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Via Email

February 15, 2013

Dragisa Adzic
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street - 11th Floor
Ottawa, Ontario
K1A 1J4

Dear Mr. Adzic:

Re: ***First Nations Child and Family Caring Society et al. v Attorney General of Canada*** **(T1340/7008)**

Enclosed is our updated Statement of Particulars.

Yours truly,

Melissa Chan
Counsel
Civil Litigation and Advisory Services

Encl.

cc: Daniel Poulin / Samar Musallam, counsel for the Commission
Paul Champ, counsel for the Caring Society
David Nahwegahbow/Thomas Milne, counsel for the AFN
Michael Sherry, counsel for the Chiefs of Ontario
Justin Safayeni, counsel for Amnesty International

Canada

File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

COMPLAINANTS

- and -

CANADIAN HUMAN RIGHTS COMMISSION

COMMISSION

- and -

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

RESPONDENT

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

INTERESTED PARTIES

UPDATED STATEMENT OF PARTICULARS OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

[Rule 6(1)(a),(b) and (c), *Canadian Human Rights Tribunal Rules of Procedure*]

This UPDATED STATEMENT OF PARTICULARS replaces the AMENDED STATEMENT OF PARTICULARS dated December 10, 2009.

1. This Updated Statement of Particulars is in response to: (a) the Complainants' Statement of Particulars, undated but received June 8, 2009; (b) the Statement of Particulars of the Canadian Human Rights Commission ("Commission") dated June 1, 2009; (c) the Amended Statement of Particulars from the Commission dated January 29, 2013; (d) the Statement of Particulars of the First Nations Child and Family Caring Society of Canada dated January 29, 2013 (the "opposing parties' particulars").

2. The Respondent states its proper name is the Attorney General of Canada (representing the Minister of Aboriginal Affairs and Northern Development Canada).

3. All the Statements of Particulars referenced in paragraph one are replete with references to anticipated evidence and argument, and those references should be struck out.

A. Introduction and Overview

4. The Respondent denies the allegations in the opposing parties' particulars unless expressly admitted herein.

5. In specific response to paragraphs 3 and 14(v) of the Complainants' Statement of Particulars filed June 8, 2009, the Respondent has consistently denied the Complainants' allegations before the Commission, and now before the Tribunal, including in submissions filed. Further, when the Complaint was before the Commission, much of the correspondence with the Commission attempted to obtain clarification of the Complaint. On May 6, 2008, the Respondent provided its preliminary legal arguments with respect to jurisdiction, and clearly stated in its cover letter that it would provide its substantive position on the Complaint should the Commission decide to accept jurisdiction over the matter. As the Commission referred the matter directly to the Tribunal thereafter without investigation, the Respondent was not provided the opportunity to submit its substantive position on the Complaint to the Commission.

6. The Minister of Aboriginal Affairs and Northern Development Canada is responsible for the management of the Department of Aboriginal Affairs and Northern Development ("Aboriginal Affairs") and programs administered or funded by that Department. The Department commonly refers to itself as Aboriginal and Northern Affairs Canada ("Aboriginal Affairs") in its communications.

7. One program funded by Aboriginal Affairs is First Nations Child and Family Services. Funding is provided by Aboriginal Affairs to First Nations Child and Family service delivery agencies, Indian Bands ("First Nations"), Tribal Councils, (collectively referred to as "First Nations Service Providers") and provincial governments to provide child and family services on reserve that are: (a) in accordance with the child welfare legislation and standards applicable in each province; and (b) reasonably comparable to child and family services provided off reserve in similar circumstances, and within Aboriginal Affairs' authorities. Aboriginal Affairs also provides funding to the Government of Yukon so that government can provide child and family services to all First Nations persons ordinarily resident in the Yukon as outlined in paragraph 12 of this Statement of Particulars.

