Court File Nos. T-1621-19 and T-1559-20

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

and

CONGRESS OF ABORIGINAL PEOPLES

Intervener

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, AMNESTY INTERNATIONAL

May 12, 2021

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PART I - OVERVIEW

1. In the proceeding below, the Canadian Human Rights Tribunal (the **"Tribunal"**) found that Canada discriminates against First Nations children in the provision of child and family services. The Tribunal, exercising its broad remedial discretion under the *Canadian Human Rights Act* (the ***"CHRA"***),[1] granted several orders designed to provide an effective remedy for this discrimination.

2. Canada does not challenge the finding that it engaged in discrimination but takes issue with the remedial orders granted by the Tribunal. Among other things, Canada argues that the Tribunal exceeded its remedial jurisdiction under the *CHRA* in ordering compensation to all First Nations children affected by its discriminatory practices. These applications raise issues relating to the proper interpretation of the relevant provisions of the *CHRA* as well as the reasonableness of the Tribunal's remedial orders.

3. The determination of these issues must be consistent with Canada's obligations under international human rights law. That is what reasonableness review requires and what the Tribunal did here. The Tribunal's decisions appropriately considered and relied on Canada's obligations under international human rights law in interpreting the relevant provisions of the *CHRA* and in crafting remedial orders for compensation and non-discrimination. Amnesty International (**"Amnesty"**) provides these submissions to assist the Court by providing further context regarding Canada's international human rights obligations that are relevant to a review of the Tribunal's decisions.

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[1] *Canadian Human Rights Act*, RSC 1985, c. H-6.

PART II - STATEMENT OF FACTS

4. On September 14, 2009, the Tribunal issued an order granting Amnesty Interested Party status in this proceeding pursuant to s. 50 of the *CHRA*. The order granted Amnesty the right to participate in the hearing by way of written and oral legal argument. Amnesty participated in certain of the proceedings below by providing submissions regarding Canada's obligations under international human rights law.

5. In its decision on the merits (the **"Merits Decision"**), the Tribunal found that Canada discriminates against First Nations children in the provision of child and family services, contrary to s. 5 of the *CHRA*.[2] In particular, the Tribunal found that Canada systematically underfunded such services for First Nations children living on reserve and in the Yukon. The Tribunal also determined that Canada discriminates against First Nations children residing on and off reserve in failing to fully implement "Jordan's Principle".[3] Jordan's Principle is a principle unanimously adopted by the House of Commons in 2007 that holds that the government (federal or provincial) or governmental department that first receives a request to pay for a service provided to an Indigenous person must first pay for the service and resolve jurisdictional issues later.[4]

6. In the Merits Decision, the Tribunal accepted that Canada's international human rights obligations were relevant "in interpreting the scope and content of

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[2] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the **"Merits Decision"**), Amnesty BOA, Tab 1.
[3] Merits Decision, 2016 CHRT 2 at para. 458, Amnesty BOA, Tab 1.
[4] Merits Decision, 2016 CHRT 2 at para. 183, 353, Amnesty BOA, Tab 1.

human rights in Canadian law".[5] The Tribunal made extensive reference to a range of international legal instruments in concluding that Canada had engaged in systemic discrimination in its provision of child and family services to First Nations children.[6] The Tribunal held that the *CHRA* must be taken to provide human rights protections that are at least as comprehensive as those provided under international law.[7] In other words, international human rights law operates as a "floor" for the proper interpretation of the *CHRA*.

7. The Tribunal summarized its conclusions regarding the relevance of international law to the Merits Decision as follows:

> [453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.
>
> […]
>
> [455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

8. The Tribunal imposed a number of systemic remedies designed to address the underfunding of child and family services for First Nations children pursuant to its broad discretion and authority under s. 53 of the *CHRA*. In a later decision, the

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[5] Merits Decision at para. 431, Amnesty BOA, Tab 1.
[6] Merits Decision at paras. 431ff, Amnesty BOA, Tab 1.
[7] Merits Decision at para. 432, Amnesty BOA, Tab 1.

