisory role over child welfare and engages in the assessment of child welfare services through actions such as auditing and administrative reviews.

a. Crown Has Not Demonstrated Clear, Complete and Uncontroverted Material Facts

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

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

[82] The Commission in its referral of the complaint to the Tribunal for a hearing further to s. 49 took the position that "having regard to all of the circumstances it is apparent that inquiry is warranted and that an investigation would likely not be administratively efficient or effective in exploring the human rights allegations and reaching findings as the main arguments being adduced are legal and not factual in nature and are not settled in law." [Referral Decision, Crown Record p. 655] I observe that the arguments adduced by the Commission in this motion are different from those outlined in its referral. As stated, the Tribunal invited the parties to file an Agreed Statement of Facts in order to move expeditiously to a hearing. The Tribunal Chairperson assigned another Tribunal Member to help the parties to come to Agreement on the Materials Facts: although the parties had represented to the Tribunal that they were circulating an Agreed Statement of Facts in December 2009, and then continued to work on the same through the assistance of the process mediator Member. In March 2010, several parties precipitously chose not to proceed with work on an Agreed Statement of Facts pending the release of this decision. An Agreed Statement of Facts would have been of assistance to me in understanding the factual basis and dealing with the issue in the motion.

[83] The Crown filed one eight page affidavit and its motion record of some 690 pages. The Crown's one affiant, Ms. Johnson, was not directly and personally involved in the delivery of child welfare by a First Nation Service Provider. I note that the Crown's proposed witness list includes persons who appear to be able to provide potentially useful evidence in a full *viva voce* hearing: i.e., INAC staff including Senior

Policy Advisors regarding funding flows to recipients, managers regarding specific agreements / arrangements in specific provinces, and memoranda of understanding and calculations of maintenance rates and reimbursements, acting regional directors regarding specific provincial models, and operational specialists. The Crown is anticipated to file a funding chart. (Mediation Agreement 2, para 2) However, it did not do so for this motion.

1. Complicated Funding Agreements – Not Filed

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

2. Witnesses are Needed to Clarify Funding Agreement that Is Filed and Are Yet to Be Filed

[85] The complainant group filed The National Program Manual ("NPM"), that contains Directive 20-1. Directive 20-1, outlines the funding applicable to B.C., Manitoba, Newfoundland, New Brunswick and the Yukon Territory. The NPM is riddled with provisions that are not clear on their face to this Tribunal, and which the rest of the record fails to clarify: *The Backgrounder* refers to the primary program objective as being to "support culturally appropriate" child and family services for Indian children and families resident on reserve, in the "best interest of the child", in accordance with provincial legislation and standards. (Clause 1.3.2). The policy is an interim step in "moving toward self-government" (1.3.3). The child and family services offered by First Nations Service Providers on reserve are to be "culturally relevant and comparable"

but not "necessarily identical" to those offered by the provinces off reserve in "similar circumstances" (1.3.5). The Crown's evidence and submissions do not show what the various provincial statutes mandate, particularly in terms of "cultural relevance" for First Nations children. Thus, it is premature to determine the issues of control and the content of, child and family services.

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

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

3. The Terms and Conditions of the NPM Are Not Clear

[88] The existence and nature of the terms and conditions are far from clear. The NPM contains only some of the terms and conditions of the funding while others are oral. (Ms. Johnson cross-examination, Transcript p.211) At one point in her cross-examination, Ms. Johnson indicates that the terms and conditions are not found in the NPM; rather they may be contained in INAC's Treasury Board submission and are verbally communicated to First Nations Agencies. Neither her cross-examination, nor her affidavit, clearly elucidate what the terms and conditions are and how they are to be implemented, by whom, and how they affect the delivery of child welfare. The Crown's written argument is also deficient regarding the Terms and Conditions. The Crown writes: "INAC enters into funding agreements and memoranda of understanding with Recipients containing express terms and conditions." (Crown Record, para 45 / p 705) Yet, the Crown fails to outline the same, nor has the Crown explained how the *unwritten* terms and conditions of the FNCFS program interact with the *written* terms and conditions in the funding arrangements.

