Court File No. A-145-12

FEDERAL COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, AMNESTY INTERNATIONAL CANADA

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I N D E X

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, AMNESTY INTERNATIONAL CANADA

OVERVIEW

1. Before this Court, the Attorney General of Canada (the "Appellant") appeals the judgment of Justice Anne Mactavish (the "Applications Judge") dated April 18, 2012 (the "Decision"), wherein the Applications Judge granted the respondents' applications for judicial review (the "Applications") and quashed the decision of the Canadian Human Rights Tribunal (the "Tribunal") dated March 14, 2011 (the "Tribunal's Decision").

2. The Applications were brought by the First Nations Child and Family Caring Society (the "Caring Society"), the Assembly of First Nations (the "AFN") and the Canadian Human Rights Commission (the "Commission") after the Tribunal's Decision dismissed a complaint brought by the Caring Society and the AFN (the "Complaint"). The Tribunal's Decision dismissed the Complaint at a preliminary stage, on a point of law and statutory interpretation, without any assessment of the Complaint's merits.

3. The Complaint raises serious issues. It alleges that the Government of Canada is discriminating against First Nations children on reserves by providing them with significantly less funding per child for child welfare services than is provided for First Nations children and other children off reserve. The Complaint alleges that this disparity has had a devastating impact on the health and welfare of First Nations children on reserve.

4. Amnesty International Canada ("Amnesty International") was granted "Interested Party" status before the Tribunal and was also a party on the Application. At both levels, Amnesty International provided written and oral submissions concerning Canada's obligations under international human rights law. On this appeal, Amnesty International is similarly limiting its submissions to Canada's obligations under international human rights law and how they affect the proper interpretation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*CHRA*").

5. The Applications Judge quashed the Tribunal's Decision based, *inter alia*, on her finding that the Tribunal had adopted an unreasonable interpretation of section 5(b) of the *CHRA*.[1] The

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

Tribunal had interpreted the words "differentiate adversely" in s. 5(b) as necessarily requiring a comparison between two groups who received the *same* service from the *same* service provider. Since First Nations children on reserve are funded by the Government of Canada and children living off reserves are funded by the provincial government, the Tribunal concluded that, as a purely legal matter, discrimination could not exist under s. 5(b) and the Complaint must be dismissed.

6. The Applications Judge held that, properly understood and reasonably interpreted, s. 5(b) did not require complainants to establish a "mirror comparator group" from the same service provider before they could proceed with a hearing on the merits before the Tribunal. Essentially, the Applications Judge viewed comparator groups as an evidentiary tool, not a threshold legal requirement to access the *CHRA* regime.

7. In her Reasons for Decision, the Applications Judge offered at least seven reasons that point to the Tribunal's Decision being unreasonable, and support the competing interpretation that she ultimately adopted. As part of this analysis, the Applications Judge reviewed the relevant treaties and legal principles regarding the presumption of conformity, and noted that a broader interpretation of s. 5(b) accords more fully with Canada's international human rights law obligations than the Tribunal's interpretation.

8. This conclusion is not only correct, it is unassailable. The Tribunal's interpretation of s. 5(b) is fundamentally inconsistent with Canada's binding international commitments to human rights and the related principles of statutory interpretation, while these same commitments and principles compel the interpretation of s. 5(b) that was ultimately accepted by the Applications Judge.

9. By adopting a narrow interpretation of s. 5(b), the Tribunal failed to respect three key aspects of Canada's binding obligations under international human rights law: the obligation to protect children through child welfare services (including preserving the integrity of the family and the child's access to his/her culture), the obligation to ensure there is no discrimination in the provision of these services and the related obligation to provide effective remedies for discrimination where it is alleged to exist.

10. The Government of Canada, the Tribunal and various U.N. groups have all recognized that domestic human rights institutions like the *CHRA* and the Tribunal play a critical role in meeting these obligations.

11. The Tribunal's interpretation of s. 5(b) is inconsistent with the presumption of conformity, which requires that where there is more than one possible interpretation of a provision in domestic legislation, the interpretation that would put Canada in breach of its international obligations should be avoided. While the presumption may be overcome by clear and unequivocal statutory language that compels a different result, no language anywhere in the *CHRA* meets this stringent threshold.

12. The Appellant cannot rely on Canadian federalism to support the Tribunal's interpretation of s. 5(b). No constitutional provision clearly compels a breach of Canada's international obligations. Moreover, it is a fundamental tenet of international law (customary and conventional) that a state cannot rely on its constitution or internal division of powers to avoid international legal obligations. To interpret s. 5(b) as the Tribunal did is to disregard this principle by denying the adjudication of discrimination complaints simply because one level of government is charged with providing services on reserves, and another is responsible for providing the same services off reserves.

13. The Tribunal's Decision is unreasonable because it adopts an interpretation of s. 5(b) that is at odds with Canada's binding obligations under international law, ignores the presumption of conformity and the high standard for rebutting that presumption, and fails to respect the principle that federalism cannot shield Canada from its commitments as a state party to various treaties and conventions.

14. By contrast, the Applications Judge properly considered Canada's human rights obligations under international law and respected the principles of statutory interpretation in examining the phrase "differentiate adversely" in s. 5(b). The Applications Judge was correct, both in concluding that the Tribunal's Decision was unreasonable and in determining that s. 5(b) does not invariably require a comparator group.

15. Accordingly, Amnesty International submits that this appeal should be dismissed.

PART I - FACTS

16. Amnesty International accepts and adopts the facts as set out in the memoranda of fact and law of the Respondents. Here, Amnesty International provides a brief supplementary factual overview, drawn from the Reasons of the Application Judge and the Appeal Record, that is most relevant to its submissions.

A. The Complaint

17. While the precise arrangements that govern the delivery of child welfare services in Canada are varied and complex, two key facts are relevant for this Appeal:

- The Department of Indian and Northern Affairs Canada ("INAC") funds child and family welfare services to First Nations children resident on reserves through its First Nations Child and Family Services Program (the "FNCFS Program");[2] and
- Child welfare services for all other children (i.e. those living off reserves, whether First Nations or otherwise) are ordinarily funded by provincial and territorial governments.[3]

18. The Complaint, filed by the Caring Society and the AFN on February 26, 2007, alleges that the Government of Canada (via INAC) violated the *CHRA* by discriminating in its provision of child welfare services to First Nations children living on reserves.