Tribunal also ordered compensation to be paid to the victims of Canada's discriminatory practice (the **"Compensation Decision")**.[8] In particular, the Tribunal ordered Canada to pay compensation to every First Nations child living on reserve or in the Yukon who was removed from their home and to pay compensation to their caregiving parents or grandparents, as well as to First Nations children (whether living on or off reserve) whose request for essential services under Jordan's Principle was denied or unreasonably delayed.[9]

9. In crafting these orders, the Tribunal considered Amnesty's submissions regarding the requirement under international law to provide effective remedies to victims of human rights violations, including compensation.[10]

10. Having found that Canada discriminated against First Nations children in failing to fully implement Jordan's Principle, it was necessary for the Tribunal to define "First Nations child" to ensure an effective remedy for this discrimination. In its decision on this issue (the **""First Nations Child" Decision"**),[11] The Tribunal referred extensively to the importance of self-determination and self-governance by First Nations under international law.[12] The Tribunal held that it would be inconsistent with these principles to restrict the definition of "First Nations child" based on status under the *Indian Act* and instead adopted a broader definition that contemplated recognition by First Nations as a sufficient basis for entitlement to the

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[8] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2019 CHRT 39 (the **"Compensation Decision"**), Amnesty BOA, Tab 3.
[9] Compensation Decision, 2019 CHRT 39 at paras. 245-250, Amnesty BOA, Tab 3.
[10] Merits Decision at paras. 479, 488, Amnesty BOA, Tab 1; Compensation Decision at paras. 179, 195-196, 232, Amnesty BOA, Tab 3.
[11] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*, 2020 CHRT 20 (the **""First Nation's Child" Decision**"), Amnesty BOA, Tab 4.
[12] "First Nations Child" Decision at paras. 136-157, Amnesty BOA, Tab 4.

protection of Jordan's Principle under the Tribunal's orders.[13] The Tribunal was clear that this definition was limited to the context of Jordan's Principle and was not intended to pre-empt rights of self-determination.[14]

PART III - POINTS IN ISSUE

11. Amnesty seeks to assist the Court by providing submissions on the relevance of Canada's international obligations to the interpretation of the *CHRA* and to the assessment of the reasonableness of the Tribunal's remedial orders.

PART IV - STATEMENT OF SUBMISSIONS

A. Application of International Law to Human Rights Tribunal Decisions

12. The interpretation and application of ss. 5 and 53 of the *CHRA* must take into account, and ultimately respect, Canada's obligations under international human rights law. This is particularly so given the important role of the *CHRA* in discharging those same obligations.

13. In *Vavilov*, the Supreme Court held that "in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker" and that "international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power".[15] Indeed, in

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[13] "First Nations Child" Decision, 2020 CHRT 20 at paras. 145, 157, Amnesty BOA, Tab 4.
[14] "First Nations Child" Decision, 2020 CHRT 20 at para. 21, Amnesty BOA, Tab 4.
[15] ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, para. 114, Amnesty BOA, Tab 5.

Vavilov itself, the majority held that the Registrar of Citizenship had acted unreasonably in failing to consider applicable principles of international law.[16]

14. The Supreme Court has long recognized that the values and principles enshrined in its international legal obligations are a "relevant and persuasive" source of law for the purpose of interpreting domestic statutes.[17] International law is particularly important to consider when interpreting and applying quasi-constitutional domestic human rights legislation like the *CHRA*, since such statutes are an essential means through which Canada implements its international human rights obligations. Courts[18] and human rights tribunals[19]—including the CHRT[20]—have referred to and relied upon a broad range of relevant international legal sources to interpret and apply domestic human rights legislation. Indeed, this Court did so in an earlier application for judicial review arising out of this proceeding.[21]

15. One important means by which international human rights obligations influence statutory interpretation is through the presumption of conformity. That