4. Self-Government Agreements Not Filed – Insufficient Evidence

[89] As well, there are cursory references in the transcript to self-government agreements, none of which are filed in this motion. For example, see reference to the Spallumcheen First Nations in B.C. (Dr. Blackstock cross-examination, p 329 Crown Record) It is unclear from the record what arguments the parties seek to advance about these.

5. The Evidence Does not Clarify How The Manitoba Funding Arrangement Works

[90] The complainant group filed the Comprehensive Funding Arrangement between Manitoba and the Southeast Child and Family Services Inc.. It states that INAC provides monies (e.g.: about 17 million dollars in one case) to the agency on the condition that these funds are to be used for child welfare in accordance with the *terms and conditions* of the agreement. [para 2.1] Yet the agreement expressly provides that INAC may reduce the funding if the Minister varies the formula. It states:

"*notwithstanding* any financial provision of this agreement, in the event that there is *a change in the formula established by the Minister*, INAC *may reduce* the level of funding payable to the agency First Nations Service Provider." ("General terms and conditions" Part B, para 2.5.2 (e)). The agreement does not appear to qualify how or when the Minister may vary the formula. The prerequisites for the exercise of such Ministerial discretion, if any, are crucial to the issue of INAC's control of child welfare. The Crown has not clarified this agreement and how First Nations child welfare works in Manitoba under this arrangement. At this juncture, I cannot decide, on the evidentiary record, if this ability to vary the formula constitutes an indicium of control of child welfare by INAC, or whether it supports the conclusion that INAC determines the content of child welfare services.

[91] In Manitoba there are four authorities that oversee, monitor and support agencies that provide direct child welfare on and off reserve. It appears that there are 14 First Nations Service Providers in Manitoba, and 10 of the funding arrangements are administered by the Southern Authority. (Affidavits of Ms. Johnson and of Ms. Flett) The remaining 4 are potentially administered by the other three authorities. In short, for Manitoba alone, there are at least 13 other such Funding Arrangements that have not been filed by the Crown.

6. The Evidence Does not Clarify How the 1965 Agreement Works And if All Relevant Agreements Are Filed

[92] Further to the 1965 Agreement, Ontario funds non-profit Children's Aid Societies and INAC reimburses Ontario for a percentage of the costs of child welfare expenses incurred in Ontario, in respect of on-reserve children. Yet the effective date of the 1965 Welfare Agreement is December 1, 1965, and it may be terminated by either party with 12 months written notice. [para 8(1)]. Witnesses would need to speak to this clause, because its existence (and potential invocation by the government parties) could shed light on the extent of INAC's role in the provision of the subject services. Another example of documents in the record which require further explanation is a series of instruments that purport to be amendments to the 1965 Agreement by way of Memoranda

dated in 1971, 1972, 1981, and 1998. The evidence does not clarify the status of the various services referred to in the 65 Agreement, the status of the referenced enabling legislation, or the status of the various amendments and their substantive implications. In Ontario, there are specific service agreements between Ontario and both mandated and non-mandated First Nations Child and Family Service organizations/ Children's aid societies. (p. 456) Again, the Crown has not filed such agreements, nor has it explained how they operate vis-a-vis INAC funding.

7. Cannot Determine If INAC Controls Preventative Measures

[93] The complainant group has emphasized that INAC's newest funding regime, the EPFA, is still deficient with respect to funding for portions of child welfare programming such as *preventative measures* (programs to reduce the risk of removal of children from their families.) INAC's funding continues to require that First Nations Service Providers meet provincial standards. Both Dir 20-1 and the EPFA purport to provide funding for these types of services. (Johnson Affidavit, para 14) It would have been helpful for the Crown to have indicated whether the various provincial statutes mandate preventative measures.

