Tribunal File No. T-1340/7008

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

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

Respondent

And

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

RESPONDENT'S SUBMISSIONS

(Re: Definitions for the Compensation Framework)

ATTORNEY GENERAL OF CANADA

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Counsel for the Respondent

A. Overview

1. The Parties have reached agreement on most of the issues necessary for the drafting of the Compensation Framework, and are jointly submitting it to the Tribunal to approve it in principle. While some additional work may need to be done on editorial matters such as ensuring consistency of terminology in the various documents, the current document reflects the culmination of several months of collective work by the parties. Finalization of the compensation process now awaits the comments and direction of the Tribunal, including ruling on certain matters that will affect the interpretation of terms in the Framework and Notice Plan.

2. These submissions deal primarily with three terms affecting compensation under Jordan's Principle: the definitions of "essential services," "service gaps," and "unreasonable delay." These are terms that appear several times in the compensation judgment (2019 CHRT 39), and to some extent in prior decisions of the Tribunal. They are terms that can be defined by reference to the nature of the complaint, the compensation judgment, the Tribunal's previous rulings, and the evidence in these proceedings. To assist the Tribunal with some factual context for the proposed definitions, the Attorney General has filed the Affidavit of Valerie Gideon dated April 30, 2020.

3. The Tribunal has ordered compensation for Canada's failure to provide "essential services" to First Nations children. The word "essential" is thus a significant qualifier, and should be interpreted in a common-sense way. Canada proposes that it include those services considered necessary for the child's safety and security, while considering substantive equality, cultural appropriateness and best interests of the child. "Service gap" is a concept that the Tribunal has used to describe a failure to provide a necessary service for reasons such as incompatibility between government programs, or Canada's use of an unduly narrow definition of Jordan's Principle. The definition Canada proposes helps ensure that the "gap" was a circumstance that resulted in a serious need going unmet for discriminatory reasons. An "unreasonable delay" is one that could reasonably have had an adverse impact, there was no reasonable justification for the delay, and the

delay was outside a normative standard. Each of these three definitions is fleshed out further below.

4. Providing clear definitions to these terms will greatly facilitate the compensation process. The definitions will help identify children intended to be beneficiaries. The definitions should be succinct and clear, so as not to encourage unreasonable expectations of receiving compensation, and not to discourage those who may be eligible from applying.

5. The submissions also deal with the issue on which the Tribunal has requested submissions, whether the starting date for compensation under Jordan's Principle should be changed. In our view, there is no jurisdiction for the court to do so, at this late stage of the proceedings.

B. Essential services

6. Canada's proposed definition is as follows:

> "Essential service" is a support, product or service that was:
>
> - requested from the federal government;
> - necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety.
>
> In considering what is essential for each child the principles of substantive equality and the best interests of the child will be considered to ensure that the focus is on the individual child.

7. The term "essential service" appears 9 times in the compensation judgment, but is not specifically defined. However, in para. 226, the Tribunal gave considerable guidance as to its meaning:

> First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after **a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them**. The Supreme Court of Canada discussed the objective component to dignity to

> mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services. [**Emphasis added**]

8. In considering Canada's proposed definition, the concepts of safety and security should be interpreted to capture situations in which the child's ability to thrive, health or personal safety would be compromised by failure to provide the support, product or service concerned. This approach encompasses the requirement that there be a prospect of real harm flowing from a failure to respond appropriately to a request for such support, service or product.

9. The Tribunal's reference to "real harm" is a significant qualifier, one that accords with a common-sense understanding of what is truly "essential". Not all supports, products and services are equally necessary, and the failure to provide them, or the failure to provide them in a timely way, should not be compensable. Canada is not suggesting that the harm actually had to occur, since the child may have obtained a product or service by other means and avoided the harm. However, the potential harm for non-provision should have had to have been at least objectively foreseeable for compensation to be given.

10. The affidavit of Valerie Gideon includes as an exhibit a chart of the broad range of supports, products and services that have been provided under Jordan's Principle since the Tribunal set out its definition in 2017 CHRT 14 and 2017 CHRT 35.[1] The chart demonstrates that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making. In particular, it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services, as the Tribunal has approvingly noted.[2]

11. But not every service on that chart is equally necessary. Ms. Gideon's affidavit also includes examples of services that the Caring Society definition of "essential services"

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[1] Affidavit of Valerie Gideon, April 30, 2020, Exhibit A.
[2] 2019 CHRT 39, at para. 222

would encompass, and demonstrates why an overly-expansive definition is unjustified.[3] To be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential". Canada's definition does that.