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[16] ***Vavilov***, *supra*, 2019 SCC 65 at para. 182, Amnesty BOA, Tab 5.
[17] ***Reference re Public Service Employee Relations Act (Alberta)***, [1987] 1 SCR 313 (per Dickson CJ, dissenting on other grounds) at 348, Amnesty BOA, Tab 6; ***R v Sharpe***, [2001] 1 SCR 45 at paras. 175, 178, Amnesty BOA, Tab 7; ***R v Hape***, [2007] 2 SCR 292 at paras. 35-39, 53-56, Amnesty BOA, Tab 8; ***Divito v Canada (Public Safety and Emergency Preparedness)***, [2013] 3 SCR 157 at paras. 22-28, Amnesty BOA, Tab 9; ***B010 v Canada (Citizenship and Immigration***, [2015] 3 SCR 704 at paras. 47-49, Amnesty BOA, Tab 10.
[18] ***Ward c. Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)***, 2019 QCCA 2042 at paras. 180-181, leave to appeal granted 2020 CanLII 50442 (SCC file no. 39041, appeal heard February 15, 2021, judgment reserved), Amnesty BOA, Tab 11.
[19] ***Yuill v Canadian Union of Public Employees***, 2011 HRTO 126 at para. 11, Amnesty BOA, Tab 12; ***Commission des droits de la personne et des droits de la jeunesse c Laverdière***, 2008 QCTDP 15 at para. 16, Amnesty BOA, Tab 13; ***Commission des droits de la personne et des droits de la jeunesse v Maksteel Québec Inc***, 1997 CanLII 49 (QC TDP) at paras. 12-18, Amnesty BOA, Tab 14.
[20] ***Day v Canada (Department of National Defence)***, 2002 CanLII 45923 (CHRT) at para. 37, Amnesty BOA, Tab 15; ***Nealy v Johnston***, (1989) C.H.R.R. D/10 (CHRT) at 35-37, Amnesty BOA, Tab 16; ***Stanley v Canada (Royal Canadian Mounted Police)***, (1987) CanLII 98 (CHRT) at 80, 86, Amnesty BOA, Tab 17.
[21] ***Canada (Human Rights Commission) v Canada (Attorney General)***, 2012 FC 445 ("***FNCFCSC***") at para. 355, aff'd 2013 FCA 75, Amnesty BOA, Tab 18.

presumption has two key aspects.[22] First, Parliament is presumed to act in compliance with Canada's international obligations when enacting domestic legislation, such that "in deciding between possible interpretations…courts will avoid a construction that would put Canada in breach of [its] obligations."[23] Second, the legislature is presumed to comply with the "values and principles" of international law, which "form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them."[24]

16. Canadian courts have previously found the presumption of conformity may only be rebutted where there is "**an unequivocal legislative intent to default on an international obligation**".[25] No such intention can be found in anywhere in the language of the *CHRA*. Indeed, as outlined above, the *CHRA* is designed to help discharge Canada's international human rights obligations — not undermine them. While international law cannot be used to amend or displace the clear text of legislation, it can nevertheless play an important role in the interpretative process, including by resolving ambiguities in the legislative text and providing part of the broader context for the exercise of statutory interpretation.[26]

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[22] **Ruth Sullivan,** ***The Construction of Statutes*** 6th ed (Markham: LexisNexis, 2014) at §18.5 to §18.21, Amnesty BOA, Tab 30.

[23] ***Hape***, *supra*, [2007] 2 SCR 292 at para. 53, Amnesty BOA, Tab 8.

[24] ***Hape***, *supra*, [2007] 2 SCR 292 at para. 53, Amnesty BOA, Tab 8. See also ***FNCFCSC,*** *supra*, 2012 FC 445 at paras. 351-354, Amnesty BOA, Tab 18.

[25] ***Hape***, *ibid* (emphasis added), Amnesty BOA, Tab 8.

[26] ***Canada (Attorney General) v. Kattenburg***, 2020 FCA 164 at paras. 24-25 (intervention motion); ***Canada (Attorney General) v. Kattenburg,*** 2021 FCA 86 at para. 6 (merits decision), Amnesty BOA, Tabs 19, 20.

17. Canada's obligations under international human rights law flow from a variety of sources, which often overlap.[27] They are set out in binding treaties that Canada has ratified or acceded to, including the *Convention on the Rights of the Child* (**"*CRC*"**)[28]—the most widely ratified human rights treaty in history[29]—the *International Covenant on Civil and Political Rights* (**"*ICCPR*"**),[30] the *International Covenant on Economic, Social and Cultural Rights* (**"*ICESCR*"**),[31] and the *International Convention on the Elimination of All Forms of Racial Discrimination* (**"*CERD*"**).[32] They are also found in the principles of customary international law, which form part of the Canadian common law under the doctrine of adoption.[33] Finally, Canada's international obligations are set out in declaratory instruments, such as the *Universal Declaration on Human Rights* (**"*UDHR*"**)[34] and the *United Nations Declaration on the Rights of Indigenous Peoples* (**"*UNDRIP*"**),[35] which encapsulate and reflect elements of customary and conventional law and its progressive interpretation.