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

[94] INAC conducts audits and administrative and compliance reviews of First Nations Service Providers. In the course of such reviews INAC examines children in care files, reviews board of governor minutes for content, as agencies in Manitoba conduct criminal record checks of staff (Cross-examination of Ms. Flette, Record pp 599 & 615), reviews Service Provider Board by-laws and amendments, and issues deficiency letters. While, the Crown's position that INAC only audits for financial accountability may be a valid argument, the Crown has filed only cursory evidence about the audit and review

procedures. The evidence does not demonstrate the audit procedures comprehensively vis a vis the various funding agreements.

(iv) Conclusion - The Crown Has Not met its Onus – Crown Has Not Filed Sufficient Evidence or Made Sufficient Submissions To Demonstrate That the Funding Program Is Not a Service

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

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

[97] As observed earlier, the magnitude and scope of this complaint is unprecedented in the Tribunal's history. It comprehensively challenges INAC's funding across Canada, across all provinces and one territory, across all funding recipients and First Nations communities, in one broad brush. In this case, the Tribunal is asked to consider the relationship between the federal government, eleven different provincial/territorial jurisdictions, and 108 FNSCPs. The factual foundations of this complaint reach deep into the crevices of INAC federal policies, guidelines, funding agreements, , and provincial and territorial statutes, practices, policies and guidelines regarding child welfare, and inter-jurisdictional child welfare agreements. The determination of the "services" issue may not be possible on a generalized basis, for all child welfare services agencies. In the substantive hearing, the complainants must be able to show that the federal government is involved in the provision of child welfare services in the circumstances of *each* of these child welfare agencies. Ultimately, the services question is a fact driven inquiry. The

precise nature and extent of INAC's decision-making needs to be assessed through the prism of the myriad subordinate arrangements and agreements, in order to ascertain the impact of this decision-making on the services received, on reserve, by First Nations children and families. The Crown's record makes clear that the motion was not an adequate vehicle for this aspect of the inquiry.

E. Regarding the Crown's Other Arguments

(i) NIL/TU,O - Evidence:

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

(ii) Justiciability

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

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

[100] Similarly, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 26, one finds the question of justiciability defined in terms of whether the issue put forward would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or whether the Court is able to give an answer that lies within its area of expertise: the interpretation of law". Finally, in *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54 at para.41, the majority of the Court relying on Dean Sossin's work, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* Toronto; Carswell (1999)—a text also relied upon by the Crown in the motion before me—defined "justiciability" as a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In addressing a complaint under the *CHRA* the provisions of the *CHRA* itself govern as opposed to "judge-made rules". Any exemption from its provisions must be clearly stated. (*Canada (House of Commons) v. Vaid,* 2005 SCC 30 at para. 81.

[101] The Crown argues that a federal transfer of funds has not attracted legal liability in claims of negligence and breach of fiduciary duty because there is insufficient proximity between the funder and those providing the service. *Aksidan v. the Attorney General of Canada,* 2008 BCCA 43 at par.13-15; *Ref re Broome v. Prince Edward Island,* 2010 SCC 11, at par. 45. First, as a matter of principle, I observe that these cases apply the law as it evolves from areas that cannot provide direct assistance to the Tribunal (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 and *Chopra v. Canada (A.G.)* (F.C.A.), 2007 FCA 268). Further, to the extent that they are insightful,

they support the need for an examination of the extent of a Crown exercise of control of funding and the proximity to the ultimate service recipient through a thorough examination of the relationship between INAC and First Nations children and families.