19. In particular, the Complaint alleges that the Government of Canada has provided inequitable and insufficient funding to child welfare agencies on reserves and, as a direct result, First Nations children are drastically under-funded on per child basis. The Complaint cites studies revealing that 22% less funding is available per child for First Nations children living on reserves than for children living off reserves in the average province. [4]

20. The Complaint further alleges that First Nations children living on reserves have been denied certain child welfare services.[5] For example, child welfare services on reserves do not have adequate funding to take "least disruptive measures" for abused or neglected children on reserves

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[2] **Reasons for Decision of the Applications Judge ("Reasons")**, Appeal Book ("AB") Vol. I, Tab 2 at para. 29

[3] **Reasons**, AB Vol. I, Tab 2 at para. 28

[4] **Joint Complaint of AFN and FNCFCS against INAC ("Complaint"),** AB, Vol. I, Tab 5 at pp. 224-226 (all page numbers cited to the AB); **Reasons,** AB Vol. I, Tab 2 at paras. 19-24

[5] **Complaint,** AB, Vol. I, Tab 5 at p. 226; **Reasons,** AB Vol. I, Tab 2 at para. 209

(i.e. allowing them to remain safely in their homes with necessary support services), with the result being that a disproportionate number of First Nations children on reserves are removed from their homes and placed into foster care.[6]

21. Finally, the Complaint alleges that while the level of child welfare services provided to First Nations children on reserves is less than the level of services provided to children living off reserves, the needs of children living on reserves are *greater* than children living off reserves, as a result of poverty, poor housing conditions, exposure to family violence and substance abuse.[7]

B. Proceedings before the Tribunal

22. On September 14, 2009, the Tribunal issued an order granting Amnesty International and the Chiefs of Ontario "Interested Party status in the hearing of the [Complaint]" pursuant to s. 50 of the *CHRA*.[8]

23. On December 21, 2009, the Appellant filed a preliminary motion to dismiss the Complaint, arguing that the complaint did not come within the purview of ss. 3 and 5 of the *CHRA*.[9] Part of the Appellant's argument on the motion was that because INAC does not provide funding for child welfare services for anyone other than First Nations children living on reserves, it could not "differentiate adversely" in the provision of these services (the "comparator issue").[10]

24. The motion to dismiss was heard by the Chairperson of the Tribunal on June 2 and 3, 2010. Amnesty International filed written submissions and participated in the hearing of the motion to dismiss before the Tribunal.[11]

C. The Tribunal's Decision

25. Almost nine months later, the Tribunal released its Reasons for Decision dismissing the Complaint.[12] The Tribunal's Decision turned on the comparator issue – that is, whether s. 5(b) of

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[6] **Complaint,** AB, Vol. I, Tab 5 at pp. 224-226; **Reasons,** AB Vol. I, Tab 2 at paras. 22, 211-212
[7] **Complaint,** AB, Vol. I, Tab 5 at pp. 224-226; **Reasons,** AB Vol. I, Tab 2 at para. 58
[8] **Order of the Tribunal,** AB, Vol. I, Tab 5 at pp. 376-378; **Reasons,** AB Vol. I, Tab 2 at paras. 16-17
[9] **Dismissal Motion**, AB, Vol. II at p. 583; **Reasons,** AB Vol. I, Tab 2 at para. 88
[10] **Reasons,** AB Vol. I, Tab 2 at para. 66
[11] **Reasons,** AB Vol. I, Tab 2 at para. 97
[12] **Reasons for Decision of the Tribunal ("Tribunal Reasons")**, AB Vol. I, Tab 4

the *CHRA* requires a comparison between different groups and, if so, whether such a comparison must involve the same service provider.

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

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.[13]

27. The Tribunal's Decision did not consider the impact of Canada's binding obligations under international human rights law. The Tribunal adverted to the relationship between international law and the interpretation of s. 5(b) in a single, brief paragraph, without any follow-up or analysis:

> Within this analysis, the intention of Parliament must be respected. The *CHRA* is a statutory creature with its genesis within the legislative control of the Parliament. Any exemption from its provisions must be clearly stated. International covenants, such as the *UNDRIP*, may inform the contextual approach to statutory interpretation. However, effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament. Thus, the starting point of any analysis is to carefully scrutinize the specific provision at issue.[14]

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

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

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

[14] **Tribunal Reasons**, AB Vol. I, Tab 4 at para. 112

[15] **Tribunal Reasons**, AB Vol. I, Tab 4 at para. 9

> The Act does not allow a comparison to be made between *two different* service providers with *two different* service recipients. Federal funding goes to on-reserve First Nations children for child welfare. Provincial funding goes to all children who live off-reserve. These constitute separate and distinct service providers with separate service recipients. The two cannot be compared. [Emphasis original].[16]

30. On this basis, the Tribunal dismissed the Complaint.

D. The Judicial Review

31. In April 2011, the Commission, the Caring Society and the AFN all brought applications for judicial review of the Tribunal's Decision.[17] The Applications were heard together over three days on February 13-15, 2012 before the Applications Judge. Amnesty International and the Chiefs of Ontario were added as respondents on the Applications, but provided submissions in support of the applicants' position.

32. On April 18, 2012, the Applications Judge released her Reasons for Decision, granted the Applications and set aside the Tribunal's Decision on the motion to dismiss.