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[27] ***Divito***, *supra*, [2013] 3 SCR 157 at paras. 22-28, Amnesty BOA, Tab 9; ***FNCFCSC***, *supra*, 2012 FC 445 at para. 353, Amnesty BOA, Tab 18; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, at paras. 69-71, Amnesty BOA, Tab 21; ***Canada (Human Rights Commission) v. Taylor***, [1990] 3 S.C.R. 892 at 916-917, 919-920, Amnesty BOA, Tab 22.

[28] ***Convention on the Rights of the Child***, 44/25 of 20 November 1989, (entered into force 2 September, 1990) ("***CRC***"), Amnesty BOA, Tab 34.

[29] ***Sharpe***, *supra*, [2001] 1 SCR 45 at para. 177, Amnesty BOA, Tab 7.

[30] ***International Covenant on Civil and Political Rights***, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 Mar. 1976, accession by Canada 19 May 1976) ("***ICCPR***"), Amnesty BOA, Tab 46.

[31] ***International Covenant on Economic, Social and Cultural Rights***, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 Jan. 1976, accession by Canada 19 May 1976) ("***ICESCR***"), Amnesty BOA, Tab 41.

[32] ***International Convention on the Elimination of All Forms of Racial Discrimination***, 21 December 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 Jan. 1969, accession by Canada 14 Oct. 1970), ("***CERD***"), Amnesty BOA, Tab 47.

[33] ***Nevsun Resources Ltd. v. Araya***, 2020 SCC 5 at paras. 90-91, Amnesty BOA, Tab 23; ***Hape***, *supra*, [2007] 2 SCR 292 at para. 39, Amnesty BOA, Tab 8.

[34] General Assembly, ***Universal Declaration of Human Rights***, 10 December 1948, 217 A (III) ("***UDHR***"), Amnesty BOA, Tab 49.

[35] UN General Assembly, ***United Nations Declaration on the Rights of Indigenous Peoples*** : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 ("***UN Declaration***"), Amnesty BOA, Tab 53.

18. The *CRC* and the *UNDRIP* are particularly pertinent to the subject matter of these applications. While the *UNDRIP* was already a universally applicable instrument at the time of the Merits Decision, Canada has since taken further steps to strengthen its commitment to the standards set out in that instrument. On May 10, 2016, Canada announced that it supported the *UNDRIP* without qualification.[36] On December 3, 2020, the Minister of Justice introduced Bill C-15, *an Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. Bill C-15 creates a framework for the federal government to ensure that the laws of Canada are consistent with the *UNDRIP*. Bill C-15 is currently before the Standing Committee on Indigenous and Northern Affairs. These developments underline Canada's own acknowledgment of the UNDRIP's significance.

19. Also relevant to Canada's international obligations are the views of the UN treaty bodies charged with interpreting a particular human rights treaty. The International Court of Justice has explained that it "ascribe[s] great weight to the interpretation adopted" by these independent bodies[37], and Canadian courts have relied on them in determining the content and scope of Canada's international obligations.[38] The Supreme Court has also relied on Canada's own actions and

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[36] **Canada, "*Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples*"** (May 10, 2016), online: https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html, Amnesty BOA, Tab 32.

[37] ***Republic of Guinea v Democratic Republic of the Congo***, Judgment of 30 November 2010, ICJ Reports 2010 at paras. 66-68, Amnesty BOA, Tab 24.

[38] ***Divito***, *supra*, [2013] 3 SCR 157 at para. 26, Amnesty BOA, Tab 9; ***FNCFCSC***, *supra*, 2012 FC 445 at para. 155, Amnesty BOA, Tab 18.

representations regarding international law as informing the content of those obligations.[39]

B. Tribunal Decisions Reflect International Obligations to Provide Effective Remedies for Human Rights Violations

20. Given the Tribunal's conclusion that Canada violated s. 5 of the *CHRA*, it was required to determine the appropriate remedial orders to be made under s. 53. In carrying out this exercise, the Tribunal properly and reasonably considered what measures are required to meet Canada's international human rights obligations—and reached a decision that is consistent with those obligations**.**

(i) The Need To Implement Special Measures and an Effective Remedy

21. There are two aspects of Canada's international human rights law obligations that are engaged in the impugned decisions. First, Canada is under a positive obligation to promote substantive equality. Second, Canada is required to provide effective remedies in cases where human rights have been violated.

