**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 and**
**AMNESTY INTERNATIONAL CANADA**

**Interested Parties**

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# SUBMISSIONS OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA (Respondent's Motion to Dismiss)

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May 14, 2010

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## PART I – THE FACTS

### *Overview*

1. This is a preliminary motion brought by the Respondent, the Attorney General of Canada on behalf of the *Minister of Indian and Northern Affairs Canada* ("INAC"), to summarily dismiss the within complaint on the basis the Tribunal does not have jurisdiction to inquire into the matter. The complaint, filed in February 2007 by the *Assembly of First Nations* ("AFN") and the *First Nations Child and Family Caring Society* ("FNCFCS" or "Caring Society"), concerns over 160,000 First Nations children, including at least 8,000 children in child welfare care, who are denied the equal benefit of child protection services due to their race and ethnic origin.[1] The Caring Society submits that the novel and complex issues of law raised by the Respondent must be determined on the basis of a full evidentiary record and the Respondent's motion should therefore be dismissed.

2. Since the filing of this complaint, the Respondent has repeatedly attempted to avoid a full hearing on the merits. The Respondent vigorously opposed the referral of the complaint by the *Canadian Human Rights Commission* ("the Commission"), and subsequently challenged the case in the Federal Court. Thus far, all of its attempts have failed. Yet the Respondent now seeks to rely on the same arguments which were rejected by the Commission and the Federal Court to have this complaint dismissed by the Tribunal.

3. According to this Tribunal's jurisprudence, complaints should almost never be dismissed on a preliminary basis. Absent of arguments of natural justice or

[1] Affidavit of Cindy Blackstock, sworn February 11, 2010 ("Blackstock Affidavit"), Exhibit H, Speaking Points: Domestic Affairs Committee – December 13, 2004 ("Speaking Points: Domestic Affairs Committee"), Complainants' Record, Tab 1, p. 1

abuse of process, the Tribunal must afford complainants a "full and ample opportunity" to "present evidence and make representations".

4. As the Respondent again attempts to have this complaint dismissed, thousands of vulnerable First Nations children become further isolated from their families and communities and deprived of adequate care and protection. The prejudices they suffer as a result of these ongoing delays are irreparable.

***First Nations Child and Family Services Program***

5. Children and families from across Canada sometimes face challenges and crises that can place children at risk of neglect or abuse. Governments enact child welfare laws in order to intervene in families to assess the safety of children and to take action to ensure the child's protection when needed. All child welfare statutes recognize that children should remain safely with their families whenever possible. Child welfare or child protection services are delivered to families and children by governments across the country. The goal of such services is always the same: to protect children from harm or neglect, and to keep them safe with their families to the greatest extent possible.

6. INAC has always assumed full responsibility for the provision of child welfare services on reserves. In the past, child protection services on reserves were delivered directly by INAC employees.[2] INAC has recognized that even if it were to allow provinces to assume the delivery of child protection services on reserves, it would remain entirely financially responsible for the funding of these

[2] Affidavit of Tom Goff, sworn February 12, 2010 ("Goff Affidavit"), Respondent's Record, Tab 5, para. 7-8. Cross-Examination of Tom Goff, dated February 12, 2010 ("Goff Cross-Examination"), Respondent's Record, Tab 8, para. 26.

services.[3] According to Tom Goff, the Respondent's responsibility to provide child protection services on reserve is "an entrenched responsibility and obligation, and is not a matter of policy or financial largesse."[4]

7. Currently, INAC provides child protection services on reserve through the *First Nations Child and Family Services Program* (the "FNCFS Program"). Through the FNCFS Program, INAC funds, oversees, administers, monitors and effectively controls the child protection services made available to children and families on reserves by First Nations child protection agencies ("Agencies"). The FNCFS Program is not a subsidy, a grant, or a hand-out. The services it provides is not a discretionary but rather one provided to all children in Canada as a matter of law. INAC properly refers to the FNCFS Program as a *program*, with specific goals and objectives, through which child protection services are provided to children on reserves. [5]

8. Formally, First Nations children living on reserve are protected by the same child welfare statutes as other children in Canada.[6] According to INAC, the express purpose of the FNCFS Program is to provide child and family services to status Indian children residing on reserve "at a level comparable to the services provided off reserve in similar circumstances".[7]

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[3] Speaking Points: Domestic Affairs Committee, Complainants' Record, Tab 1, p. 6

[4] Goff Affidavit, Respondent's Record, Tab 5, para. 7

[5] Blackstock Affidavit, Respondent's Record, Tab 3, para. 10; Affidavit of Elsie Flette, sworn February 11, 2010 ("Flette Affidavit"), Respondent's Record, Tab 4, para. 33-44; Goff Affidavit, Respondent's Record, Tab 5, para. 13-16; and Cross-Examination of Odette Johnston, dated February 26, 2010 ("Odette Cross-Examination"), Respondent's Record, Tab 6, p. 305

[6] There are a few exceptions where bands have adopted their own child welfare by-laws, such as Spallumcheen Band in B.C. Nevertheless, these bands receive their funds in the same manner, at the same levels, and on the same basis, as First Nations covered directly by provincial child welfare legislation.

[7] Blackstock Affidavit, Exhibit I, FNCFS National Program Manual, May 2005 ("FNCFS Program Manual"), Respondent's Record, Tab 3B, p. 54

9. The FNCFS Program provides funding to Agencies based on different funding models including *Directive 20-1*, the *Enhanced Funding Model* and the *1965 Indian Welfare Agreement* with Ontario.[8] In the Yukon, the Northwest Territories and Nunavut, the Respondent appoints Commissioners who play central roles in the provision of child protection services.[9] For example, in the Yukon, the Commissioner is conferred the power to adopt any regulation regarding child protection services.[10]

***INAC's control over child protection services***

10. While Agencies providing child welfare services on-reserve are required to comply with provincial legislation, the Respondent's FNCFS Program only funds services within its mandate, regardless of the legislative requirements of the province in which the service is delivered. If a child protection service is required under provincial legislation but is not within the Respondent's self defined FNCFS Program's mandate, it will not be funded, and therefore not provided, to First Nations children on reserve. Put simply, it is INAC, and not provinces, territories or Agencies, that ultimately determines what child protection services, and what level of services, are offered to First Nations children living on reserve. [11]