33. After carefully reviewing the relevant legal principles and the record, the Applications Judge held that the Tribunal's interpretation of the phrase "differentiate adversely" in s. 5(b) of the *CHRA* was unreasonable because it:

- is contrary to the purpose of the *CHRA*[18];
- is contrary to the ordinary meaning of both the English and French versions of the *CHRA*[19];
- would lead to patently absurd results, as it would deny protection to individuals or groups who have been victims of discriminatory practices but cannot identify a suitable comparator[20];
- creates an internal incoherence between and s. 5(a) and s. 5(b) of the *CHRA*[21];
- is contrary to jurisprudence of the Federal Court of Appeal on the evidentiary burden in adverse differentiation analysis[22]; and

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[16] **Tribunal Reasons**, AB Vol. I, Tab 4 at para. 11
[17] **Application for Judicial Review,** AB Vol. I, Tab 3
[18] **Reasons,** AB Vol. I, Tab 2 at paras. 258-259
[19] **Reasons,** AB Vol. I, Tab 2 at para. 359
[20] **Reasons,** AB Vol. I, Tab 2 at paras. 256-266, 360
[21] **Reasons,** AB Vol. I, Tab 2 at paras. 276-279

- is inconsistent with recent Supreme Court of Canada equality jurisprudence.[23]

34. The Applications Judge determined that the correct interpretation of the phrase "differentiate adversely" is to treat someone differently than you might otherwise have done because of the individual's membership in a protected group[24] – a definition that does not require a comparison, although one may be useful as an evidentiary tool.[25]

35. Finally, the Applications Judge addressed the issue of international law in her Reasons.[26] After noting the various treaties, covenants, conventions and declarations put before her by the parties, she set out the governing legal principles as follows:

> The Supreme Court has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act.* The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. **As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.**
>
> **While these presumptions are rebuttable, clear legislative intent to the contrary is required.**
>
> International instruments such as the *UNDRIP* and the *Convention of the Rights of the Child* may also inform the contextual approach to statutory interpretation.
>
> **As a result, insofar as may be possible, an interpretation that reflects these values and principles is preferred.** [Emphasis added]. [Citations omitted].[27]

36. Applying these principles to the different interpretations of s. 5(b) that were before her, the Applications Judge observed (at para. 355): "Suffice it to say that my interpretation of the provision [s. 5(b)] also accords more fully with Canada's international obligations than does that of the Tribunal, and is thus to be preferred."

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[22] **Reasons,** AB Vol. I, Tab 2 at paras. 299-302, 361
[23] **Reasons,** AB Vol. I, Tab 2 at para. 362
[24] **Reasons,** AB Vol. I, Tab 2 at para. 254, 274
[25] **Reasons,** AB Vol. I, Tab 2 at para. 290
[26] **Reasons,** AB Vol. I, Tab 2 at paras. 348-356
[27] **Reasons,** AB Vol. I, Tab 2 at paras. 351-354

PART II - ISSUES

37. Amnesty International accepts and adopts the legal submissions set out in the memoranda of fact and law of the other Respondents, and will not repeat those submissions here. Rather, Amnesty International's legal submissions focus on addressing the following issues, which are raised by the Appellant in relation to the role of Canada's international legal obligations in the exercise of interpreting s. 5(b) of the *CHRA*:

A. Does the Tribunal's interpretation of s. 5(b) respect Canada's obligations under international human rights law?

B. Does s. 5(b) of the *CHRA* evidence a clear and unequivocal legislative intention that could rebut the presumption of conformity?

C. Does Canada's federalist structure have any relevance to the issues raised on this appeal?

D. Was the Tribunal's interpretation of s. 5(b) unreasonable?

E. Was the Application Judge's interpretation of s. 5(b) correct?

38. Amnesty International submits that questions (a), (b) and (c) must be answered in the negative, and questions (d) and (e) must be answered in the affirmative.

39. In the result, Amnesty International submits that this Appeal should be dismissed.

PART III - SUBMISSIONS

A. Tribunal's interpretation of s. 5(b) fails to respect Canada's international human rights law obligations

40. Amnesty International submits that the interpretation of s. 5(b) of the *CHRA* adopted by the Tribunal (and advanced by the Appellant before this Court) – one invariably requiring a comparison between groups receiving the same service from the same provider – is unreasonable because it is fundamentally inconsistent with a number of Canada's binding obligations under international human rights law, as well as a number of non-binding instruments of universal applicability.

41. This inconsistency occurs on at least three levels. First, because it requires a comparator group from the same service provider before a discrimination complaint can even be *considered*

42. Second, the Tribunal's interpretation falls woefully short of Canada's international legal obligations to ensure that there is no discrimination in access to or delivery of child welfare services. This matter is discussed further in paras. 59-60 of this section, below.

43. Third, by adopting a narrow reading of s. 5(b) that prevents the Complaint from being heard, the Tribunal's interpretation fails to respect Canada's obligations under international human rights law to monitor and enforce individual human rights domestically and to provide effective remedies where these rights are violated.[28] The denial of adjudication of human rights claims is plainly inconsistent with these obligations. This is discussed further in paras. 61-81, below.

44. The disconnect between the Tribunal's restrictive interpretation of s. 5(b) and Canada's international obligations comes into even sharper focus when one recognizes that not only would the Tribunal's decision preclude this *particular* Complaint from going forward, but it also eliminates the possibility for *any* similarly situated complainants to seek redress under the *CHRA*, even if the facts alleged can be definitively proven. No matter how egregious the circumstances, how stark the discrimination and how significant the departure from Canada's international human rights obligations, the Tribunal's interpretation requires such an outcome.

45. This result, taken alone, should be sufficient to demonstrate the unreasonableness of the Tribunal's interpretation and its marked departure from Canada's commitments under international human rights law. However, as it may assist the Court, Amnesty International will highlight some of the obligations that are engaged in the context of this case, both with respect to the substance of the Complaint and the Tribunal's decision to deny adjudication of the Complaint.[29]

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[28] ***Universal Declaration of Human Rights***, GA Res. 217A (III), 3 U.N. GAOR, U.N. Doc A/810 at 71 (1948), Article 8; ***Vienna Declaration and Programme of Action***, adopted by the World Conference on Human Rights on 25 June 1993, U.N. Doc. A/CONF.157/23 (1993), at para. 27

[29] The Complaint is taken as true for the purposes of this analysis since, as discussed, the Tribunal's interpretation would not be any different if the facts alleged were all found to be true.

(i) Canada's international obligations to ensure the protection of children

46. Canada is a signatory to a number of binding international treaties and conventions dealing with the rights of children and Canada's obligations towards children, including the *Convention on the Rights of the Child* ("*CRC*"), the *International Covenant on Civil and Political Rights* ("*ICCPR*"), the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR"*) and the *International Convention on the Elimination of All Forms of Racial Discrimination* ("*ICERD*"). The substance of these commitments can be summarized as follows: Canada must take all appropriate measures to ensure the protection of children, including supporting and maintaining the child's family environment and cultural identity. This commitment is also reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*"), which deals specifically with the rights of Indigenous children.