8. This funding is provided pursuant to appropriations by Parliament and authorities received from Cabinet and Treasury Board. One of the directives that applies to some funding of child and family services is Directive 20-1, Chapter 5 (the "Directive"[1]) issued by Aboriginal Affairs in or about 1990 and amended thereafter from time to time. The Directive applies in all provinces, except Ontario, Alberta, Saskatchewan, Nova Scotia, Quebec, Prince Edward Island, and Manitoba, as addressed in the following paragraphs. The Directive also applies in the Yukon. In addition, in some provinces funding is provided under both the Directive and other arrangements and agreements as elaborated upon in this Updated Statement of Particulars. Funding is provided as a policy decision made by the federal government.

9. In Ontario, child and family services on reserve are provided by non-profit organizations designated by the province as Children's Aid Societies or Indian or native child and family service authorities (collectively referred to as "Societies"). Societies are funded by the Province to provide child and family services to all families and children ordinarily resident in Ontario. The provincial funding is pursuant to a provincial funding framework. Societies provide child and family services on reserve and off reserve in accordance with provincial legislation and standards. Pursuant to the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965 (the "1965 Welfare Agreement"), Aboriginal Affairs reimburses the Province for the cost of child and family services according to a cost-sharing formula. Currently, Aboriginal Affairs pays approximately 93% of the costs, which reimbursement is at a level that supports the delivery of child and family services on reserve in accordance with provincial legislation and standards. Ontario pays the difference to make up 100%, or approximately 7% of the costs.

10. In Alberta, Saskatchewan, Nova Scotia, Quebec, Prince Edward Island, and Manitoba, child and family services on reserve are provided by the provincial government or provincially-delegated First Nations Service Providers (collectively referred to as the "Service Providers") in accordance with provincial legislation and standards. The Service Providers provide child and family services on reserve that are reasonably comparable to the services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances. Aboriginal Affairs funds the Service Providers pursuant to the Enhanced Prevention-Focused Approach (as elaborated upon below), and other arrangements and agreements that may be in place as elaborated upon in this Statement of Particulars. This funding is at a level that permits the delivery of child and family services on reserve in accordance with provincial legislation and standards. In the case of First Nation Service Providers who have opted into the Enhanced Prevention-Focused Approach, funding arrangements are entered into between Aboriginal Affairs and the First Nations Service Providers. The funding is provided to First Nations Service Providers in accordance with Business Plans prepared by the First Nations Service Providers, and which Business Plans become

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[1] The INAC First Nations Child and Family Services: National Program Manual as of May, 2005; The Directive is found at Appendix "A" within the Manual.

annexes to the Funding Arrangements. The Business Plans are supported by the province and are in accordance with Aboriginal Affairs' financial accountability requirements.

11. In all other provinces, with the exception of Ontario, child and family services on reserve are provided by the provincial government or provincially-delegated First Nations Service Providers (collectively referred to as "Other Provinces' Service Providers") in accordance with provincial legislation and standards. These Other Provinces' Service Providers provide child and family services on reserve that are reasonably comparable to the services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances. Aboriginal Affairs funds these Other Provinces' Service Providers pursuant to the Directive or other arrangement or agreement that may be in place as elaborated upon in this Updated Statement of Particulars. The funding is at a level which permits the delivery of child and family services on reserve in accordance with provincial legislation and standards. In the case of First Nations Service Providers, funding arrangements are entered into between Aboriginal Affairs and the First Nations Service Providers that set out the funding levels for each year.

12. In the Yukon, there are no reserves. Aboriginal Affairs provides funding under the Directive to the Yukon Government so it can provide child and family services to all First Nations persons ordinarily resident in the Yukon. The Yukon Government provides such services without making any distinction or differentiation between people or groups of people and provides child and family services in accordance with territorial legislation and standards. Aboriginal Affairs' funding under the Directive permits the Yukon Government to deliver child and family services to all First Nations families and children ordinarily resident in the Yukon in accordance with sound child and family service delivery principles and, in doing so, to take into account cultural considerations for First Nation people, the remoteness of some locations, and other particular circumstances of First Nations communities, families and individuals.

13. Child and family services in the Northwest Territories and Nunavut are provided by or through those territorial governments with their own funding. Canada makes annual unallocated transfer payments to the governments of the Northwest Territories and Nunavut which make up a portion of their annual budgets, and those governments decide how and where to spend funds.