12. Another difference between the parties is that Canada's definition requires that the child, or someone on the child's behalf, must have made a request. It need not be the case that the person applying used the term "Jordan's Principle," but they must have brought the service request to Canada's attention. While the Caring Society is correct that Canada did not make a significant effort to establish a simple mechanism for families or service providers to come forward with Jordan's Principle requests, Canada did provide a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators.[4] Unless the definition includes the making of a request as a condition, the process risks becoming a search back in time for a service that might have been requested had the person chosen to do so. Canada cannot be accused of discrimination for failing to respond to requests that were never made. Compensation should not be provided in such cases.

C. Service Gaps

13. Canada's proposed definition is as follows:

> "Service gap" is a situation where a child requested a service that
>
> - was not provided because of a dispute between jurisdictions or departments as to who should pay;
> - would normally have been publicly funded for any child in Canada;
> - was recommended by a professional with expertise directly related to the service;
>
> but the child did not receive the service due to the federal government's narrow definition of Jordan's Principle.

[3] Affidavit of Valerie Gideon, April 30, 2020, paras. 6, 9 and 10
[4] Affidavit of Valerie Gideon, April 30, 2020, para. 7

For greater certainty, the narrow definitions employed by the federal government demanded satisfaction of the following criteria during the following time periods:

a) Between December 12, 2007 and July 4, 2016
   - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve;
   - Child with multiple disabilities requiring multiple service providers;
   - Limited to health and social services;
   - A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
   - The case must be confirmed to be a Jordan's Principle case by both the federal and provincial Deputy Ministers; and
   - The service had to be consistent with normative standards.

b) Between July 5, 2016 and November 2, 2017
   - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);
   - The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
   - The service was limited to health and social services (July 5, 2016 to May 26, 2017).

14. The Tribunal's decision substantiating the complaint (2016 CHRT 2), identified two types of service gap. One type of gap arises from the narrow definition of Jordan's Principle applied by Canada at certain points in the past. The second involves the lack of coordination among the various programs intended to address First Nation children's health. The Tribunal expressed the concept in the following paragraph:

> In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially

> AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.[5]

15. The compensation decision itself also suggests that the reason for giving compensation for children experiencing service gaps in relation to Jordan's Principle was that the service gaps led to some children being placed "outside of their homes, families, and communities in order to receive those services."[6] Placing these children outside their families, homes and communities could itself be seen as a harm.

16. There is substantial agreement between the parties as to how service gaps arose under the application of Jordan's Principle when Canada was applying an unduly narrow definition. Canada also agrees that where a child did not receive a service simply because the lack of co-ordination of programs meant no payment was permitted, compensation is appropriate.

17. The essence of the dispute between the Parties in relation to this definition concerns whether some necessary limitations should apply to ensure that there was indeed a gap. Canada proposes that the service in question must be one that was ordinarily provided to other children in Canada under certain conditions: such conditions could include the need to travel to certain locations, eligibility criteria including specific age brackets, limited frequency, and within certain income thresholds.[7] This is less a limitation than inherent in the understanding of the word "gap": the need to compensate arises because there was a gap between the services a First Nations child was receiving and the services other Canadian children received.

18. The second part of Canada's definition is aimed at ensuring that the service in question was recommended by a professional with the relevant expertise to determine that the service is essential to meet the child's needs. As Valerie Gideon describes, it is sometimes the case in considering Jordan's principle cases that a service request is supported by a recommendation from someone who does not have the required

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[5] 2016 CHRT 2, at para. 381
[6] 2019 CHRT 39, at para. 250
[7] Affidavit of Valerie Gideon, April 30, 2020, paras. 10-12

professional expertise.[8] In these cases, the Department will offer support for the child to access the needed professional referral. Such situations should not be compensable, since they do not provide evidence either of a service gap or of unreasonable delay. They are just a necessary step to ensure that the approved service will meet the assessed need of the child.

19. Finally, it is important to note that many programs are not universally available across communities. This may cause differences in the availability of supports, products or services, but this a common practice among governments to respond to specific needs where they arise; it is not based on discriminatory treatment of specific children. Governments must prioritize resources and will do so based on varying criteria: unmet needs, conditions for success of the initiative, demonstration of results for future implementation in other communities.[9] A proper understanding of the existence of a service "gap" must recognize that the availability of programs to First Nations children must be assessed against programs that are generally available to most other children. That being said, there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.[10]

D. Unreasonable Delay

20. Canada's proposed definition is as follows:

"Unreasonable delay" is informed by:

- the nature of the product, support or service sought;
- the reason for the delay;
- the potential of delay to adversely impact the child's needs;
- the normative ranges for providing the category or mode of support or services across Canada by provinces and territories.