The Convention on the Rights of the Child

47. The *CRC* is a cornerstone of the international human rights law regime. As the Supreme Court recognized in *R. v. Sharpe*, "the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it **the most universally accepted human rights instrument in history**."[30] The Complaint, on its face, offends several *CRC* provisions, including:

- **Article 3.1:** In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[31]

- **Article 5:** States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention

[30] ***R. v. Sharpe***, [2001] 1 S.C.R. 45 at para. 177 (emphasis added)

[31] According to the Committee on the Rights of the Child, "The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children." See Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003) at para. 12

- **Article 9.1:** 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

- **Article 16.1:** No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

- **Article 19.1:** States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

- **Article 19.2:** Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

- **Article 20.1:** A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

- **Article 27.1:** States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

- **Article 27.3:** States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

48. Beyond Articles 5, 8, 9 and 27, the importance of preserving a family environment is equally evident in the pre-amble to the *CRC*, which states:

> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly

> children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,
>
> Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…

49. The obligations set out in the *CRC*, including the obligation to support and preserve the family environment, carry special significance in the context of First Nations children. In its General Comment on Indigenous Children, the Committee on the Rights of the Child – the body responsible for interpreting and monitoring compliance with the treaty's provisions – observes that "[t]he specific references to indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights."[32] The Committee goes on to explain some of these special measures and considerations as follows:

> **States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities** in accordance with articles 3, 5, 18, 25 and 27(3) of the Convention.
>
> … **Maintaining the best interests of the child and the integrity of indigenous families and communities should be primary considerations** in development, social services, health and education programmes affecting indigenous children.
>
> Furthermore, **States should always ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children** and in accordance with article 20 (3) of the Convention pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background. **In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.** Specifically, if an indigenous child is placed in care outside their community, the State party should take special measures to ensure that the child can maintain his or her cultural identity. [Emphasis added].[33]

50. The contents of the Complaint point to a child welfare system that does not respect Canada's obligations under the *CRC*, and falls particularly short when considering the special measures required in the case of indigenous children.

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[32] Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their Rights under the Convention*, U.N. Doc. CRC/C/GC/2009/11 (2009), at para. 5

[33] *Ibid.*, at paras. 46-48

Other binding treaties

51. The contents of the Complaint engage Article 23.1 of the *ICCPR*, which sets out that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State", and Article 24, which sets out that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

52. Article 10 of the *ICESCR* is particularly relevant, as it requires that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."

53. Finally, article 5 of the *ICERD* is directly implicated on the face of the Complaint. That provision guarantees "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) economic, social and cultural rights, in particular… the right to housing [and] the right to public health, medical care, social security and social services."

U.N. Declaration on the Rights of Indigenous Peoples

54. There is a clear and obvious disconnect between the expectations set out in the *UNDRIP* and what is set out in the Complaint.

55. Echoing Canada's obligations under the *CRC, ICCPR, ICESCR* and *ICERD,* Article 22(1) of the *UNDRIP* states that indigenous peoples "have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of… housing… health and social security." In meeting this responsibility, states must take "effective measures, and where appropriate, special measures to ensure the continuing improvement of [Indigenous people's] economic and social conditions", and "[p]articular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."[34]

[34] ***U.N. Declaration on the Rights of Indigenous Peoples***, U.N. Doc. A/RES/61/295 (2007), Article 22(2)

56. While human rights declarations are not, in and of themselves, directly binding on states, the *UNDRIP* reflects commitments that are grounded in fundamental human rights principles and closely related to Canada's binding treaty obligations, described above.[35] Moreover, some of its provisions, such as the principle of non-discrimination, also rise to the level of customary international law.[36]

57. The *UNDRIP* represents the dynamic development of international legal norms and values, which serves to further illuminate and reinforce the substance of Canada's binding legal obligations and, by extension, informs the exercise of statutory interpretation. Indeed, the Government of Canada has recently acknowledged that the *UNDRIP* may be properly consulted by decision-makers when interpreting Canadian laws.[37] This reflects the views of the Supreme Court that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation"[38] and "international trends" or "significant movement towards acceptance internationally" of a value or norm may assist in *Charter* analysis[39] – conclusions that apply with equal force to human rights legislation, which is quasi-constitutional in nature. Indeed, the Tribunal routinely relies on non-binding sources of international law in determining cases.[40]

58. Accordingly, the *UNDRIP* forms a valid part of the interpretive analysis when examining s. 5(b) of the *CHRA*, and there can be no question that the Tribunal's interpretation offends several of Canada's central obligations under that declaration.

(ii) Canada's international obligations to ensure that there is no discrimination in the provision of child welfare services

59. Canada's obligations to ensure that there is no discrimination in the provision of child protection services is evident in Article 5 of the *ICERD* and Article 22(1) of the *UNDRIP* (both discussed above).

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[35] ***Interim Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people***, U.N. Doc. A/65/264 (August 2010), at para. 62

[36] ***Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people***, U.N. Doc. A/HRC/15/37/Add.1 (September 2010), at para. 112

[37] Committee on the Elimination of Racial Discrimination (18th session), *Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada*, U.N. Doc. CERD/C/SR.2142 (March 2012), at para. 39

[38] ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817

[39] ***United States v. Burns***, [2001] 1 S.C.R. 283 at paras. 85-89

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

60. The principle of non-discrimination is also explicitly set out in the other treaties to which Canada is a party. Article 2 of the *CRC* mandates that the the treaty be respected "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property disability, birth or other status." Similarly, Article 2.1 of the *ICCPR* requires each state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Finally, Article 2 of the *ICESCR* sets out that "the rights enunciated in the present Covenant will be exe*rcise*d without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(iii) Canada's international obligations to provide effective remedies for human rights violations

61. The obligations canvassed above risk being meaningless unless states have taken steps to enforce them. Enforcement requires providing effective remedies where human rights violations have occurred, including (at the very least) fair processes for hearing and adjudicating complaints that allege such violations.