14. Outside of the Northwest Territories and Nunavut, there are 105 First Nations Service Providers in Canada, serving approximately 447 of 617 First Nations Bands.

15. Funding levels are determined in accordance with sound child and family service delivery principles and take into account cultural considerations for First Nations people, remote locations in some parts of Canada, and other particular circumstances of First Nations communities, families and individuals. Aboriginal

Affairs' funding permits First Nations Service Providers and provinces to deliver child and family services on reserve that are reasonably comparable to child and family services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances.

16. The funding structure or practices under the Directive, the 1965 Welfare Agreement, the Enhanced Prevention-Focused Approach ("EPFA"), or any other arrangement or agreement that may be in place is not the cause of, and is not a contributor to, a high or growing number of First Nations children ordinarily resident on reserve in Canada or living anywhere in the Yukon being placed into protective care. Further, the funding is at a level that permits First Nations Service Providers to meet their statutory responsibilities.

17. Aboriginal Affairs provides funding for child and family services on reserve or anywhere in the Yukon and does not provide a service within the meaning of sections 3 and 5 of the *Canadian Human Rights Act*. Aboriginal Affairs does not deny a service, or deny access to a service, on the ground of race, national or ethnic origin, or any other ground listed in section 3(1) of the *Canadian Human Rights Act*. Further, Aboriginal Affairs does not differentiate adversely or discriminate in relation to any individual on the ground of race, national or ethnic origin, or any other ground listed in section 3(1) of the *Canadian Human Rights Act*. Sections 3 and 5 of the *Canadian Human Rights Act* are not engaged.

18. Aboriginal Affairs provides funding only for on reserve child and family services and does not provide funding for off-reserve services, which are provided by provincial governments. The exception is in the Yukon where Aboriginal Affairs provides funding for child and family services for all First Nations persons ordinarily resident in the Yukon.

19. Aboriginal Affairs does not differentiate adversely or engage in discriminatory practices in the funding of child and family services, whether looked at internally as to the funding of child and family services on reserve, or when child and family services on reserve provided under the funding are compared to child and family services funded by provincial or territorial governments off reserve.

B. Material Facts

i) Response to Particular Paragraphs in the Complainants' Statement of Particulars

20. In answer to paragraph 6 of the Complainants' Statement of Particulars dated June 1, 2009, Aboriginal Affairs admits only that the Complainant, the First Nations Child and Family Caring Society of Canada ("FNCFCS"), is an incorporated non-profit organization.

21. In answer to paragraph 7 of the Complainants' Statement of Particulars dated June 1, 2009, Aboriginal Affairs admits only that the Complainant, the Assembly of First Nations ("AFN"), is a national political representative body of First Nations governments.

22. The Respondent requires further particulars in relation to the following aspects of the Complainants' claim:

    a) In response to paragraph 3 and the reference to "compared to that received by all others"; paragraph 9 and the reference "comparable to those received by all other children and families"; paragraph 11 and the reference "comparable benefits that are available, and received, by all others", the Respondent states that the Complaint 2006/1060 filed with the Canadian Human Rights Commission on February 23, 2007 specifically stated that the comparison was to be between "First Nations children and families resident on reserve… compared to non-Aboriginal children." The Respondent seeks clarification and particulars as to whom, specifically, the Complainants are identifying as the comparator group in this Complaint, including by the use of the words "all others", "all other children and families" and "by all others".

    b) In response to paragraphs 9 and 10 in the Complainants' Statement of Particulars, and elsewhere in their Statement of Particulars, concerning the Complainants' reference to "culturally based" child and family services, the words "culturally based" do not appear in the Complaint 2006/1060 filed with the Canadian Human Rights Commission on February 23, 2007 or the *Canadian Human Rights Act*. The purpose of these words in the Statement of Particulars and their meaning is unclear, and they do not disclose a ground of complaint or basis for relief under the Act or otherwise. Aboriginal Affairs provides funding so culturally appropriate child and family services can be provided by First Nations Service Providers, provinces, and the Yukon. The Respondent requires further particulars about what the Complainants mean by "culturally based" and the grounds or basis on which the words support the Complaint and relief sought.