22. Turning first to the measures required to meet Canada's international obligations, the relevant treaties and declarations all refer to the need to take action to achieve substantive equality.

23. Where there is discrimination due to the unequal and inadequate level of financial and other resources being provided to First Nations children, there is an obligation to end this discrimination and take the positive measures necessary to address the situation of disadvantage that has been created — including by providing

[39] ***United States v. Burns***, 2001 SCC 7 at para. 81, Amnesty BOA, Tab 25.

increased funding and resources for child welfare services delivered to those children. Indeed, given the history of discrimination against First Nations peoples and the deep challenges that they continue to face today in relation to child and family services, meeting Canada's international obligations requires taking additional measures (sometimes referred to as "special measures") in order to achieve substantive equality quickly and effectively.

24. With respect to the *CRC*, article 4 states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention." The Committee on the Rights of the Child has affirmed that this obligation includes taking positive measures to achieve substantive equality:

> **The right to non-discrimination is not a passive obligation**, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also **requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality**.[40]

25. Indigenous children are a group that requires such positive measures, and indeed special measures, including taking steps to identify potential discrimination, and the allocation of resources to remedy that discrimination. As the Committee explained:

> As previously stated in the Committee's general comment No. 5 on general measures of implementation, **the non-discrimination obligation requires States actively to identify individual children**

[40] ***CRC No. 14***, at para. 41 [emphasis added], Amnesty BOA, Tab 37.

> **and groups of children the recognition and realization of whose rights may demand special measures**…
>
> The Committee, through its extensive review of State party reports, notes that **indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children**. In particular, **States parties are urged to consider the application of special measures in order to ensure that indigenous children have access to culturally appropriate services in the areas** of health, nutrition, education, recreation and sports, **social services**, housing, sanitation and juvenile justice.
>
> Among the positive measures required to be undertaken by States parties is disaggregated data collection and the development of indicators for the purposes of identifying existing and potential areas of discrimination of indigenous children. **The identification of gaps and barriers to the enjoyment of the rights of indigenous children is essential in order to implement appropriate positive measures through legislation, resource allocation, policies and programmes**.[41]

26. Canada's other treaty commitments also include the obligation to take positive and special measures to give effect to protected rights and freedoms.

27. Article 2 of the *ICESCR* sets out that a State party must "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…" In interpreting this provision, the Committee on Economic, Social and Cultural Rights, which is the relevant treaty body, specified that the "means" used by a State "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party"[42], and that it may include

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[41] ***CRC No. 11***, at paras. 24-26 [emphasis added], Amnesty BOA, Tab 36.

[42] Committee on Economic, Social and Cultural Rights ("***CESCR***"), General Comment No. 9: *The domestic application of the Covenant*, U.N. Doc. E/C.12/1998/24 (1998), at para 5, Amnesty BOA, Tab 43.

financial means.[43] The Committee has also addressed the need for special measures: "In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination."[44]

28. Article 2 of the *CERD* requires states to undertake to use "all appropriate means" to eliminate racial discrimination, including, "when the circumstances so warrant… special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." The Committee on the Elimination of Racial Discrimination has concluded that the *CERD* also includes a "general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis…", but that the reference to "special measures" in article 2 denotes additional measures specifically designed to eliminate circumstances of substantive discrimination.[45]

29. The obligation to take positive and special measures is also included under article 2.2 of the *ICCPR*. That provision requires States parties to take "measures as may be necessary to give effect to the rights recognized in the present Covenant", and the Human Rights Committee (the relevant treaty body) has confirmed that this

[43] ***CESCR No. 3***, at para. 7, Amnesty BOA, Tab 42.
[44] ***CESCR No. 20***, at para. 9, Amnesty BOA, Tab 44.
[45] ***CERD No. 32***, at paras. 14, 28-35, Amnesty BOA, Tab 48.

includes taking "special" and "positive" measures, particularly when dealing with the rights of children and the cultural rights of minority populations.[46]

30. Finally, the *UNDRIP* includes an obligation to provide "effective mechanisms" to address discrimination, as well as the "prevention of and redress for any action which was the aim or effect of depriving [Indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities."[47] The *UNDRIP* also specifies the need to take positive and special measures to ensure Indigenous peoples enjoy improving economic and social conditions.[48] In addition, the *UNDRIP* calls on all states to pay "[p]articular attention… to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities"[49] and to "take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[50]