11. INAC controls the child protection services offered on reserves by dictating to Agencies what services are eligible for reimbursement. Agencies and provinces have no say in this. For example, under *Directive 20-1*, the FNCFS Program

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[8] Blackstock Affidavit, Respondent's Record, Tab 3, para. 43.
[9] See *Northwest Territories Act*, R.S.C. 1985, c. N-27, s. 56(1); *Child And Family Services Act*, S.N.W.T. 1997, c. 13, s. 51; and *Child and Family Services Act*, S.Y. 2008, c. 1, ss. 173(1), 174(1), 189.
[10] *Child and Family Services Act*, S.Y. 2008, c. 1, s. 189.
[11] Johnston Cross-Examination, Respondent's Record, Tab 6, pp. 235, 307 and 371; Flette Affidavit, Respondent's Record, Tab 4, para. 23; Goff Cross-Examination, Respondent's Record, Tab 8, para. 319; and "Baby Andy" Report, Examination of services provided to Baby Andy and his family, Saskatchewan Community Resources and Employment, July 2003 ("Baby Andy Report"), Complainants' Books of Authorities, p. 23.

provides full, per child funding to put children into care, but only limited funding for preventative or least disruptive measures - services that are expressly mandatory under most provincial legislation[12] - that would allow more children to remain safely in their family homes. The FNCFS Program also provides less funding for facilities, capital expenditures, staff training, salaries, information management and other operational functions.[13]

12. In addition to controlling the child protection services offered to First Nations children by determining which services are funded and which are not, INAC also closely monitors and oversees the Agencies and the services provided to children and their families. For example, INAC conducts its own compliance reviews of Agencies to ensure that they are meeting the objectives of the FNCFS Program.[14] As explained by Elsie Flette:

> Once a year, INAC officials reconcile the maintenance funding it has provided to agencies over the year by reviewing the services and expenses it has funded and determines whether it should fund them. If INAC takes the position that a service or an expense should not have been funded or that a service was provided in a manner that did not comply with provincial legislation, it will recover the amount by reducing the next funding installment provided to the agency. The agencies will then be obliged to absorb the disallowed maintenance expense through their operational

[12] See *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, sections 2 (b), (c), (e), (f), 3 (e), 30(1)( a),( b), 33(1)( d), 35 (1)( c), 71(3), 93 (1)( a),( f),( g) and (v); *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, sections 2(c), (e)( ii), (h), 3 (a)( ii), 8 (1) (b), 9(b), and 43.1(1)( f); *Child and Family Services Act*, C.C.S.M. c. C80, sections 3, 4 (a),(d),(e), 14(1), 17(1), 37(1),(4), and 39(1); *Child and Family Services Act*, C.C.S.M. c. C80, Declaration of principles (2,3,4,7,9), 2(1)(d), 7(1)( a),( b),(c),(f),(k), 9, 10, 11, 12, 13, 14, 38(1); *Child and Family Services Act*, R.S.O. 1990, c. C.11, sections 1, 2(2)(b), 15(3)(c), 29(4)(a)( b), 30, 34(10), 35(3), 37(3)(1),(5-13), 40(2-4),(10), 41, 46(2)(a), 51(2) (c),(d), (3), (3.1), 53,55,56, 57, and 61; and *Family Services Act*, S.N.B. 1980, c. F-2.2, Preamble.

[13] Blackstock Affidavit, Respondent's Record, Tab 3, para. 20; Flette Affidavit, Respondent's Record, Tab 4, para. 18-20.

[14] FNCFS Program Manual, Respondent's Record, Tab 3B, p. 70 and p. 97-112.

> budget. There is no appeal process to challenge decisions to disallow maintenance funding of in-care expenses. [15]

13. INAC officials, who are often not trained in child welfare, also review the files of children in care even though these files contain sensitive and private information which, according to provincial legislation, should only be shared with persons employed by Agencies or if required by a court order or to protect the child.[16] Ms. Flette explains the process as follows:

> During the annual reconciling of maintenance funding, INAC officials also select one month at random and review in detail all of the files opened by the agency during that month. This random file review consists of reviewing all of the personal information of the foster parents as well as the children and the families to whom services were provided in a given month. When verifying the files, INAC officials review a wide range of information including the status and address of the children and their parents, the placement agreement and whether the foster homes in which children are placed are licensed.[17]

14. INAC also dictates how Agencies are governed. For example, INAC sets specific requirements regarding the by-laws of the Agencies and its board members. Pursuant to INAC policy, Agencies that do not comply with these requirements risk having their funding cut.[18]

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[15] Flette Affidavit, Respondent's Record, Tab 4, para. 35.

[16] *Privacy Act,* C.C.S.M. c. P125, s. 5; *Child and Family Services Act,* C.C.S.M. c C80, s. 76(3). See also Cross-Examination of Cindy Blackstock, dated February 23, 2010 (Blackstock Cross-Examination"), Respondent's Record, Tab 7, para. 104; and Johnston Cross-Examination, Respondent's Record, Tab 6, para. 105.

[17] Johnston Cross-Examination, Respondent's Record, Tab 6, para. 289; Flette Affidavit, Respondent's Record, Tab 4, para. 38.

[18] Flette Affidavit, Respondent's Record, Tab 4, para. 39-40; Flette Affidavit, Exhibit D, Letter from INAC Funding Services Officer to Peguis Child and Family Services Inc., dated December 9, 2009, Complainants' Record, Tab 4, p. 1-2; and FNCFS Program Manual, Respondent's Record, Tab 3B, p. 110.