    c) In response to paragraph 9 of the Complainant's Statement of Particulars and the reference to "First Nations Child and Family Services Program", the Respondent requires clarification and particulars as to whether the Complaint relates only to funding provided by Aboriginal Affairs under the Directive, or if the Complaint relates to all funding provided by Aboriginal Affairs under the Directive, the 1965 Welfare Agreement, the Enhanced Prevention-Focused Approach, or any other arrangement or agreement that may be in place, or some combination of these various funding arrangements.

d) The Respondent requires clarification and particulars as to the temporal scope of the Complaint, as the Complainants have not identified a temporal scope, other than to make a request in paragraph 21(3)(a) for compensation dating back to 1989 for unnamed First Nations persons.

e) The Respondent understands that the Complainants take issue with the level of funding provided to First Nations Service Providers, provinces and the Yukon for the provision of child and family services, but requires clarification and particulars as to whether the Complaint pertains to all funding (including Maintenance, which is reimbursed at actual costs), funding for Operations as a whole, funding of prevention services, or some combination of all three.

ii) Particulars of Aboriginal Affairs Funding Child and Family Services

23. The funding provided under the Directive has two components:

a) First, the service provider receives an annual fixed amount of funding for "Operations", which includes administration (e.g. staff salaries). Funding for prevention services is included in the Operations component. The quantum of funds provided for Operations is formula-driven, based on an amount per Indian child on reserve under the age of 19 years (ages 0 to 18 years inclusive), plus an amount per band, plus a fixed amount per Agency based upon the size of the agency, plus adjustments for the agency, band, and number of children amounts based upon remoteness.

b) Second, the service provider receives funding for "Maintenance", which reimburses actual costs of maintaining children in out-of-home placements (foster home, group home, or institution). The "Maintenance" portion of the funding is not fixed. Reimbursement is made in accordance with applicable terms and rates.

24. The funding provided under the Directive is as follows:

a) In Newfoundland and Labrador, the provincial government provides all child and family services directly to the two Innu bands in Labrador. AANDC has one funding arrangement with Newfoundland and Labrador for services they provide to the Innu First Nations who administer their own child and family services program. In addition, Aboriginal Affairs has a bilateral funding agreement with the Miawpukek First Nation who deliver their own child and family services program. Aboriginal Affairs.

b) In New Brunswick, contrary to the Commission's Amended Statement of Particulars dated January 29, 2013 at paragraph 8, New Brunswick has not

transitioned to the EPFA and is currently under the Directive. AANDC provides funding for child welfare services to 10 First Nations Service Providers for 14 on reserve communities. The First Nations Service Providers deliver all child welfare services on reserve for these 14 bands. AANDC provides funding to the province for the provision of child welfare services for one particular band which does not have its own child and family services program. The province in turn directly administers child and family services to this band.

Moreover, one First Nation in the province of New Brunswick has an incorporated agency that is administered by the province. The AANDC funding agreement is with the province, who in turn fund and oversee the agency.

c) In British Columbia, AANDC reimburses the province for its delivery of child welfare services on reserve pursuant to the terms of a Service Delivery Agreement effective April 1, 2012. With respect to First Nations Service Providers delivering child welfare services on reserve in British Columbia, AANDC provides funding under the Directive. In practice, First Nations Service Providers in British Columbia receive funding based on the Directive for Operations, but are funded for maintenance based on actuals.

d) In the Yukon, Aboriginal Affairs funds the Yukon Government to deliver child and family services to all First Nations persons ordinarily resident in the Yukon.

25. In Ontario, the Province provides funding for the operation and maintenance expenses of any Society approved to provide services to children and families under the *Child and Family Services Act*. The provincial funding is pursuant to a provincial funding framework. The provincial funding framework for Societies includes money for service providers to protect children as well as to undertake preventative measures. Aboriginal Affairs reimburses the provincial government directly for the provision of child and family services on reserve in accordance with the 1965 Welfare Agreement. Under the 1965 Welfare Agreement, Aboriginal Affairs reimburses Ontario for a formula-based share of provincial costs for child welfare services to status Indian children ordinarily resident on reserve. Currently, the reimbursement rate is approximately 93%.