62. That is why each of the aforementioned instruments impose separate obligations on Canada to take legislative measures and administrative action to ensure compliance with its obligations:

- The *CRC* requires states parties to take "all appropriate measures to ensure the child is protected against all forms of discrimination" (Article 2.2) and "all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention (Article 4);

- The *ICCPR* requires each state party "to take the necessary steps… to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present covenant" (Article 2.2); "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" (Article 2.3(a)); and "to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities" (Article 2.3(b));

- The *ICESCR* provides that each state party "undertakes to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (Article 2.1);

- The *ICERD* requires states parties to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them" (Article 2.2) and to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions" (Article 6); and

- The *UNDRIP* sets out that "states, in consultation with indigenous peoples, shall take appropriate measures, including legislative measures, to achieve the ends of this Declaration" (Article 38) and that "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights" (Article 40).

63. Canada also has obligations under customary international law to monitor and enforce human rights domestically and to provide "effective remedies" to redress human rights grievances or violations where they may arise.[41] As the Supreme Court set out in *Hape*, the legislature is presumed to respect the values and principles enshrined in customary international law, absent explicit statutory language to the contrary.[42]

(iv) The critical role of the CHRA in meeting Canada's obligations

64. The Appellant argues that the aforementioned instruments "do not lay down, nor should they be interpreted to support, a particular scheme for addressing alleged discrimination", and thus the Tribunal's interpretation of s. 5(b) "is not inconsistent with or in conflict with the international convention[s] cited by the respondents."[43]

65. In other words, the Appellant suggests that because Canada's obligations do not specifically require that non-discrimination be enforced through the *CHRA*, a restrictive interpretation of s. 5(b) requiring a comparison between groups receiving the same service from the same service provider does not offend these obligations.

66. This position fails to respect both the content and purpose of Canada's international commitments. It is also irreconcilable with statements from the Government of Canada and from

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[41] ***Universal Declaration of Human Rights***, GA Res. 217A (III), 3 U.N. GAOR, U.N. Doc A/810 at 71 (1948), Article 8. Most provisions of the UDHR have become incorporated into customary international law: see H. Hannum, "The UDHR and International Law" *Health and Human Rights*, Vol. 3, No. 2 at p. 145. See also: ***Vienna Declaration and Programme of Action***, adopted by the World Conference on Human Rights on 25 June 1993, U.N. Doc. A/CONF.157/23 (1993), at para. 27

[42] ***R. v. Hape***, [2007] 2 S.C.R. 292 at para. 39

[43] Appellant's submissions at para. 85

the Tribunal itself that recognize the critical role the *CHRA* plays in discharging Canada's international human rights obligations.

Content and purpose of Canada's international obligations

67. In setting out states parties' obligations to provide an effective remedial scheme for adjudicating human rights violations, the *CRC*, the *ICCPR*, the *ICESCR*, the *ICERD* and the *UNDRIP* use expansive language. These instruments are designed to be given a broad and purposive interpretation, as reflected in phrases such as "all appropriate measures" and "all appropriate means." Certainly, the text does not support the narrow, restrictive reading put forward by the Appellant, whereby the *CHRA* does not have to comply with Canada's international commitments simply because it is not specifically referenced in those commitments.

68. In fact, Canada's obligations under these treaties – particularly with respect to providing effective enforcement mechanisms for the principle of non-discrimination – include establishing domestic human rights tribunals, and ensuring that they serve as a reliable and effective means of redress for victims of discrimination. This point has been made on a number of occasions by the international bodies responsible for commenting on the scope of the relevant treaties and reporting on the implementation of Canada's obligations under them.[44]

69. The Committee on the Rights of the Child, in a General Comment setting out its interpretation of Article 4 of the *CRC*, confirmed that national human rights institutions are "**an important mechanism to promote and ensure the implementation of the Convention**" and their establishment "fall[s] within the commitment by States parties upon ratification to ensure the implementation of the Convention".[45] The mandate of such institutions is to be broad:

> NHRIs should, if possible, be constitutionally entrenched and must at least be legislatively mandated. **It is the view of the Committee that their mandate should include as broad a scope as possible for promoting and protecting human rights… NHRIs should be accorded such powers as are necessary to enable**

[44] These and other non-binding international legal sources have guided courts and tribunals in determining the legislative intent underlying certain sections of domestic legislation. Indeed, the Supreme Court of Canada has relied on these sources in assessing the legislative objective underlying the *CHRA*: see ***Canada (Human Rights Commission) v. Taylor***, [1990] 3 S.C.R. 892 at pp. 31-32 (relying on decisions of the Human Rights Committee and several provisions of the European Convention of Human Rights to affirm that the eradication of discrimination includes preventing harms caused by hate propaganda); ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, [2004] 1 S.C.R. 76.

[45] Committee on the Rights of the Child, *General Comment No. 2: The role of independent national human rights institutions in the protection and promotion of the rights of the child*, U.N. Doc. CRC/GC/2002/2 (2002) at para. 1 (emphasis added)

> **them to discharge their mandate effectively**, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence. [Emphasis added].[46]

70. In a General Comment focused on indigenous children, the Committee on the Rights of the Child went on to note that state parties have an "obligation to ensure that the principle of non-discrimination is reflected in **all domestic legislation**, and can be directly applied and appropriately monitored and enforced through judicial **and administrative bodies**".[47]

71. This view was reiterated in the Committee's Concluding Observations, which evaluated Canada's compliance with the *CRC* and specifically stated that the right to non-discrimination must be "effectively applied in **all political, judicial and administrative decisions** and in projects, programmes and services that have an impact on all children, **in particular** children belonging to minority and other vulnerable groups such as children with disabilities and **Aboriginal children**".[48]

72. Similarly, the Committee on Economic, Social and Cultural Rights has stated that it is "essential" that national human rights institutions give "full attention" to the *ICESCR* in their activities, including when "examining complaints alleging infringements of applicable economic, social and cultural rights within a state."[49] According to the Committee, national human rights institutions, including tribunals, "should adjudicate or investigate complaints promptly, impartially and independently", and that "[d]omestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights."[50]

73. Taken together, the language in the treaties themselves and the statements of these Committees demonstrate that domestic human rights schemes like the *CHRA* are important means of fulfilling Canada's international obligations. In particular, when it comes to the key principle of non-discrimination – a common theme shared by all of the instruments canvassed above – Canada's