***Adverse impact of the FNCFS Program on First Nations families***

15. Because of the manner in which INAC controls child protection services, children and families on reserve have access to fewer preventative child protection services and resources even though research indicates that First Nations children have higher child welfare needs. As a result, status Indian children are being placed in care outside of their family home at significantly greater frequency than non-Aboriginal children in provincial and territorial jurisdictions. Internal INAC documents indicate that the Respondent is aware that the manner in which it funds and controls child protections services on reserves is also causing qualified Aboriginal social workers to leave Agencies that are unable to offer competitive salaries; inadequate in-home family support for children who are at risk; and increased threats from Agencies to withdraw from service delivery because they cannot meet their statutory obligations.[19]

16. Several provinces have sent letters to the Respondent indicating that the FNCFS Program is not allowing Agencies to meet provincial child welfare statutory requirements.[20]

17. The FNCFS Program's adverse and discriminatory impact on First Nations families, and children in particular, cannot be overstated. Everyday, apprehensions of First Nations children occur which could be avoided if the

[19] Speaking Points: Domestic Affairs Committee, Complainants' Record, Tab 1, p. 6

[20] Blackstock Affidavit, Respondent's Record, Tab 3, para. 20; Flette Affidavit, Respondent's Record, Tab 4, para. 18-20; Blackstock Affidavit, Exhibit F, Report of the Auditor General of Canada to the House of Common. Chapter 4. First Nations and Family Service Program ("Auditor General's Report"), Complainants' Record, Tab 2, p. 2; Johnston Cross-Examination, Respondent's Record, Tab 6, page 235. Johston Cross-Examination, Exhibit 1, Letter to Chuck Strahl, Minister of Indian and Northern Development, from Mary Polak, Ministry of Children and Family Development, and George Abbott, Minister of Aboriginal Relations and Reconciliation, dated November 17, 2009 and letter Miniters Polak and Abbot from Minister Strahl, dated January 21, 2010, Tab 3, Complainants' Record.

FNCFS Program provided least disruptive measures and appropriate and preventative services to help families stay together.[21] Teenagers with addictions are removed from their families and communities because they are otherwise unable to access the addiction services they need through the FNCFS Program.[22] Children with disabilities are put into care because the FNCFS Program does not provide their families with the same level of support available to other children.[23] In a tradition where children are viewed as sacred beings, the loss of a child to child protection services devastates the entire First Nations community.[24]

18. Jurisdictional disputes regarding the funding of services for First Nations between and within governments are also having a detrimental and discriminatory impact on First Nations peoples such as Jordan River Anderson, a young child from Norway House Cree Nation in Manitoba. Jordan remained in hospital for a prolonged period of time due to jurisdictional disputes between different government departments as to which one was responsible for paying his home care costs. He passed away at 5 years of age before the jurisdictional dispute could be resolved and never had a chance to live in a family environment. The only home Jordan ever knew was a hospital.[25]

19. In another case, Patrick Norman, a teenager from Manitoba, committed suicide by hanging after being bounced from home to home and institution to institution while his health issues were left unaddressed. Like Jordan, Patrick's needs could

[21] Flette Affidavit, Respondent's Record, Tab 4, para. 25.
[22] Flette Affidavit, Respondent's Record, Tab 4, para. 20.
[23] Blackstock Affidavit, Exhibit D, Wen:de Report: We are Coming to the Light of Day (First Nations Child and Family Caring Society) 2005 ("Wen:de Report: We are Coming to the Light of Day"), Complainants' Record, Tab 6, page 99. See also, Flette Affidavit, Respondent's Record, Tab 4, para. 25-26.
[24] Baby Andy Report, Complainants' Books of Authorities, p. 11
[25] Wen:de Report: We are Coming to the Light of Day, Complainants' Record, Tab 6, p. 16

have been met through greater cooperation between and within different levels of government. [26]

***The Complaint***

20. On February 26, 2007, the AFN and the Caring Society filed a complaint under the *Canadian Human Rights Act* ("the Act") with the Commission. The complaint alleges that INAC, through the FNCFS Program, discriminates against First Nations children contrary to section 5(b) of the Act. In particular, the complaint alleges that the child protection services provided through the FNCFS Program are inadequate and unequal compared to those available to other children, and that this disparity adversely impacts First Nations children on the basis of their race and ethnic origin. The complaint also alleges that the Respondent's failure to implement Jordan's Principle amounts to discrimination in the provision of government services on the basis of race and ethnic origin, contrary to the Act.

***The Respondent's request that the Commission dismiss the complaint***

21. By a letter dated May 6, 2008, the Respondent requested that the Commission decline its jurisdiction over the complaint pursuant to section 41(1)(c) and 41(1)(d) of the Act based on the same reasons on which it now relies to have this Tribunal dismiss this complaint. In particular, the Respondent argued, as it does before this Tribunal, that the complaint was beyond the Tribunal's jurisdiction because there was no comparator group within the same jurisdiction as the complainants and because it does not provide a service within the meaning of the Act. [27]

[26] Wen:de Report: We are Coming to the Light of Day, Complainants' Record, Tab 6, p. 99
[27] Canadian Human Rights Commission's Assessment Report, dated June 26, 2008 ("Assessment Report"), Respondent's Record, Tab 10, p. 645

22. After considering the submissions of the parties on jurisdiction, the Assessor recommended that the complaint be referred directly to this Tribunal under s. 49 of the Act. Specifically, the Assessor stated that the complaint "cannot be determined without an inquiry".[28] The Commission adopted this recommendation.

23. The Respondent sought judicial review of the decision of the Commission to refer the complaint to this Tribunal. It argued, as it did before the Commission and as it does before this Tribunal, that the FNCFS Program was not a service within the meaning of the Act, and that First Nations children cannot be compared to other children, effectively due to their unique constitutional status. [29]

24. Given the special nature of this complaint, the Federal Court was not inclined to entertain the Respondent's judicial review. In a motion before the Court, Madam Prothonotary Aronovitch, like the Commission, held that the substance of this complaint ought to be dealt with on the basis of a complete evidentiary record and a full hearing. In particular, the Prothonotary found that the complainants would suffer irreparable harm if deprived of the opportunity to present a full evidentiary record to the Tribunal. She stated:

> The subject matter of the complaint being serious and complex, I agree that it should not be determined in a summary fashion and in the absence of the factual record necessary to fully appreciate the matters in issue.[30]

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[28] Assessment Report, Respondent's Record, Tab 10, p. 651,

[29] Order of Madam Prothonotary Aronovitch ("Aronovitch Order"), dated November 24, 2009, Federal Court of Canada, Complainants' Books of Authorities, page. 2

[30] Aronovitch Order, Complainants' Books of Authorities, page 5. Also see page 6, where the Prothonotary emphasizes that there is an interest in "allowing a **full and thorough examination** in the specialized forum of the Tribunal, of issues that may have impact on the future ability of aboriginal peoples to make discrimination claims."