F. Addressing Comparator In A Motion Forum – Question of Law

(i) Summary of the Positions of the Parties

Crown

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

Complainant Group

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

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

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

[106] Finally, the complainant group advocates that INAC is the sole provider of race-based child welfare that ultimately benefits First Nations children residing on reserve. This is the consequence of the constitutional division of powers wherein the federal government has jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional reality prevents the rigid application of the traditional section 5(b) test outlined in *Singh* , and prevents the application of the *Act* to this entire group of Canadian children. Requiring a comparator in this case cannot be the interpretation consonant with the intent of Parliament. Nor can it be reconciled with jurisprudence espousing the quasi-constitutional nature of human rights legislation and its large and liberal interpretation. This is particularly the case given the fiduciary obligations of the Crown toward First Nations people and Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 (*UNDRIP)*. This legal impediment does not exist in any other case where the s.5(b) analysis under the *CHRA* has been developed and applied. The effect of ruling that a comparator is not required and/or not using a discrimination analysis involving two service providers, is tantamount to sustaining a racial construction of discrimination wherein First Nations children residing on reserves are deprived of equal or similar child welfare to all other Canadian children.

(ii) The Comparator Issue is a True Question of Law

[107] Has the complainant group had a full and ample opportunity to present the evidence and make submissions required by the *Act* to address this comparator issue? This is a pure question of law. Indeed, as noted, the Commission's referral of the complaint characterized the issues raised by the complaint as ones of law, and not fact. The parties have had extensive opportunities to present their submissions and even additional submissions. On this issue, the parties have had a full and ample opportunity to file affidavits, cross-examine on affidavits, appear before the Tribunal with the help of their lawyers, submit arguments and present evidence (See Appendix "A"). Further, the parties were granted an opportunity to file submissions until August 23, 2010 and December 23, 2010*, respectively with respect to three new decisions being *New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40 [*NBHRC v. PNB*] released on June 3, 2010, and two decisions of the Supreme Court of Canada being *NIL/TU,O*, and *Native Child and Family Services of Toronto* rendered together on November 4, 2010, and with respect to the *UNDRIP*. No further evidence in a further *viva voce* hearing can make this legal issue any clearer.

(iii) What Does "Differentiate Adversely" mean in the Context of Section 5(b) of the *Act*?

How is S. 5(b) to Be Interpreted?

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

Denial of good, service, facility or accommodation 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	Refus de biens, de services, d'installations ou d'hébergement **5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : *a*) d'en priver un individu; *b*) de le défavoriser à l'occasion de leur

any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. 1976-77, c. 33, s. 5.	fourniture. 1976-77, ch. 33, art. 5.

[109] The Supreme Court of Canada has a specific procedure to be followed when interpreting bilingual statutes (*R. v. Daoust*, 2004 SCC 6 [*Daoust*], at para. 27). The first step is to determine whether there is discordance between the English and French versions of s. 5(b) of the *Act* and, if so, whether a shared meaning can be found (see *R. v. S.A.C.*, 2008 SCC 47 [*S.A.C.*], at para. 15; *Daoust*, *supra*, at para. 27). If s. 5(b) may have different meanings, the Tribunal has to determine what kind of discrepancy is involved. In *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), Côté suggests that there are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply(*S.A.C.*, *supra*, at para. 15; *Daoust*, *supra*, at para. 27; Côté, *supra*, at p. 327). Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous (*S.A.C.*, *supra*, at para. 15; *Daoust*, *supra*, at para. 28; Côté, *supra*, at p. 327. Third, one version may have a broader meaning than the other. Where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning (*S.A.C.*, *supra*, at para. 15; *Daoust*, [*supra*, at para. 29; Côté, *supra*, at p. 327). At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent (*S.A.C.*, *supra*, at para. 16;; *Daoust*,*supra*, at para. 30; Côté, *supra*, at p. 328.

[110] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30 [*Vaid*], the Supreme Court of Canada affirmed that proper statutory interpretation requires that "the words of an Act […] be read in their entire context and in their grammatical and ordinary sense

harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (at para. 80).