For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service that was not provided

[8] Affidavit of Valerie Gideon, April 30, 2020, paras. 12 and 13
[9] Affidavit of Valerie Gideon, April 30, 2020, para. 5
[10] Affidavit of Valerie Gideon, April 30, 2020, para. 5

through Jordan's Principle or another federal program, delay resulting from administrative procedures or jurisdictional dispute will be considered unreasonable.

21. All Canadians understand that some amount of delay is endemic in our health care system. Few, however, would expect to receive compensation where they experienced some delay in getting the service. To be worthy of compensation, the delay must, in some objective sense, be unreasonable based on the harm (actualized or potential) experienced by the individual.

22. Canada's definition would accept that if the reason for delay was jurisdictional wrangling over who should pay, the delay was unreasonable. That is a reality that First Nations children experienced that other Canadian children did not, or were much less likely to, experience. Jordan's Principle is now in place to prevent these situations from occurring.

23. As pointed out above, the Tribunal was concerned in its compensation decision about the possibility of harm to children because of delay. Conversely, where there was no reasonable possibility of harm, that factor should weigh against the provision of compensation.

24. The essence of the dispute between the parties under this definition is whether the Tribunal's judgment imposing 12 and 48 hour standards for the provision of services should be the touchstone for compensation. However, as the affidavit of Valerie Gideon sets out, those standards exceed the standards set by the federal government with respect to services to children and families, and those of provinces and territories. The fact that Canada is bound by the Tribunal's order to observe much higher standards is a mechanism to ensure the longstanding injustices experienced by First Nations children will cease. However, minor deviations from those high standards should not lead to compensation: it is simply not evidence of discrimination to fail to achieve standards that exceed those of other jurisdictions and experienced by other Canadian children. Instead, what Canada proposes is that the failure to achieve normative standards, that is, standards which other Canadian jurisdictions strive to achieve with respect to services

to children, should be the benchmark against which the reasonableness of delay is assessed. On that standard, the evidence is that Canada is achieving such standards.[11]

E. The starting date for Jordan's Principle compensation should remain unchanged

25. At para. 153 of its judgment in 2020 CHRT 7, the Tribunal requested submissions on

> whether First Nations children living on reserve or off-reserve who were not removed from their home but who experienced a gap/delay or denial of services, were deprived of essential services as a result of discrimination found in this case prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should be compensated.

26. The Panel states that re-visiting the starting date of compensation is justified because the Attorney General "made arguments on the temporal scope for the compensation order under Jordan's Principle."[12] However, all that the submissions did was point out that in the Panel's compensation decision, the Panel had printed the starting date in bold letters, apparently so as to emphasize the importance of that date. Repeating the Panel's own words could not be reasonably construed as an invitation to re-visit the temporal scope of the order.

27. Amending the starting date for compensation at this very late point in the proceedings raises two distinct and equally important issues. First, under s. 41(1)(e) of the *Canadian Human Rights Act*, where an aspect of the claim is based on old events - those occurring more than a year before filing - the Commission has a decision to make about whether this aspect of the claim should go forward. As a question of procedural fairness, the Commission would have afforded the respondent the opportunity to make submissions on that point. Making the change now denies the respondent that procedural protection.[13]

28. More importantly, no mention of this issue is found in the letter from the Commission referring the complaint. As Member Lustig has noted, the referral by the Commission is

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[11] Affidavit of Valerie Gideon, April 30, 2020, paras. 15-18
[12] 2020 CHRT 7, at para. 152
[13] See Appendix "A", Letter from David Langtry, October 14, 2008

what gives the Tribunal the authority to hear the complaint.[14] This case was not referred to the Tribunal as a case concerning the denial of individual service requests under Jordan's Principle, much less a case about the denial of requests that occurred before the House of Commons resolution. The Tribunal has no jurisdiction to change the starting date to some date before the date determined in the compensation decision. A copy of the letter from the Commission referring the complaint is attached to this factum as Appendix A.