25. The Respondent appealed the Prothonotary's decision to a judge of the Federal Court. Justice O'Reilly dismissed the appeal and found the Prothonotary's decision was reasonable.[31]

26. Having had its arguments rejected by the Commission and repeatedly by the Federal Court, the Respondent now seeks to make the same preliminary arguments before this Tribunal in order to have this complaint dismissed in the absence of a complete evidentiary record and without a full hearing, contrary to the Federal Court's decision on this very issue.

[31] Order of the Honourable Justice O'Reilly, dated March 30, 2010, Federal Court of Canada, Complainants' Books of Authorities, p. 7-8

## PART II – ISSUES

27. The issues before this Tribunal are:

a) Has the Respondent established that it is "plain and obvious" that this complaint should be dismissed without a full hearing and in the absence of a complete evidentiary record, contrary to the Federal Court's order?

b) Has the Respondent established that it is plain and obvious that the FNCFS Program is not a service within the meaning of the Act?

c) Is it plain and obvious that a comparator group is required to adjudicate this complaint?

d) Is it plain and obvious that policy decisions are not justiciable under the Act?

e) Is it plain and obvious that the Tribunal does not have jurisdiction to determine whether the failure to implement Jordan's Principle amounts to discrimination?

## PART III – ARGUMENTS

**ISSUE 1: Has the Respondent established that it is "plain and obvious" that this complaint should be dismissed without a full hearing and in the absence of a complete evidentiary record, contrary to the Federal Court's order?**

28. In any Court or forum, motions to dismiss a complaint or action on a preliminary basis are scrutinized very cautiously and rarely allowed.[32] The Canadian Human Rights Tribunal has been especially loathe to grant such motions, given the specific statutory language of the *Canadian Human Rights Act* and the special significance and remedial objectives of human rights legislation generally.

29. Several Tribunal cases have observed that the Act already includes a screening function which is performed by the Commission. Tribunal jurisprudence has also placed significant weight on s. 50(1) of the Act, which states that the Tribunal "shall" provide parties with a "full and ample opportunity" to present evidence and make arguments on the matters raised in the complaint.[33] In one recent case, the Tribunal member held she had no authority to dismiss a complaint by motion except "in limited circumstances" where there the issues in the complaint have been heard in another forum, or where is a clear breach of natural justice.[34] These circumstances do not apply in the present case, and thus the motion should be dismissed for this reason alone.

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[32] *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, Complainants' Books of Authorities, at para. 25-26, 33; and *Hodgson v. Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042 (F.C.A.) (QL) Complainants' Books of Authorities, para. 5

[33] See, e.g., *Roch v. Maltais Transport Ltée*, 2003 CHRT 33, Complainants' Books of Authorities, paras.5-6 and 12; *Buffett v. Canadian Armed Forces*, 2005 CHRT 16, Complainants' Books of Authorities, paras. 38-39; and *Harkin et al v. Attorney General of Canada*, 2009 CHRT 6, paras. 20-22.

[34] *Harkin et al, supra*, para. 24. Also see *Maltais Transport Ltée*, supra, para. 12.

30. In those cases where the Tribunal has accepted that there may be authority to dismiss complaints on a preliminary basis, such motions should only be granted where it is "plain and obvious" that the complaint cannot succeed. Courts and Tribunals alike have emphasized that complaints or actions should not be dismissed "where the law is burgeoning or unsettled or where the disposition of the case on the merits calls for an assessment and finding of fact".[35] The Supreme Court of Canada has even suggested that, where a claim raises "a difficult and important point of law", it is "critical" that the matter be allowed to proceed to a full hearing.[36]

31. Furthermore, unlike a hearing on the merits, which obviously requires the complainants to prove their case, the Respondent bears the burden in such motions, and must demonstrate to the Tribunal that it is "plain and obvious" that the case cannot succeed.

32. To conclude, the Caring Society submits that the within matter is precisely the kind of complaint that the Tribunal should never dismiss on a preliminary basis. It affects a very significant personal interest for thousands of children – namely, the right to live with one's family and be supported and protected from harm. In addition, the complaint raises difficult and important issues of law that have not been previously addressed and which will have wide ranging precedential impact. Moreover, a determination on what constitutes a service "must turn on the facts" placed before the tribunal in a given case.[37] Here, the facts are many and complex, and will necessarily inform the jurisdictional analysis the Tribunal will be called upon to perform. The Respondent has simply not met this very strict test.

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[35] *Harkin, et al*, paras. 26-27, 27 for quote.
[36] *Hunt v. Carey, supra*, para. 52
[37] *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, Respondent's Book of Authorities, Tab 30, para. 59

**ISSUE 2: Has the Respondent established that it is plain and obvious that the FNCFS Program is not a service within the meaning of the Act?**

***The term "services" must be interpreted as broadly as possible***

33. The Supreme Court of Canada has repeatedly stated that human rights legislation is quasi-constitutional in nature and ought to be interpreted in a broad and liberal manner:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. **We should not search for ways and means to minimize those rights and to enfeeble their proper impact**. [emphasis added][38]

34. The Supreme Court has also held that human rights tribunals and courts cannot limit the meaning of terms in human rights legislation which are meant to advance the purpose of the Act. Only Parliament, and not this Tribunal, may narrow the scope of the protection provided by this quasi-constitutional legislation. As expressed by the Ontario Human Rights Tribunal,

> … a legislature would have to use very clear language to limit the ambit of a term; it is not open to the Tribunal to read in a limitation that the legislature has not created.[39]

[38] *C.N.R. v. Canada (Human Rights Commission),* [1987] 1 S.C.R. 1114, Complainants' Books of Authorities, at para. 24

[39] *Dopelhamer v. Workplace Safety and Insurance Board,* 2009 HRTO 2056 ("Dopelhamer"), Complainants' Books of Authorities, para. 9. See also *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, Complainants' Books of Authorities, para. 81

35. This is especially true when interpreting the meaning of "service". Because the definition given to "service" will often determine whether or not an individual can benefit from human rights protection, it has been held that this term must be given the least restrictive definition as possible in order to advance the objective of the Act. [40] The Supreme Court of Canada has considered the definition of "services" in human rights legislation and held that it necessarily encompasses a "broad range of activities".[41]

36. The Respondent has failed to demonstrate that the Act reveals any Parliamentary intent to limit the meaning of the term "service" so as exclude services such as those offered by the Respondent through the FNCFS Program. In the absence of clear language to this effect, this Tribunal cannot limit the meaning of the term "service" to exclude the FNCFS Program. It must be assumed that if Parliament had intended to create such an exception, it would have done so expressly. The least restrictive definition of services possible encompasses the services offered by the Respondent to First Nations children.