26. Also in Ontario, in addition to the funding to Societies under the provincial funding framework for protection services and preventative services, in or about the mid-1970s, Ontario introduced initiatives directed at First Nations people on reserve whereby enhanced funding was provided for prevention/family support workers. Ontario provides funding to a number of Societies, incorporated organizations and First Nations for First Nations prevention initiatives. This funding by Ontario is based on provincially established funding levels. Aboriginal Affairs reimburses the Province approximately 93% of the agreed costs in accordance with the 1965 Welfare Agreement.

27. In Alberta, the province has provided for many years, and continues to provide, child and family services to all children ordinarily resident on seven reserves. Aboriginal Affairs reimburses Alberta based on funding formulas set out in the 1991 Arrangement for Funding and Administration of Social Services concerning various social services, including child and family services. The seven First Nations had, and continue to have, access to prevention services, referred to as the Alberta Response Model.

28. Also in Alberta, prior to April 2007, funding for child and family services on reserve was provided under the Directive to First Nations Service Providers. Since April 2007, under what is known as the Enhanced Prevention-Focused Approach (also known as the Targeted First Nations child and family services Funding Approach in Alberta) separate and additional funding for prevention measures has been provided by Aboriginal Affairs to the First Nations Service Providers. The quantum of funds provided to a First Nations Service Provider now involves three streams: operations, maintenance, and prevention/least disruptive measures. To receive funding under the Enhanced Prevention-Focused Approach, the First Nations Service Provider must commit to a multi-year Business Plan with strategies and performance measures set by the First Nations Service Providers themselves. The Business Plan must be supported by the province and be in accordance with Aboriginal Affairs' financial accountability requirements.

29. In Saskatchewan, prior to July 2008, funding of child and family services on reserve was under the Directive. Aboriginal Affairs entered into separate funding arrangements with First Nations Service Providers, which in turn delivered child and family services on reserve. One First Nations community did not have a First Nations Service Provider and therefore received child and family services directly from the Province of Saskatchewan.

30. In Nova Scotia, prior to July 2008, Aboriginal Affairs funded one First Nations Service Provider (Mi'kmaw child and family services of Nova Scotia), which delivered child and family services to all provincial residents ordinarily resident on reserve. Aboriginal Affairs provided funding under a bilateral funding agreement between Aboriginal Affairs and the First Nations Service Provider, but was also a party to a tripartite child and family service funding arrangement with Nova Scotia and the First Nations Service Provider which sets out roles and responsibilities.

31. From and after July 2008, in Saskatchewan and Nova Scotia, funding is in accordance with the Enhanced Prevention-Focused Approach (as described above in relation to Alberta).

32. In Quebec, prior to August 2009, Aboriginal Affairs provided funding under the Directive to First Nations Service Providers to deliver child and family services on reserve to 19 of 27 First Nations communities, and reimbursed the Province for its delivery of child and family services on reserve in the other 8 First Nations communities.

33. In Prince Edward Island, prior to August 2009, Aboriginal Affairs provided funding under the Directive to the Province, which delivered protection related child and family services on reserve, and to a First Nations Service Provider, who provided the prevention component of child and family services on reserve.

34. From and after August 2009, in Quebec and Prince Edward Island, funding is in accordance with the Enhanced Prevention-Focused Approach (as described above in relation to Alberta).

35. In Manitoba, prior to 2010, Aboriginal Affairs funded First Nations Service Providers to provide child and family services on reserve. Aboriginal Affairs had no child and family services agreement with the province of Manitoba as the First Nations Services Providers delivered all Child and Family Services on reserve.

36. From and after 2010, in Manitoba, funding is in accordance with the Enhanced Prevention Focused Approach. In Manitoba First Nations agencies provide services to all First Nations people both on and off reserve. The new funding under EPFA recognizes this uniqueness, and results in a cost-shared (province pays 60%, federal government pays 40%) element for the agencies' management core operations, and funding formulae that are very similar for service delivery components.

37. Self-governing First Nations that have included child and family services in their Self-Government Agreements are not eligible for federal funding under the Directive, EPFA, or other similar arrangements or agreement. Their funding is provided under and in accordance with their respective Self-Government Agreement.