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[46] Committee on the Rights of the Child, *General Comment No. 2: The role of independent national human rights institutions in the protection and promotion of the rights of the child*, U.N. Doc. CRC/GC/2002/2 (2002) at para. 9. See also: Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003), at para. 65

[47] Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their Rights under the Convention*, U.N. Doc. CRC/C/GC/2009/11 (2009), at paras. 23, 25 (emphasis added)

[48] Committee on the Rights of the Child, *Concluding Observations: Canada (2003)*, U.N. Doc. CRC/C/15/Add.215, at para. 22

[49] Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, U.N. Doc. E/C.12/1998/25 (1998), at para. 3

[50] *Ibid.*, at para. 40

obligations require that domestic human rights schemes be interpreted to allow for "effective remedies", including the full and fair adjudication of discrimination complaints.

The role of the *CHRA*, according to the Government and the Tribunal

74. The Government of Canada's position on the role of domestic human rights legislation is clear: it has relied on regimes like the *CHRA* as an "important means" of meeting its international obligations, particularly with respect to non-discrimination. Canada's Core Document, provided to the U.N. as part of Canada's reporting obligations to various committees monitoring compliance with international treaties, states:

> Many of the international human rights instruments that Canada has ratified are directed against discrimination, or, where they are more general in nature, require that the rights guaranteed in them be respected without discrimination. **An important means of implementing this feature of international obligations is through human rights legislation (or human rights codes)**. [Emphasis added].[51]

75. In discussing implementation of the "international conventions that Canada has ratified", the Core Document reiterates that "**to a considerable extent**, they are implemented by legislative and administrative measures".[52] Foremost among these would be human rights codes, including the *CHRA,* and the "primary means of enforcing human rights codes (dealing mainly with discrimination)" is through human rights commissions and the use of human rights tribunals to adjudicate complaints.[53]

76. That the *CHRA* and the Tribunal play a critical role in complying with Canada's international commitments to non-discrimination can also been seen from past decisions of the Tribunal itself. In *Nealy v. Johnston*, the Tribunal explained this role as follows:

> **Canada's international obligations in the field of human rights have been worked out domestically** at both the federal and provincial levels **through legislative initiatives**, involving both changes to the criminal law of the country **and the creation of human rights bodies charged with the administration of anti-discrimination laws**. [Emphasis added].[54]

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

[52] *Ibid.,* at para. 138 (emphasis added)

[53] *Ibid.,* at para. 95

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

77. Similarly, in another decision, the Tribunal observed that "[m]uch of the impetus for the passage of the *Canadian Human Rights Act* came from international sources, such as the *Charter of the United Nations,* and the *Universal Declaration of Human Rights*."[55] Provincial human rights tribunals have recognized this connection as well, with one tribunal noting that "international instruments can prove to be reliable tools for interpreting our domestic standards, particularly in the area of human rights."[56]

(v) Comparator groups are not required to establish discrimination under international human rights law

78. The Appellant also suggests that the Tribunal's interpretation of s. 5(b) does not offend the obligations set out in the *CRC, ICCPR, ICESCR* and *ICERD* because "none of the international conventions identified speak to the issue of comparator groups in the context of funding for social programs."[57]

79. Properly understood, this supports the position of the respondents on this appeal, not the Appellant. Indeed, the fact that these treaties do not require or refer to "comparator groups" of "same service providers" reflects a broad understanding of what constitutes discrimination for the purpose of Canada's binding international obligations – one that is not circumscribed by the need for a specific type of comparison between certain types of service providers. To accept the Appellant's argument would be to endorse an unjustifiably narrow reading of Canada's obligations simply based on the fact that "comparator groups" are *not* mentioned in the treaty texts. There is no basis for such an interpretive approach, and to read in such a limitation would be wholly inconsistent with the language and the purpose of the *CRC, ICCPR, ICESCR, ICERD* and *UNDRIP*.[58]

80. The Appellant's position also contradicts the key principle of customary international law that a state is ultimately responsible for its international legal obligations, regardless of that state's constitutional division of powers (this is discussed further below, in Part II.C). Canada, as a federal state, is responsible for respecting the principle of non-discrimination embodied in its international

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

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

[57] Appellant's submissions at para. 86

[58] Treaty bodies have adopted a broad view of what constitutes discrimination. See, for example: U.N. Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination,* 10 November 2012 at paras. 6-7; Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003), at para. 12

treaties, and it cannot point to the delivery of services under provincial jurisdiction to shirk that responsibility. Requiring that there be a comparator group from the same service provider before Canada's international obligations with respect to non-discrimination are triggered is tantamount to using federalism as a shield against breaches of these same obligations.

81. Put differently, the question of whether funding for child welfare services is delivered via federal or provincial organs is irrelevant: for the purposes of Canada's obligations under international human rights law *there is only one service provider* – the federal Canadian state. That is the perspective from which the principle of non-discrimination operates.

B. *CHRA* contains no clear intention to default on Canada's international obligations

82. As outlined above, the Tribunal's interpretation of s. 5(b) fails to respect Canada's binding international obligations by (i) perpetuating discriminatory practices, including a system that, on the face of the Complaint, runs afoul of the requirement that child welfare services be provided on a non-discriminatory basis; and (ii) failing to provide effective remedies under the *CHRA* so that the principle of non-discrimination can be enforced.

83. The Tribunal's interpretation thus offends the presumption of conformity, and is unreasonable on that basis alone. As the Applications Judge correctly recognized, the presumption requires that "where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations."[59]

84. While the presumption is not insurmountable, the jurisprudence has established an appropriately high threshold before it can be overcome. In *R. v. Hape*, LeBel J. (for the majority) put the test as follows:

> The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, **unless the wording of the statute clearly compels that result**. … The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates **an unequivocal legislative intent to default on an international obligation**. [Emphasis added].[60]

[59] See also ***R. v. Hape***, [2007] 2 S.C.R. 292 at para. 53

[60] *Ibid*. Professor Sullivan adopts the similar standard of whether "it is plain that the legislature intended to enact a provision that is inconsistent with international law": see *Driedger on the Construction of Statutes*, 5th ed. (Toronto: Butterworths, 2008) at p. 549

85. The Appellant argues that the presumption has been rebutted because "Parliament did not confer upon the Tribunal the power to permit comparison between federal and provincial service providers in the context of alleged discrimination."[61]

86. With respect, the language in the *CHRA* does not reveal a "clear" and "unequivocal" intention on the part of Canada to default on its international obligations. In fact, as the Applications Judge found, the statutory language and purpose of the *CHRA* supports the interpretation of s. 5(b) of the *CHRA* put forward by the Respondents. This interpretation complies with Canada's obligations under international human rights law by allowing for the adjudication of discrimination complaints before the Tribunal.