***The FNCFS Program is a service within the meaning of the Act***

37. Though the role of the Respondent in providing child protection services on reserves goes well beyond that of a funder, this Tribunal would have jurisdiction over this complaint even if the Respondent simply provided funding for the child protection services available on reserves. According to the Supreme Court,

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fits. But this right is not unlimited. It must be exercised according to law. **The government's right to allocate**

[40] *Dopelhamer, supra*, para. 9. See also *Braithwaite v. Ontario (Attorney General),* 2006 HRTO 15 (CanLII), Complainants' Books of Authorities, para. 17 upheld 2007 CarswellOnt 8249 (Ont.Div.Ct)

[41] *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, Respondent's Book of Authorities, Tab 30, para. 59

**resources cannot override a statute such as the *Canadian Human Rights Act*.** [emphasis added] [42]

38. In keeping with the Supreme Court's position on this matter, human rights tribunals and courts in jurisdictions across this country have consistently applied human rights legislation to the funding of services such as to the discriminatory funding of travel expenses to attend a softball tournament[43], scholarships for post-graduate research[44], live-in care programs,[45] schools on reserves[46], educational services for children with disabilities[47], and disability benefits and pensions[48].

39. The cases cited by the Respondent do not support the proposition that the FNCFS Program is not a service within the meaning of the Act. In *MacNutt v. Shubenacadie Indian Band*, for example, this Tribunal did not make a definite finding that funding was not a service according to the Act.[49] Rather, it made an *obiter* comment that the respondent, the Band, could not avoid human rights scrutiny simply because INAC subsidized, in part, the discriminatory services it provided.[50]

40. Moreover, in *MacNutt*, the complainants produced evidence that INAC was willing to pay for the benefits sought by the complainants but the Band refused to provide

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[42] *Kelso v. The Queen*, [1981] 1 S.C.R. 199, Complainants' Books of Authorities, p. 107

[43] *Hawkins obo Beacon Hill Little League Major Girls Softball Team - 2005 v. Little League Canada (No. 2),* 2009 BCHRT 12 (CanLII), Complainants' Books of Authorities, para. 335

[44] *Arnold v. Canada (Human Rights Commission),* [1997] 1 F.C. 582 ("Arnold"), Complainants' Books of Authorities, para. 25-27

[45] *HMTQ v. Hutchinson et al,* 2005 BCSC 1421 (CanLII), 2005 BCSC 1421, 261 D.L.R. (4th) 171 ("Hutchinson"), Complainants' Books of Authorities, para. 83-87

[46] *Courtois v. Canada (Department of Indian and Northern Affairs*), 1990 CanLII 702 (C.H.R.T.), Complainants' Books of Authorities, p. 17-18

[47] *HMTQ v. Moore et al*, 2001 BCSC 336 (CanLII), Complainants' Books of Authorities, para. 19, 26-27

[48] *Ball v. Ontario (Community and Social Services),* 2010 HRTO 360 (CanLII)("Ball"), Complainants' Books of Authorities, para. 61, *Morrell v. Canada (Employment and Immigration Commission),* 1985 CanLII 91 (C.H.R.T.), p. 3

[49] *MacNutt v. Shubenacadie Indian Band Council*, 1995 CanLII 1164 (C.H.R.T.)("MacNutt"), Respondent's Books of Authorities, Tab 33.

[50] *Ibid,* p. 37

them.[51] Accordingly, it was the Band that was responsible for the breach, not INAC. Here, the complainants have named INAC as the respondent because only INAC can redress the discrimination caused by the FNCFS Program.

41. Similarly, in *Bitonti*, the British Columbia Human Rights Council held that the Ministry of Health could not be liable for discrimination experienced by foreign medical residents because the complainants failed to articulate how the Ministry was involved in the discrimination they experienced.[52] But the Council emphasized that it would have been willing to make a finding against the Ministry had it been presented with evidence demonstrating that it was involved more closely with the delivery of the service alleged to be discriminatory. With regards to the Ministry's argument that funding is immune from human rights legislation, the Council stated:

> Carried to its extreme, that position would mean, for example, that if the Ministry of Health provided funding for internships but stipulated that it would only pay for male interns, that conduct would be immune from review**. <u>I am not prepared to go that far</u>.** [emphasis added][53]

42. Unlike in *Bitonti*, INAC's role goes well beyond that of a distant funder.[54] Through the FNCFS Program, INAC exercises a considerable degree of control and influence over the child protection services provided on reserve through the development of national policies relating to First Nations child welfare, audits and reviews of Agencies and children's files, retroactive claw-backs of expenditures, impositions of funding requirements and by determining which

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[51] *Ibid,* p. 3, 6, 10

[52] *Bitonti v. British Columbia*, [1999] B.C.H.R.T.D. No. 60, 1999 CarsellBC 3186 ("*Bitonti")*, Respondent's Books of Authorities, Tab 23. See para. 338. "The Complainants have not clearly stated what they allege the Ministry of Health has done that contravenes with the Act."

[53] *Bitonti, supra*, para. 315

[54] It must be noted that in *Bitonti*, the Council did not deal with the issue of service on a motion to dismiss. The complainants were provided with an opportunity to establish that the Ministry had breached the Act during a hearing.

child protection services of funded and which are not.[55] The Federal Court of Appeal has held that when a party exercises a "considerable degree of control or influence" over a discriminatory practice, this party may be held responsible for breaches of the Act. [56]

43. Similarly, in *Robichaud v. Canada (Treasury Board),* the Supreme Court held that the Act must be interpreted in a manner so as to place responsibility on the organization who is in a position to take measures to remove the undesirable condition.[57] In this complaint, it is alleged only INAC, and not the Agencies, is responsible for the inadequate child protection services provided to First Nations children. Only the Respondent can take measures to remedy this situation.[58] Based on the Supreme Court's position, only INAC can be considered the service provider for the purposes of this complaint.