[111] Such interpretative principles apply with special force in the application of human rights laws given the quasi-constitutional status of the *Act* (*Vaid*, *supra*, at paras. 80-81). While it is accepted that human rights statutes are to be interpreted in a "large and liberal" fashion, it is also well established that the words of the statute must be capable of bearing the interpretation sought (*Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para 13). This approach is reinforced by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that "every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, former Chief Justice Lamer had this to say about the "broad, liberal and purposive approach" in applying it to the British Columbia human rights statute:

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

[112] Within this analysis the intention of Parliament must be respected. The *CHRA* is a statutory creature with its genesis within the legislative control of the Parliament. Any exemption from its provisions must be clearly stated (*Vaid*, *supra*, at para. 81) International covenants, such as the *UNDRIP*, may inform the contextual approach to statutory interpretation (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). However, "…effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament" (*Rahaman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para. 36). Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue.

(iv) Analysis

a. Adverse Differentiation is A Comparative Concept

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

[113] In English, the plain meaning of "differentiate adversely" necessitates a comparison between two groups. The word "adverse" in a legal context is to be "opposed" or "contrary" [*Black's Law Dictionary,* 7th ed., *s.v.* "Adverse".] and "differentiates" in the ordinary context means "recognize or identify as different, distinguish" [*The Oxford English Dictionary*, 2d ed., *s.v.* "Differentiates".]. The plain meaning of the phrase requires a comparison through the word "differentiate". "Differentiate" involves being different from something or someone else. It involves distinguishing, or the drawing of a distinction. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, by definition, it is necessary to compare the situation of the complainant with that of a different individual.

[114] In French, the plain meaning of "défavoriser" in s.5(b) of the *Act* does not necessarily require a comparator. The definition may include a comparative concept: "priver d'un avantage", "priver d'un avantage (consenti a un autre ou qu'on aurait pu lui consentir)" import a comparison; however, "deservir", "frustrer, handicapper" do not import a comparison: [*le Petit Robert, 2006, s.v.* "défavoriser"]. The first group includes the possibility of a comparison while the second group of words do not. The meaning is ambiguous in that it can have two meanings. Accordingly, the normal rules of statutory construction must be utilized to determine Parliamentary intention.

2. Parliament Intended That S. 5(b) of the *Act* Be Interpreted as Requiring the Making of A Comparison

[115] The *Act* is a unique creature of Parliament and s. 5(b) is unique and specific to the aspirations of Parliament within the *CHRA*. The historical genesis of s. 5 is closely

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

[116] The scheme and object of the *Act* can be gleaned from s. 2 being the Purpose Section wherein the *Act* enshrines the principle that "all individuals should have an opportunity equal with other individuals". The French text uses the phrase "à l'égalité des chances d'épanouissement". The purpose section affirms that the *CHRA* is founded upon a comparator concept. In both English and French the concept of equality denotes a comparative concept. "Equal" as used in law implies "not identity but duality and the use of one thing as the measure of another" [*Black's Law Dictionary*, 7th ed., *s.v.* "Equal".]. "Equal" as used generally means "the same in quantity, quality, size, degree, rank, level" etc. [*The Concise Oxford Dictionary, 9th* ed.,]. In French, "égalité" is derived from the word "égal" which means « qui est de même quantité, dimension, nature, ou valeur » [le Petit Robert, 2006, *s.v.* "égalité"]. The definitions in both languages impute a comparison.

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

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

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

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

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

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

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

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

[121] At this juncture it is important to distinguish jurisprudence arising out of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The specific wording of the *Act* in s.5(b) of the *CHRA* "differentiate adversely" must be respected. Jurisprudence emanating from the *Charter* may be helpful to the analysis. However, it cannot be transposed unsupervised into the *CHRT* regime without a careful search for Parliament's intent. In *Wignall*, *supra*, the Federal Court found that the Tribunal had

erred when it said that there has been a convergence in the approaches under human rights statutes and subsection 15(1) of the *Charter*. The Federal Court found that the Tribunal made an error when it analysed the complaint according to the full terms of the decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (*Law*). In particular, the Federal Court stated that the "…definition of "discrimination" under subsection 15(1) of the Charter, and outlined in the *Law, supra*, case, does not apply to human rights legislation" [*Wignall, supra*, at para. 8]. The Federal Court went on to explain that *Law, supra*, is concerned with the meaning to be given to the constitutional standard of equality as set out in the *Charter*, and the Supreme Court gave no indication that its approach should apply more broadly to human rights codes or statutes, whether in provincial or federal law.