38. Some First Nations Service Providers in Canada, depending on the funding scheme under which they operate, carry annual budget surpluses from federal funding.

39. All funding provided under the Directive, the 1965 Welfare Agreement, EPFA, or other arrangement or agreement that may be in place is for the purpose of allowing First Nations Service Providers, provincial governments, and the Government of Yukon to provide child and family services on reserve (or anywhere in the Yukon) that are reasonably comparable to child and family services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances.

40. Aboriginal Affairs does not provide any services. It provides funding only so that others may provide services.

41. In addition to funding provided through Aboriginal Affairs, other federal government departments provide funding for programs and benefits for families and children on reserve, including Health Canada, Human Resources Social Development Canada, and the Canada Revenue Agency.

iii) Response to Complainants' Statement of Particulars concerning Jordan's Principle

42. In response to paragraph 13 of the Complainants' Statement of Particulars wherein reference is made to Jordan's Principle, Jordan's Principle is a 'child first' approach, which engages various health and social services and not solely child and family services. The Government of Canada response to the House of Commons Private Members Motion on Jordan's Principle provides that where a First Nations child who is ordinarily resident on reserve has multiple disabilities requiring intervention by multiple service providers, and at the same time where there is a dispute over whether the federal or provincial government or a federally funded or provincial agency should fund or provide those services or needs, the agency of first contact will provide immediate services and the provincial and federal governments will resolve funding issues as between them later.

43. There is no adverse differentiation or discrimination in the provision of funding for child and family services in accordance with Jordan's Principle. It is plainly an arrangement to ensure that immediate needs are attended to without delay that otherwise could be caused by funding issues as between governments.

44. Further, there is no contravention of Jordan's Principle by the Government of Canada. Implementation of Jordan's Principle does not rest with one level of government, but necessarily requires cooperation amongst all levels of government.

C. Position on Legal Issues

45. The Complainants are not entitled to receive child and family services, and never have been, as neither of them is a First Nations person ordinarily resident on reserve (they are corporate entities). Further, neither Complainant is a First Nations Service Provider and are not eligible to receive funding from Aboriginal Affairs for child and family services. The Complainants therefore do not have standing to pursue a complaint alleging discrimination under the *Canadian Human Rights Act* as neither Complainant is a victim within the meaning of the *Act*.

46. Funding is the provision of money to others. Aboriginal Affairs does this in the context of child and family services on reserve in all Provinces, except Ontario, and for all First Nations persons ordinarily resident in the Yukon. In Ontario, Aboriginal Affairs does this in the context of reimbursing Ontario for an agreed upon portion of the Province's expenditures for child and family services on reserve in Ontario.

47. Providing a service means to take action in relation to and provide work or advice to others. Aboriginal Affairs does not do this in the context of child and family services.

48. Aboriginal Affairs provides funding for the provision of child and family services in all Provinces, except Ontario, and for all First Nations person ordinarily resident in the Yukon. In Ontario, Aboriginal Affairs reimburses the Province for an agreed upon portion of the expenditures it incurs in ensuring the full range of provincial welfare programs are made available to First Nations on reserve. It does not decide or control which child and family services are provided or how those services are to be provided. The details of providing child and family services are determined by the entity providing the services, acting in accordance with the applicable provincial or territorial legislation.

49. With respect to the Yukon and all provinces except Ontario, Aboriginal Affairs provides funding for two groups of people only, that is, First Nations families and children ordinarily resident on reserve in the provinces and for all First Nations persons ordinarily resident in the Yukon. Aboriginal Affairs does not make a distinction or draw an adverse differentiation within these groups beyond establishing funding province by province and for the Yukon. Funding province by province and for the Yukon is to ensure that funding enables service providers to provide child and family services on reserve and in the Yukon that are reasonably comparable to provincially funded services off reserve and meet provincial and territorial standards. The only differentiation or distinction between groups made by Aboriginal Affairs is based on geography (province/territory of residence), which does not constitute a prohibited ground under the *Canadian Human Rights Act*.