44. Finally, a textual analysis of the Act supports the Caring Society's submissions that INAC is ultimately responsible for the provision of child protection services to First Nations children. While it is acknowledged that the Agencies deliver the child protection services at issue, it is INAC that is responsible for the provision of those services. Section 5 of the Act seeks to address discriminatory practices "in

[55] Blackstock Affidavit, Respondent's Record, Tab 3, para. 20, Flette Affidavit, Respondent's Record, Tab 4, para. 33-43.
[56] *Canadian Pacific v. Canada* [1991] 1 F.C. 571, Complainants' Books of Authorities, para. 10. See also *Tulk v. Newfoundland (Ministry of Health and Community Services)* [2002] N.J. No. 65, Complainants' Books of Authorities, para. 24 where the Ministry of Health and Community was found to be responsible for discrimination which occurred in the context of employment. According to the Newfoundland and Labrador Supreme Court, the Ministry, by funding home care services, was "integral" to the delivery of these services and was thus responsible for the discrimination.
[57] *Robichaud v. Canada (Treasury Board),* [1987] 2 S.C.R. 84, Complainants' Books of Authorities para. 7
[58] Odette Cross-examination, Respondents' Record, Tab 6, p. 307-8; Auditor General's Report, Complainants' Record, Tab 2, p. 19-25; Wen:de Report: We are Coming to the Light of Day, Complainants' Record, Tab 6, p. 31, 40; Blackstock Affidavit, Exhibit B, Joint National Policy Review Final Report, June 2000, Complainants' Record, Tab 4, p. 14

the provision of" services, a phrase that has a broad connotation. The Act does not specify that only respondents that deliver services are liable for discriminatory practices, as opposed to those that are responsible for the "provision" of the services in question. This more expansive language is consistent with the remedial objectives of the *Canadian Human Rights Act*.

***The Respondent cannot delegate its human rights obligations to Agencies***

45. Although the Respondent relies on Agencies to deliver child protection services on reserves, it cannot delegate its human rights obligations to them. In *Arnold v. Canada (Human Rights Commission)*[59], for example, the Social Sciences and Humanities Research Council argued that it did not have to accommodate scholars with disabilities when considering whether to provide them with grants because it could assume that they had been accommodated within the university. The Court rejected this argument and explained,

> When, as here, the SSHRC's decision is impugned in this Court, can the SSHRC simply shrug off the duty of accommodation onto a surrogate in the form of a provincial university whose performance is beyond this Court's supervision? Not by a long shot! The SSHRC must perform its own legal duties itself. The disabled applicant indeed is entitled, not merely to surrogate provincial-law accommodation, but rather to direct federal-law accommodation.[60]

46. Similarly, the fact that the FNCFS Program accomplishes the provision of child protection services through "corporate entities" does not shield the Respondent from it human rights obligations. Courts have often held governmental departments responsible for discrimination in cases where services were provided through

[59] *Arnold,* Complainants' Books of Authorities.
[60] *Ibid,* para. 36

corporate entities such as schools and school boards, bands, and hospitals.[61] This Tribunal has the jurisdiction to examine any discriminatory practice. Whether the service adversely impacts members of a protected group, and not the "vehicle" chosen to deliver the service, is the question at the heart of the discrimination analysis. As the Supreme Court of Canada held in *Eldridge v. British Columbia (Attorney General)*,

> Hospitals in providing medically necessary services, carry out a specific governmental objective. The *Hospital Insurance Act* is not simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. **Hospitals are merely the vehicles the legislature has chosen to deliver this program.**[62] [emphasis added]

**ISSUE 3: Is it plain and obvious that a comparator group is required to adjudicate this complaint?**

47. The Respondent argues that this complaint must fail because it does not "fit within the discrimination analysis". In particular, it argues that because First Nations children are the only children who receive child protection services from the Respondent, the discrimination they experience is not unlawful. According to this position, the Act would allow the Respondent to treat First Nations people living on reserves as second class citizens by providing inadequate and discriminatory public services compared to other Canadians, without accountability or recourse. Put simply, this would mean that First Nations peoples have no human rights when receiving services from the Respondent.

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[61] *Hutchinson,* Complainants' Books of Authorities, para. 8; *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624, Complainants' Books of Authorities, p. 6; *Courtois v. Canada (Department of Indian and Northern Affairs*), 1990 CanLII 702 (C.H.R.T.), Complainants' Books of Authorities, p. 18,

[62] See *Eldridge,* Complainants' Books of Authorities, where the Supreme Court of Canada states at p. 37.

48. Such an interpretation of the Act is inconsistent with the fundamental value of equality and would be a flagrant breach of the very objectives of human rights legislation. The Caring Society submits that this position reflects a very troubling attitude towards First Nations people particularly and human rights generally, and is completely untenable.

***There is no need for a comparator group in the same jurisdiction***

49. Contrary to what is claimed by the Respondent, the English version of the Act does not support its claim that a comparator group is required to establish discrimination. The terms "comparator group" or "comparison" do not appear in the definition of discriminatory practice under the Act. Likewise, the language of the Act does not support the Respondent's proposition that cross-jurisdictional comparisons are not permitted.