87. At the very least, the Reasons of the Applications Judge demonstrates that the language of s. 5(b) of the *CHRA* is not so clear and unequivocal as to *compel* the interpretation put forward by the Appellants, which results in a denial of the opportunity to have human rights complaints adjudicated.

88. Importantly, the Tribunal's Decision **never** considers whether this is a case involving an unequivocal statutory intention to compel an interpretation that is at odds with Canada's obligations under international law. The Tribunal completely fails to consider the presumption of conformity in its analysis.

C. Federalism does not shield Canada from its human rights obligations

89. The Appellant repeatedly adverts to Canada's federalist structure and division of powers, but fails to articulate exactly how or why this affects any of the foregoing analysis regarding the content of Canada's international obligations, the presumption of conformity or the lack of any clear legislative intention required to rebut the presumption.

90. It is equally difficult to understand how or why the interpretation of s. 5(b) accepted below offends Canada's federalist structure. It merely grants complainants under federal jurisdiction access to the Tribunal so that their allegations of discrimination can be heard and adjudicated. If the Complaint is made out, the remedy would require the Government of Canada to take steps in order

[61] Appellant's submissions at para. 83

for the discrimination to be eliminated. This does not impinge on or otherwise undermine the constitutional division of powers.

91. To the extent that federalism is being invoked by the Appellant to buttress the argument of a "clear intention" to rebut the presumption of conformity, it must fail. The Appellant points to no constitutional provision that clearly and unequivocally *compels* the Tribunal's interpretation.

92. To the extent that federalism is being relied upon to argue that the contents of the Complaint do not engage Canada's international human rights obligations, this argument must also fail. It is based on the flawed premise that Canada's treaty obligations require a comparison between groups receiving services from the "same service provider" before discrimination exists. In other words, the *CRC, ICCPR, ICESCR* and *ICERD* can never be engaged where there is differential treatment between a group of children who receive their services provincially and another group of children who receive their services federally.

93. This amounts to using Canada's federalist structure to avoid Canada's obligations under international human rights law. Not only does it undermine the purpose and content of the treaties and declarations which Canada has signed, but it is also contrary to Canada's binding commitments under customary and conventional international law.

94. It is a basic principle of customary international law that a State party is ultimately responsible for the breach of an international obligation, whether or not that breach is attributable to the actions or omissions of a federal or provincial government within that State.[62] The Government of Canada regularly relies upon this rule, recently citing it as a "cornerstone rule of the customary international law regarding State responsibility."[63] In Canada, customary international law is automatically incorporated into domestic common law in the absence of conflicting legislation.[64]

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

[63] *In the matter of an Arbitration under Chapter Eleven of NAFTA between Clayton and the Government of Canada*, Counter-Memorial (Public Version) at para. 271 [excerpt]

[64] ***R. v. Hape,*** [2007] 2 S.C.R. 292 at para. 39

95. A long line of jurisprudence from the International Court of Justice demonstrates that this is a foundational principle in customary international law. In the seminal *Polish Nationals in Danzig* case of 1932, the Court declared that "a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[65] In *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, the Court concluded that "[a]ccording to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state."[66] Commentators have noted that this "would clearly cover units and sub-units within a state."[67] Most recently, in the *LaGrand* decision, the Court applied this same line of reasoning in determining that the United States had breached its international obligations under the *Vienna Convention on Consular Relations*, notwithstanding the fact that U.S. officials were following federal law in denying a German citizen the ability to raise alleged violations of the Convention.[68]

96. In addition to forming a part of customary international law, the principle of ultimate federal responsibility is also explicitly recognised in conventional international law, including the *ICCPR*, the *ICESCR* and the *Vienna Convention on the Laws of Treaties* (the "*Vienna Convention"*) – all agreements that are binding on Canada.

97. Article 50 of the *ICCPR* and Article 28 of the *ICESCR* both provide that: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." The Committee on Economic, Social and Cultural Rights has confirmed that the ultimate obligation to comply with the *ICESCR* rests with the federal government.[69] Article 27 of the *Vienna Convention* reflects the same principle, stating that a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[70]

98. Similarly, the Committee on the Rights of the Child has confirmed that the "decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State party's Government to fulfil its obligations to all children within its

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[65] ***Polish Nationals in Danzig Case*** [1932] PCIJ, Series A/B, No. 44.

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

[67] Malcolm N. Shaw, *International Law*, 5th Edition, Cambridge: Cambridge University Press, 2003 at p. 702.

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

[69] Committee on ESCR, *Concluding Observations on the Government of Canada*, UN Doc. E/C.12/1/Add.31 (4 December 1998) at para. 52

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

jurisdiction, regardless of the State structure." The Committee reinforced this point in its General Recommendation on Indigenous Children, explaining that "[t]he duty to respect and protect requires each State party to ensure that the exercise of the rights of indigenous children is fully protected against any acts of the State party by its legislative, judicial or administrative authorities or by any other entity or person within the State party".[71] This obligation extends to the funding associated with implementing children's rights, with the Committee noting that "[i]n any process of devolution, State parties have to make sure that the devolved authorities do have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of the Convention."[72]

99. Simply put, customary international law, conventional international law and common sense all dictate that rather than relying on federalism to *relieve* states from their human rights obligations, different levels of government are required to collaborate in order to effectively *meet* those obligations.[73]

D. The Tribunal's interpretation of s. 5(b) was unreasonable

100. For the reasons set out above, Amnesty International submits that Canada's international human rights obligations were engaged on the facts of this case, that the presumption of conformity applied to the exercise of interpreting s. 5(b) of the *CHRA* and that the presumption was not rebutted by any clear and unequivocal statutory language.