50. With respect to Ontario, Aboriginal Affairs reimburses Ontario for an agreed upon portion of the provincial child and family services in accordance with the 1965 Welfare Agreement. Societies deliver their services under delegated authority from the Province.

51. With respect to the Yukon and all provinces except Ontario, in seeking to make a human rights comparison between funding levels on and off-reserve, the Complainants' analysis fails for lack of a comparator group. The comparison is sought to be made by looking at acts performed by more than one entity: the federal government, which provides funding for child and family service providers on reserve and in the Yukon, and the various provincial governments, which provide off reserve funding. This proposed comparison of actions taken by more than one actor is inappropriate. The comparison must be between the way a single actor treats two or more different groups, rather than a comparison between the way one actor treats one group, and a separate actor treats another group.

52. Moreover, the comparison with off reserve child and family services funding is not valid because Aboriginal Affairs does not control the quality, nature, and funding structure of child and family services provided by the provinces.

53. With respect to Ontario, in seeking to make a human rights comparison between funding levels and/or child and family services on and off reserve, the Complainants analysis fails for lack of a comparator group and lack of any distinct

or adverse discrimination. The Province funds Societies to deliver child and family services to all residents, on or off reserve, alike. There is no comparator as there is only one actor in Ontario (the Province), and no distinction is made between children and families on or off reserve. Alternatively, any distinction made is not made by the Respondent, and would be contrary to Ontario's obligation under the 1965 Welfare Agreement.

54. The Complainants have not made out allegations that support a case of adverse differentiation or discrimination on any basis, let alone a basis within the governing statute, and the Complaint should be summarily dismissed or, alternatively, dismissed following a hearing.

55. In further answer to the whole of the Complainants' Particulars and without limiting the foregoing, Canada says that:

a) the Complainants and Commission are required to show that there is an appropriate comparator, and they cannot do so. Aboriginal Affairs, as a single actor, funds child and family services on reserve and treats all eligible children and families alike within a given province or the Yukon;

b) the Complainants and Commission erroneously seek to compare children and families based on residency, that is whether a person ordinarily resides on or off reserve, which is an inappropriate and invalid comparator, including because the federal Crown has jurisdiction on reserve only and, correspondingly, the provincial Crown has jurisdiction off reserve;

c) further, the Complainants and Commission are required to link the impugned activity of funding to a prohibited ground of discrimination to establish discrimination, something they have not and cannot do;

d) even if a comparator group is not required, which is not admitted, the Complainants and Commission have not made out and the evidence will not support a finding of discrimination;

e) the funding structure or practices under the Directive, 1965 Welfare Agreement, Enhanced Prevention-Focused Approach, or any other arrangement or agreement that may be in place is not the cause of, and is not a contributor to, a high or growing number of First Nations children ordinarily resident on reserve in Canada or living anywhere in the Yukon being placed into protective care;

f) funding is at a level that permits First Nations Service Providers; provinces and the Yukon to meet their statutory responsibilities in the provision of child and family services on reserve;

g) funding levels also permit First Nations Service Providers, provinces and the Yukon to provide child and family services on reserve that are reasonably comparable to those provided by provinces, their delegates, or the Yukon in similar circumstances and geographic proximity off reserve;

h) funding levels permit First Nations Service Providers, provinces and the Yukon to provide child and family services on reserve that meet the needs of First Nation children and families;

i) service providers are responsible to ensure that they allocate funds in a way that meets those needs, provides reasonably comparable services to those services provided in similar circumstances and geographic proximity off reserve, and meet their statutory obligations;

j) accordingly, there is no discrimination within the meaning of the *CHRA*, or otherwise;

k) further and in any event, the decision whether to fund child and family services and what level of funding to set are policy decisions and are not justiciable;

l) alternatively, if decisions to fund and at what levels are justiciable, then it is justifiable for government to allocate finite financial resources and funds amongst multiple priorities and determine funding levels for Child and Family services on reserve;

m) in addition, Canada does not provide a service within the meaning of the *CHRA*, its role is limited to that of a funder and so does not fall within the meaning of s. 5 of the CHRA;

n) in particular and further to paragraph 7 hereof (referring to the Amended Statement of Particulars of the Commission dated September 25, 2009), Aboriginal Affairs is not the effective provider of child welfare services on reserve because the essence of child welfare practice is a contextual on the ground assessment of whether a child needs or would benefit from preventative services or is in need of protection and Aboriginal Affairs does not make these decisions or take action in that regard. All of that is done by First Nation Service Providers, provinces and the Yukon pursuant to statutory and delegated authority.