50. Furthermore, the English version of the Act cannot be interpreted in isolation. Its French version, which suggests that no comparison is required to establish a breach of the Act, must be given equal consideration.[63] Contrary to the English version, the word "differentiate" does not appear in the definition of a discriminatory practice in la *Loi canadienne sur les droits de la personne* ("La Loi"). Rather, la Loi provides that "priver" or "défavoriser" an individual based on a prohibited ground is sufficient to establish discrimination. Le *Trésor de la langue française* defines "défavoriser" as "priver (quelqu'un) d'un avantage matériel ou moral auquel il pouvait s'attendre." [64] No comparison is required to establish that an individual was been "défavorisé". The

[63] Michel Bastarache and al. "Le droit de l'interprétation bilingue" (Montréal : LexisNexis, 2009, Complainants Books of Authorities, p. 20.
[64] Le Trésor de la langue française informatisé; http://atilf.atilf.fr/dendien/scripts/tlfiv5/advanced.exe?8;s=4161215205 (accessed on May 12, 2010)

French version of the Act should be preferred in interpretation because it best promotes the objectives of the legislation. [65]

51. This interpretation of the Act is also consistent with the flexibility Canadian courts and human rights tribunals have shown when dealing with cases which do not fit neatly into the discrimination analysis in order to promote the objective of human rights legislation. In fact, according to the Ontario Human Rights Tribunal, the failure to identify an appropriate comparator should not be fatal to a discrimination complaint given that it is unclear whether comparator groups are required in the human rights analysis.[66] For example, people with disabilities are generally not required to demonstrate that they are treated differently than people who do not have disabilities in accommodation cases.[67] The focus of the discrimination analysis should not always be comparisons with members of other groups, but whether a given service is meeting the needs of those who experience adverse treatment due to an immutable personal characteristic.[68] In this case, it is clear that the FNCFS Program does not meet the needs to First Nations children and families.

52. While a comparator group is not necessary in order to establish *prima facie* discrimination, the complainants in this case have identified a clear comparator group; children living off reserves.[69] The Respondent has itself on numerous occasions stated that the very *raison d'être* of the FNCFS Program is to provide First

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[65] *Doré v. Verdun (City),* [1997] 2 S.C.R. 862, Complainants' Books of Authorities, para. 25

[66] *Lane v. ADGA Group Consultants Inc*., 2007 HRTO 34 (CanLII), para. 127-131; reversed in part in *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.), Complainants' Books of Authorities, para. 88, 95-97.

[67] *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON S.C.D.C.), Complainants' Books of Authorities, para. 94. See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3, Complainants' Books of Authorities, where there is no discussion of the appropriate comparator group for the purposes of determining whether there was discrimination against a female fire fighter by the application of a standard that applied equally to men and women.

[68] *Cunningham v. Alberta (Aboriginal Affairs and Northern Development),* 2009 ABCA 239 (CanLII), Complainants' Books of Authorities, para. 50

[69] Complainants' Statement of Particulars, Respondents' Books of Authorities, Tab 12, para. 3.

Nations children with child protection services comparable to those available off-reserve.[70] The Respondent has failed to articulate why this is not an appropriate comparator group. Moreover, the Respondent has not provided any precedent in support of its position that cross-jurisdictional comparator groups are not permitted.[71]

***The complainant is compatible with the equality analysis***

53. The Respondent erroneously claims that the child protection services provided through the FNCFS Program cannot be considered as being "customarily available to the public" because they are only available on reserve. Implicit in this argument is that First Nations people are not members of the public. The Federal Court firmly rejected this argument in *Courtois:*

> [I]t cannot in any way be alleged and maintained that the reserve school does not constitute a service customarily available to the general public simply because this reserve school is limited primarily to Indians. In fact, although it is a so-called Band school, the costs of these schools are nevertheless paid primarily by public funds. To claim that these schools are not a public service because they are intended solely for Indians would be to say, as in the Anvary case, that all persons who belong to a special group (that is, Indians) are no longer members of the community as a whole, which would open the door to all kinds of discriminatory practices.

54. The Supreme Court of Canada in *Berg v. University of British Columbia* and *Gould v. Yukon Order of Pioneers* confirmed that the word "public" should be defined in relational terms. In the words of the Supreme Court, "Every service has its own public", and must be defined on the basis of the relationship between the service

[70] FNCFS Program Manual, Respondent's Record, Tab 3B, p. 53

[71] *Singh (Re)* (C.A.), [1989] 1 F.C. 430 (C.A.), Respondent's Books of Authorities, does not stand for the principle that a proper discrimination complaint must identify one service provider. The "algebraic formula" was provided by way of example by the Court.

provider and the service user.[72] Here, child protection services are made available to all children in Canada by statutes in every single province and territory. There is no service more customarily available to the public than one enforced on the entire population as a matter of law.

55. Further, members of minority groups, including First Nations peoples, are members of the public. As in *Courtois,* accepting the Respondent's claim would "open the door to all kinds of discriminatory practices". This argument must fail.

***Providing inadequate services on reserves adversely impacts First Nations contrary to the Act***

56. The Respondent argues that because place of residence is not an enumerated ground of discrimination under the Act, providing First Nations living on reserve with inadequate services in comparison to those living off reserve does not amount to discrimination. This position, which is akin to claiming that the adverse treatment of individuals who are pregnant does not amount to discrimination on the basis of sex, is wholly inconsistent with how the right non-discrimination is understood in Canadian jurisprudence.

57. The Supreme Court has repeated held that *prima facie* discrimination is established by examining not the respondent's justification for a distinction, but whether members of a protected group are adversely impacted by a treatment. [73] Based on this reasoning, it has been held that the adverse treatment of individual who are

[72] See *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, as explained in *Gould, supra*, at para. 57, Respondent's Book of Authorities, Tab 30.
[73] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3, Complainants' Books of Authorities.

pregnant amounts to discrimination on the basis of sex.[74] Similarly, sexual harassment amounts to discrimination on the basis of sex, even in cases where the treatment is claimed to be based on "physical attractiveness". [75] Because individuals residing on reserves are almost exclusively First Nations peoples, the adverse treatment on the basis of place of residence, when the place of residence is a reserve, will inevitably amount to discrimination against First Nations peoples on the basis of their race and ethnic origin.