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

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

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

[124] The Society argues that the failure to identify an appropriate comparator should not be fatal to a discrimination complaint given that it is unclear whether comparator groups are required in human rights analysis. The Society refers to *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425, 91 O.R. (3d) 649 (Ont. Sup. Ct. J. (Div. Ct.)) [*ADGA*]. This is an employment termination case grounded in Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19. In the *ADGA, supra*, judgment, the Court makes clear at para. 94 that "in cases of disability in the employee termination context, it

is not necessary or appropriate to have to establish a comparator group". Disability cases bring with them particular and individualized situations. Once it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a prima facie case of discrimination. Thus the lack of need for a comparator group in *ADGA*, *supra*, was largely driven by the fact that—unlike the case before me—it involved termination of employment in the context of disability.

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

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

5. Conclusion

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

b. Section 5(b) Does not Allow for Comparisons Between Two Service Providers

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

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

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

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

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

c. Complainants Arguments-That race Based Funding Require an Interpretative Exception – Hard Facts Make Bad Law

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

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

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

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

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

d. <u>The Complainants' Arguments that The Crown's Position Results in An Unacceptable Situation Is Not Consonant With the Clear Words of *CHRA*</u>

[136] The Society advocates that the failure to hold a hearing, and ultimately determine that the CHRA does not provide relief to First Nations children in this case has unacceptable consequences. Effectively, First Nations children are deprived of the protection of the CHRA, which is tantamount to approving a separate but equal racial discrimination construct akin to the situation in the United State leading to the ruling of *Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (U.S. Sup. Ct.1954). The Ont. Chiefs refer to the government's repeal of s. 67 of the *CHRA* that formerly prevented the Tribunal from hearing cases that arose under the auspices of the *Indian* Act, R.S.C. 1985, c. I-5. The Ont. Chiefs argue that in spite of the

repeal of s.67 of the *CHRA* INAC would be more or less immune from the *CHRA*. The complainant group argues that Parliament has deliberately repealed s. 67 of the *Act* to divide and conquer First Nations persons.

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

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

well be disconcerting to the First Nations communities; however, the *CHRA* cannot be interpreted using a *results* based analysis. It is the words of the *CHRA* that must govern the ambit of both the complaint and the remedy. Unfortunately, if the *CHRA* provides no remedy in this case, then the remedy may lie elsewhere (e.g.: a constitutional challenge to the *Act*, or seeking political redress).

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

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

G. Conclusion

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

Shirish P. Chotalia Q.C.
Chairperson
Ottawa Ontario
March 14, 2011

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1340/7008
STYLE OF CAUSE:	First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Developement)
DECISION OF THE TRIBUNAL DATED:	March 14, 2011
DATE AND PLACE OF HEARING:	June 2 and 3, 2010 Ottawa, Ontario
ADDITIONAL SUBMISSIONS FILED ON:	August 16 and 23, 2010; and, December 9, 17 and 23, 2010.

APPEARANCES:

Paul Champ Anne Lévesque Cindy Blackstock	For the Complainant, First Nations Child and Family Caring Society of Canada
David Nahwegahbow Joanne St. Lewis Valerie Richer	For the Complainant, Assembly of First Nations
Daniel Poulin Samar Musallam	For the Canadian Human Rights Commission
Jonathan Tarlton Edward Bumburs Heather Wilson Natalia Strelkova	For the Respondent
Michael Sherry	For the Chiefs of Ontario, Interested Party
Patricia Latimer	For Amnesty International, Interested Party

Process mediation

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

Apendix "A"

Documents filed

Legend:

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

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

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

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

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

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

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

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

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