D. Response to Retaliation Allegations

56. The meeting of December 9, 2009 was between the Office of the Minister for Aboriginal Affairs and the Chiefs of Ontario. Proper security protocol requires that any attendees to this meeting be identified to Aboriginal Affairs prior to the meeting and placed on the invited attendee list. Dr. Blackstock was not an invited attendee to the December 9, 2009 meeting. As a result, when she arrived at the meeting, she

was advised that she could request a meeting at a different time but would not be able to attend the meeting that day.

57. Although Dr. Blackstock gained access to the elevator to the Minister's Office, this was due to the unauthorized actions of an employee of Aboriginal Affairs and not because she was cleared by security. Unauthorized access by any person is considered to be a security breach and, following proper protocols, security personnel attended and Dr. Blackstock was advised she could not attend the meeting. She was however, advised she could request a meeting at another time.

58. The actions taken by Aboriginal Affairs on December 9, 2009 were as a result of following proper security protocol in place for gaining access to a meeting with the Minister's Office, and not due to any form of retaliation.

59. With respect to the meeting in British Columbia on April 3, 2008, the Respondent also denies that any actions taken were as a result of retaliation for filing the human rights complaint.

60. There was no improper viewing of Dr. Blackstock's personal Facebook page. Any viewing of Dr. Blackstock's Facebook page followed the discovery that transcripts of cross-examinations in the Tribunal proceeding were improperly posted on the page. This was later remedied following the Order of the Tribunal. Further, there was no form of impersonation or improper access in viewing the Facebook page. Rather, the only information viewed was that which was available to the general public.

61. Dr. Blackstocks's personal information, including records on her Indian status, was not improperly viewed or shared by the Respondent.

62. The Respondent denies it took any actions motivated by the human rights complaint.

63. The Respondent denies the Caring Society and Dr. Blackstock are entitled to any of the remedies set out in paragraph 10.

E. Position on Relief Requested by the Complainants

64. With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering, and for expenses for certain services) and 21(5) of the Complainants' Statement of Particulars, the requested relief is beyond the jurisdiction of the Tribunal. Further, the Tribunal has no jurisdiction to make an Order as to the level or amount of funding.

65. Further to the relief sought in paragraph 21(4) of the Complainants' Statement of Particulars, the Tribunal has no jurisdiction to make an award of costs under the provisions of the *CHRA* (*Canada (A.G.) v Mowat* (26 October 2009), No. A-89-08 (F.C.A.)), and no jurisdiction to award compensation, full or otherwise, for legal

services under s. 53(2)(d) or any provision of the *CHRA*. Further, and in any event, there is no basis in fact or law to award full compensation for legal expenses.

66. No compensation should be awarded under s. 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meets the definition of "victim" within the meaning of the section. In the alternative, any compensation awarded under s. 53(2)(e) should be limited to a maximum of $40,000 (calculated as follows: the maximum amount available, $20,000, multiplied by the number of Complainants, two, equals $40,000).

67. Further, any findings as to this Complaint should be only as to acts or omissions which occurred no more than one year prior to the date of receipt of the Complaint by the Commission in February 2007, pursuant to section 41(1)(e) of the *Canadian Human Rights Act*.

68. In further answer to the whole of the Complainants' requested relief and without limiting the foregoing, Canada repeats and referentially incorporates into this Amended Statement of Particulars and relies upon what is pleaded in its Statement of Particulars in Response to the Amended Statement of Particulars of the Commission dated September 25, 2009 concerning the issue of requested relief.

F. Relief Requested by the Respondent

69. The Complaint be dismissed including as to the allegations pertaining to:

a) child and family services, and
b) Jordan's Principle.

70. Such further and other relief as may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Halifax, Nova Scotia, this 15th day of February 2013.

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