29. In any event, there is no legal basis for the suggestion that the starting date for compensation for Jordan's Principle should be any date prior to the Jordan's Principle resolution in the House of Commons. To begin at some date before December 12, 2007 would ignore the following important facts:

- The Panel fixed that date based on the "evidence and other information in the case,"[15] which has not changed;
- The date fixed in the Panel's compensation decision was the date suggested by the parties to the complaint;[16]
- Neither the complaint, nor the complainants' particulars, suggested a date before the House of Commons resolution, so to change it now would occasion considerable prejudice to the respondent;
- The Tribunal notes that the life story of Jordan River Anderson and his family and the discrimination that they have experienced prior to December 12, 2007 gave rise to Jordan's Principle. It was following Jordan's untimely death in 2005 that the Wen:De report focused attention on the issue and recommended that the federal government recognize the principle. The House of Commons responded

[14] *Tran v. Canada Revenue Agency*, 2010 CHRT 31, at para. 17; *Letnes v. Royal Canadian Mounted Police*, 2019 CHRT 41, at para. 7; *Constantinescu v. Correctional Service Canada,* 2018 CHRT 17, at para. 5; however, compare *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc*., 2013 CHRT 24 at paras. 31-32.
[15] 2019 CHRT 39, at para. 251
[16] Submissions of the Caring Society, April 3, 2019, para. 50

on December 12, 2007 by unanimously passing the motion recognizing the Principle;

- In its 2016 decision, the Tribunal found that First Nations children were discriminated against as a result of Canada's narrow interpretation of Jordan's Principle following its recognition by Parliament. Canada was ordered to cease that interpretation and to fully implement the principle;

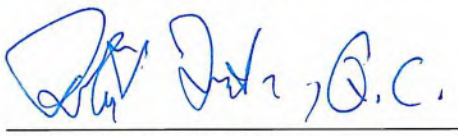
- There can be no basis for a finding that Canada discriminated by narrowly interpreting the principle prior to its being recognized.; and

- There is no logical starting date other than the one the Panel chose.

Thus, there is no basis for changing the starting date for compensation for failure to observe Jordan's Principle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, Province of Ontario, this 30th day of April, 2020.



Robert Frater, Q.C.

Counsel for the Attorney General of Canada

TABLE OF AUTHORITIES

	Statutes	**Loi**	**Referred to at Paragraph(s)**
1.	*Canadian Human Rights Act*, RSC, 1985, c H-6 RSC, s. 41(1)(e)	*Loi canadienne sur les droits de la personne*, LRC (1985), ch H-6, art. 41(1)(e)	27

Case Law		**Referred to at Paragraph(s)**
2.	*Blodgett v. GE-Hitachi Nuclear Energy Canada Inc.*, 2013 CHRT 24	28
3.	*Constantinescu v. Correctional Service Canada,* 2018 CHRT 17	28
4.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada,* 2016 CHRT 2	14
5.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2019 CHRT 39	2, 10, 15, 29
6.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2020 CHRT 7	25, 26
7.	*Letnes v. Royal Canadian Mounted Police*, 2019 CHRT 41	28
8.	*Tran v. Canada Revenue Agency*, 2010 CHRT 31	28

CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Deputy Chief Commissioner
Vice-président

PROTECTED B

OCT 14 2008

Mr. Grant Sinclair
Chairperson
Canadian Human Rights Tribunal
11th Floor
160 Elgin Street
Ottawa, Ontario K1A 1J4

Dear Mr. Sinclair:

I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (20061060) of First Nations Child and Family Caring Society of Canada *and* Assembly of First Nations against Indian and Northern Affairs Canada.

The Commission has decided, pursuant to section 49 of the *Canadian Human Rights Act*, to request that you institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

A copy of the complaint form is enclosed. Form I, including complainant and respondent information, will be provided by the Litigation Services Division.

The complainant and respondent are being advised that they will receive further information from the Tribunal regarding the proceedings.

Yours sincerely,

David Langtry

Encl.

CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Executive Secretariat *Secrétariat exécutif*

PROTECTED B

OCT 14 2008

Ms. Cindy Blackstock
Executive Director
First Nations Child and Family
Caring Society of Canada
101-251 Bank Street
Ottawa, Ontario K1P 5E7

Mr. Jonathan Thompson
Acting Senior Director
Assembly of First Nations
473 Albert Street, 8th Floor
Ottawa, Ontario K1R 5B4

Dear Ms. Blackstock and Mr. Thompson:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20061060) against Indian and Northern Affairs Canada.

Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subsection 41(1) of the *Canadian Human Rights Act,* to deal with the complaint.

The Commission further decided, pursuant to section 49 of the *Canadian Human Rights Act,* to request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

The decision of the Commission is attached.

Further information will be provided to you by the Tribunal regarding the conduct of proceedings.

Yours sincerely,

Lucie Veillette
Secretary to the Commission

Encl.

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CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Executive Secretariat *Secrétariat exécutif*

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OCT 14 2008

Mr. Michael Wernick
Deputy Minister
Indian and Northern Affairs Canada
Les Terrasses de la Chaudière
North Tower
Room 2101
10 Wellington Street
Gatineau, Quebec K1A 0H4

Dear Mr. Wernick:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in the complaint (20061060) of First Nations Child and Family Caring Society of Canada and Assembly of First Nations against Indian and Northern Affairs Canada.

Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subsection 41(1) of the *Canadian Human Rights Act,* to deal with the complaint.

The Commission further decided, pursuant to section 49 of the *Canadian Human Rights Act,* to request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

The decision of the Commission is attached.

Further information will be provided to you by the Tribunal regarding the conduct of proceedings.

Yours sincerely,

Lucie Veillette
Secretary to the Commission

Encl.

c.c.: Ms. Marielle Doyon

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First Nations Child and Family Caring Society of Canada and
Assembly of First Nations v. Indian and Northern Affairs Canada (20061060)

At the outset, the Commission wishes to remind the parties of the Commission's decision making role. The Commission does not make findings of discrimination but determines whether inquiry into the allegations raised in the complaint warrants inquiry at the Canadian Human Rights Tribunal. Inquiry at Tribunal may be required in many circumstances including when there are contentious factual or legal issues raised in the complaint and the submissions of the parties.

1) **Consent of alleged victims**

The Commission adopts the reasons set out in the Assessment Report in regards to why the consent of the alleged victims in this matter is not required.

2) **Section 40/41 Decision**

The Commission's decision-making powers under s.40/41 of the *CHRA* do allow it to screen out complaints when they do not meet the basic requirements of the *Act*. The Respondent in this case argues in its submissions that the complainants have failed to demonstrate a *prima facie* case of discrimination and therefore, the complaint is out of the Commission's jurisdiction. The determination of whether a *prima facie* case has been established is made by the Tribunal. The Complainant has provided sufficient information in its complaint for it to be in a form acceptable to the Commission and demonstrates a sufficient link to a prohibited ground and an alleged discriminatory practice. There is no information before the Commission to support a finding that this complaint is trivial, frivolous, vexatious or made in bad faith pursuant to s.41(1)(d). The Commission has decided to deal with this complaint in accordance with s. 41(1).

3) **Section 49 Decision and procedural fairness**

Section 49 (1) of the *CHRA* allows the Commission to request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into a complaint *at any stage after the filing of a complaint* if it is satisfied that, having regard to all of the circumstances, an inquiry is warranted.

The Respondent further argues that the Assessment Report before the Commission should have been limited to an analysis of the s.40/41 jurisdictional issues and should not have included a recommendation regarding the complaint as a whole.

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However, the Assessment Report, the complaint form and the submissions of the parties before the Commission support the recommendation of the Assessor as the jurisdictional objections in this case are inextricably linked to the merits of the complaint. These objections by the Respondent include whether a comparator group is necessary to prove discrimination and whether funding is a service within the meaning of s.5 of the *CHRA*. The Respondent raises several legal questions in its objections that cannot be separated from the merits of the complaint itself, are not settled in law, and require further inquiry.

The Respondent's objections also include submission that it had a legitimate expectation that a full investigation was going to be completed in this matter and therefore the Commission has breached procedural fairness. It cites the decision in *Canada (Attorney General) v. Grover* [2004] F.C.J. No. 865 in support of this assertion.

Firstly, the *CHRA* expressly provides for the possibility that a decision will not only be made under section 44 but also could be made section 49. This section gives the Commission the discretion to refer a complaint to Tribunal at any stage of the process. Secondly, the *Grover* decision relied upon by the Respondent involved a complaint which had previously been dismissed, referred back to Commission for investigation and then referred to Tribunal part way through an investigation and without reasons. The doctrine of legitimate expectation was applied to the Commission's duty to give reasons in those particular circumstances.

The circumstances giving rise to the *Grover* decision differ substantially from the case at hand. In this complaint the parties have had ample opportunity to know the substance of the allegations and to respond to them and the positions of the parties were disclosed, and cross disclosed.

The materials before the Commission show that the Respondent has been given many opportunities to provide comments on both the s. 40/41 issues it raised as well as the merits of the case since it was notified of this complaint in February 2007. As stated above, the position of the Respondent on the section 40/41 issues are in any event inextricably linked to the issues to be determined by a Tribunal.

The Commission has discretion to use s.49 when it deems it appropriate. In this case, 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.

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For these reasons, as well as the public interest that is raised in this complaint, the Commission has decided, pursuant to section 49 of the *Canadian Human Rights Act*, to request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

Decision rendered by the Canadian Human Rights Commission on September 30, 2008.

Lucie Veillette
Secretary to the Commission
Canadian Human Rights Commission