58. The Respondent's claim that there is no discrimination because many First Nations peoples reside off reserve and are not adversely affected by the FNCFS Program is equally frivolous. It is well established in human rights law that a complainant is not required to demonstrate that all members of his or her group are adversely impacted by a treatment in order to establish *prima facie* discrimination. According to the Supreme Court, "it is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically". The Court went on to explain that requiring a complainant to demonstrate that all members of its group experienced discrimination would significantly undermine the objectives of human rights legislation. It held:

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value[76]

[74] *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252, Complainants' Books of Authorities, p. 39
[75] *Ibid.*
[76] *Ibid.*, p. 37-38

59. The Respondent has failed to establish that it is plain and obvious that this complaint does not "fit" in the discrimination analysis. Rather, this is a clear case of discrimination. The complainants allege that the child protection services provided through the FNCFS Program are inadequate compared to those available to other children. It is alleged that this disparity adversely impacts First Nations children and their families on the basis of their race and ethnic origin because individuals who reside on reserves are almost exclusively First Nations peoples. Putting aside the jurisdictional issues raised by the Respondent that are peculiar to the *Canadian Human Rights Act*, the complainants have clearly established a *prima facie* case of discrimination. There is no reason to dismiss this complaint on a preliminary basis and it should proceed to a full hearing on the merits to determine whether First Nations children do, as a matter of law, enjoy the equality protections of the Act.

**ISSUE 4: Is it plain and obvious that policy decisions are not justiciable under the Act?**

60. The Respondent claims that this complaint should be dismissed because it concerns a question of general policy which it alleges to be non-justiciable. It fails to cite a single case arising from the human rights context in support of this argument. The Respondent's position is completed unfounded in law.

61. While the "political nature" of certain decisions or actions may limit the liability of the government in the law of negligence or restrict the scope of a judicial review, no such exceptions or limitation exist in the human rights context. The Act confers this Tribunal the power to review any allegedly discriminatory practice referred to it by the Commission. The Act, like all other human rights legislation across the country, makes no distinction between "policy" or "operational" actions when conferring this Tribunal with the power to determinate whether discrimination has occurred.

62. Consequently, human rights tribunals and courts have adjudicated complaints relating to the following matters which can be characterized as political or policy related:

- a regulation de-listing sex reassignment surgery under the *Health Insurance Act*[77]
- a Mayor's decision to issue a proclamation[78];
- legislation preventing persons with addictions from receiving disability benefits [79];
- governmental policy limiting the scope of public funding for health services[80];
- the policy decision of the Canadian Forces to fund IVF treatment for women. [81]

63. There is no basis in human rights law to dismiss this complaint because it is a matter of public policy. The Respondent's argument has no merit.

64. Contrary to what the Respondent alleges, this complaint is not about socio-economic rights which, as it argues, are "political in nature". It is about INAC's discriminatory treatment of a very vulnerable segment of the population – children and families – and its failure to comply with human rights legislation passed by Parliament. It is well established in human rights jurisprudence that once the government provides a service, even in instances where it is under no obligation to do so, these services must be offered in compliance with human rights legislation. [82]

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[77] *Hogan v. Ontario (Health and Long-Term Care),* 2006 HRTO 32 (CanLII), Complainants' Books of Authorities, para. 108 and 120.
[78] *Hudler v. London (City)* (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.), Complainants' Books of Authorities, para. 39, 56-58
[79] *Ontario Disability Support Program v. Tranchemontagne*, 2009 CanLII 18295 (ON S.C.D.C.)(" Tranchemontagne") Complainants' Books of Authorities,
[80] *Hutchinson,* Complainants' Books of Authorities, para. 1.
[81] *Canada (Attorney General) v. Buffett,* 2007 FC 1061 (CanLII), Complainants' Books of Authorities, para. 62
[82] *Tranchemontagne, supra,* Complainants' Books of Authorities, para. 69-72

**ISSUE 5: Is it plain and obvious that the Tribunal does not have jurisdiction to determine whether the failure to implement Jordan's Principle amounts to discrimination?**

65. The Respondent claims that the failure to implement Jordan's Principle cannot amount to discrimination because Private Members Motions of the House of Commons do not have a legally binding effect. It asks this Tribunal to dismiss this aspect of the complaint on a summary basis in the absence of any evidence regarding how the failure to implement Jordan's Principle adversely impacts First Nations peoples.

66. Contrary to what is claimed by the Respondent, the FNCFCS does not allege that the failure to implement a House of Commons resolution itself amounts to discrimination. Rather, what is alleged is that jurisdictional disputes between and within provincial, territorial and federal governments often cause First Nations peoples to be denied equal access to government services and that this amounts to *prima facie* discrimination on the basis of race and national ethnic origin. The FNCFCS seeks the implementation of Jordan's Principle as a remedy for this discrimination, pursuant to section 53(2)(a) of the Act. [83]

67. Much like the breach of statute can serve as evidence of negligence, the failure to implement Jordan's Principle, in spite of the adverse impact that jurisdictional disputes within, and between, the various departments of the Respondent and the provinces/territories continue to have of First Nations peoples, can serve as evidence in support of this complaint.[84] By passing the resolution, the House of Commons acknowledged that First Nations peoples often experience discrimination on the basis of race when accessing government services due to jurisdictional

[83] Statement of Particulars of the Complainants, Respondent's Record, Tab 12, p. 669
[84] *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, Complainants' Books of Authorities, p. 226

disputes between and within different levels of government. This helps establish a *prima facie* case of discrimination.

68. This Tribunal has jurisdiction to examine any action or inaction that may amount to discrimination and make any order, including the implementation of a practice, such as Jordan's Principle, that will redress or prevent further discrimination. The Respondent has not shown any reason for this Tribunal to decline its jurisdiction regarding the adverse impact that continued jurisdictional disputes between and within the federal, provincial and territorial governments is having on First Nations people, including in the context of First Nations child and family services.

***Conclusion***

69. The Respondent has failed to demonstrate that it is plain and obvious that this complaint will fail. It has also failed to provide any reasons why this Tribunal should not comply with the Federal Court's order requiring it to adjudicate this complaint based on a complete evidentiary record and a full hearing. The Respondent's motion is frivolous and ought to be dismissed.

## PART IV - REMEDY

70. The Caring Society asks that this motion be dismissed by the Tribunal. It also reiterates its requests that this complaint be dealt with expeditiously based on a complete evidentiary record with a full hearing in a fair and just manner. Further delays in this matter will cause irreparable harm to thousands of vulnerable First Nations children who are being denied the necessary services and support to stay safely in their families and communities.

All of which is respectfully submitted on this 14th day of May 2010,

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