101. In adopting an interpretation of s. 5(b) that failed to respect Canada's obligations under international human rights law, without any statutory language that could form the basis for rebutting the presumption of conformity, the Tribunal erred in law and reached a decision that was unreasonable.

102. However, not only did the Tribunal fail to apply the presumption of conformity in its Reasons for Decision – it failed to *consider* the presumption altogether. Accordingly, the Tribunal's interpretation is also unreasonable because its decision-making process does not satisfy

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[71] Committee on the Rights of the Child, *General Comment No. 11: Indigenous Children and their Rights under the Convention*, U.N. Doc. CRC/C/GC/2009/11 (2009), at para. 78

[72] Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (2003), at paras. 40-41

[73] *Ibid.*, at para. 27

the requirements of "justification, transparency and intelligibility" with respect to its formulation of the test for discrimination under s. 5(b).

103. Indeed, it is clear that Canada's obligations under international human rights law played no role in the Tribunal's final interpretation of s. 5(b). The Tribunal's Reasons for Decision run more than 50 pages, but devote just *a single paragraph* to issues of international law (at para. 112). In this paragraph, the Tribunal briefly discusses some of the general legal principles regarding international law, but these principles are never applied to s. 5(b) and the issue of international law is never revisited.

104. Crucially, the Tribunal does not discuss or even mention the presumption of conformity anywhere in its Reasons for Decision. Nor does the Tribunal advert to any of Canada's *binding* legal obligations under international human rights law.

105. Simply put, then, the Tribunal never properly directs itself to the critical question of how Canada's binding legal obligations under international human rights law impact the exercise of interpreting s. 5(b) of the *CHRA*. Had the Tribunal done so, it may well have reached a different result, as the Applications Judge did.

E. The Application Judge's interpretation of s. 5(b) is correct

106. By contrast, the Applications Judge correctly concluded that the Tribunal's Decision was unreasonable and that the proper interpretation of s. 5(b) did not require a comparator group from the same service provider in every case. She reached these conclusions after careful and extensive reasons that thoroughly reviewed the relevant legal principles.

107. As part of her analysis, the Applications Judge turned her mind to Canada's various legal obligations under international human rights law, the presumption of conformity and the strict standard for rebutting that presumption. Having regard to these principles, she reached the modest and unassailable conclusion that her interpretation of s. 5(b) of the *CHRA* "accords more fully with Canada's international legal obligations than does that of the Tribunal, and is thus to be preferred."

108. The Appellant has pointed to no basis upon which this Court could properly interfere with this conclusion, or any other aspect of the Applications Judge's Decision.

F. Conclusions

109. Instead of applying the presumption of conformity and upholding an interpretation of s. 5(b) that is consistent with the broad right to non-discrimination enshrined in the *CRC*, *ICCPR*, *ICESCR*, *ICERD* and *UNDRIP*, the Appellant invites this Court to ignore these obligations, apply a narrow and restrictive reading, and ultimately deny the complainants the ability to even have their allegations of discrimination *heard* under the *CHRA*. Such a result, as the Applications Judge determined, is unreasonable.

110. The Appellant justifies its interpretation on the basis of the language in the *CHRA* and the structure of Canadian federalism. Neither provides a basis for disregarding Canada's international commitments. The *CHRA* does not clearly or unequivocally reveal such an intention, and it is a key principle of international law that a country's internal division of powers cannot be used to avoid its binding treaty obligations.

111. The interpretation of s. 5(b) of the *CHRA* adopted by the Applications Judge takes account of the legal principles regarding the role of international obligations in the exercise of statutory interpretation, and recognizes that Canada's obligations under international human rights law are engaged in this case. By not invariably requiring a comparator group from the same service provider in order to establish adverse differentiation under s. 5(b) of the *CHRA*, the Applications Judge reached the only result that is defensible in law, the only result that is consistent with the language and purpose of the statute, and the only result that serves to advance, rather than undermine, the various treaties, conventions, covenants and declarations to which Canada is a party.

PART IV - ORDER REQUESTED

112. Amnesty International respectfully requests that this appeal be dismissed.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 19, 2012

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SCHEDULE "A" - AUTHORITIES

International Treaties

1. *Convention on the Rights of the Child*, adopted November 20, 1989, UNGA Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, on-line: http://www2.ohchr.org/english/law/crc.htm

2. *International Covenant on Civil and Political Rights*, adopted December 16, 1966, UNGA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, on-line: http://www2.ohchr.org/english/law/ccpr.htm

3. *International Covenant on Economic, Social and Cultural Rights*, adopted December 16, 1966, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, on-line: http://www2.ohchr.org/english/law/cescr.htm

4. *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted December 21, 1965, GA Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, on-line: http://www2.ohchr.org/english/law/cerd.htm

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6. *Universal Declaration of Human Rights*, GA Res. 217A (III), 3 U.N. GAOR, U.N. Doc A/810 at 71 (1948), on-line: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/217(III)&Lang=E

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en.asp?lang=en&url=%2Fpublications%2F2001_ar%2Fpage6-en.asp).

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

12. Committee on the Rights of the Child, General Comment **No. 2**: The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, CRC/GC/2002/2

13. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties obligations, U.N. Doc. E/1991/23 (1990), on-line: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument

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35. *Commission des droits de la personne et des droits de la jeunesse c. Laverdière***,** 2008 QCTDP 15 (CanLII)

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46. *In the matter of an Arbitration under Chapter Eleven of NAFTA between Clayton and the Government of Canada*, Counter

SCHEDULE "B" – STATUES

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Denial of good, service, facility or accommoda-tion	DISCRIMINATORY PRACTICES **5.** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	ACTES DISCRIMINATOIRES **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 fourniture. 1976-77, ch. 33, art. 5.	Refus de biens, de services, d'installations ou d'héberge-ment

Court File No. A-145-12

FEDERAL COURT OF APPEAL

B E T W E E N :

THE ATTORNEY GENERAL OF CANADA

Appellant

- and –

CANADIAN HUMAN RIGHTS COMMISSION, ET AL

Respondents

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