31. In addition to the need for special measures, it is a key principle of customary and conventional international law that where a state has failed to meet its international legal obligations—whether with respect to prohibiting formal and substantive discrimination, ensuring the protection of children, or taking positive and special measures as necessary—it must provide a timely and effective remedy.[51]

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[46] See Human Rights Committee ("***HRC***"), ***General Comment No. 17****: Rights of the child (Art. 24)*, U.N. Doc. A/44/40 (29 September 1989), as published in U.N. Doc. HRI/GEN/1/Rev.7, at paras. 1 and 4, Amnesty BOA, Tab 50; ***HRC, No. 23***, at paras. 6.1, 6.2 and 7, Amnesty BOA, Tab 51.
[47] ***UN Declaration***, article 8.2(a), Amnesty BOA, Tab 53.
[48] ***UN Declaration***, article 21, Amnesty BOA, Tab 53.
[49] ***UN Declaration***, article 22.1, Amnesty BOA, Tab 53.
[50] ***UN Declaration***, article 22.2, Amnesty BOA, Tab 53.
[51] See ILC 2001 **Articles on Responsibility of States for Internationally Wrongful Acts** (appended to GA Res 56/83, 12 December 2001), Part Two ("***ILC Articles on Responsibility***"), Amnesty BOA, Tab 56; ***CRC No. 5***, at

Under international law, the right to an effective remedy requires, among other things, that the remedy be prompt, accessible, and that it lead to cessation and reparations.[52]

32. Indeed, compensation or reparations are recognized as a key remedial tool under international law. The Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 on non-discrimination in economic, social and cultural rights (as articulated in Article 2(2) of the ICESCR) has underscored that:

> National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons…. should also be empowered **to provide effective remedies, such as compensation, reparation,** restitution, rehabilitation, guarantees of non-repetition and public apologies".[53]

(ii) The Tribunal Took Account of Canada's International Human Rights Obligations

33. The Tribunal ordered a number of remedies with respect to the unequal and inadequate funding of child welfare services provided to First Nations children. The remedies ordered by the Tribunal are consistent with Canada's international legal obligations—an important consideration in assessing their reasonableness.

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para. 24, Amnesty BOA, Tab 35; ***ICCPR***, Article 2.3, Amnesty BOA, Tab 46; ***CESCR No. 9***, at paras. 2-3, Amnesty BOA, Tab 43; ***CERD***, article 6, Amnesty BOA, Tab 47; ***Universal Declaration***, article 8, Amnesty BOA, Tab 53.

[52] **International Court of Justice,** ***The Right to a Remedy and Reparation for Gross Human Rights Violations*** (revised edition, 2018) at §3.3, online: https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf, Amnesty BOA, Tab 33.

[53] ***CESCR No. 20***, at para 40 (emphasis added), Amnesty BOA, Tab 44.

34. ***First***, particularly given the need to take positive and special measures, it was appropriate for the Tribunal to order systemic remedies designed to ensure the financial and other resources necessary to satisfy all relevant obligations under human rights law—including the obligation to achieve substantive equality in the delivery of child welfare services. Increasing the level of financial and other resources is not a complete cure, however. Where the breach of an international obligation raises structural or systemic issues—such as longstanding discriminatory policies or practices in the delivery of funding to Indigenous children—the underlying violations must be addressed at the structural or systemic level.[54]

35. The Tribunal's remedial orders in this case were consistent with the requirement to prioritizes the protection of First Nations children's rights, without delay, including delay due to jurisdictional or inter-departmental disputes over the provision of funding. It was entirely appropriate and reasonable for the Tribunal to rely on Jordan's Principle to ensure that such disputes do not interfere with a meaningful remedy. This is a natural corollary of the requirement to provide an *effective* remedy, the child-first principle that binds Canada under the *CRC*, the recognized need for "urgent" and "immediate" action to address the impact of discrimination against Indigenous children,[55] and the principle that Canada's internal laws do not detract from its responsibility to fully meet its international obligations.

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[54] General Assembly, ***Special Rapporteur on Violence Against Women***, A/66/215 (1 August, 2011) at para. 71, Amnesty BOA, Tab 57; General Assembly, ***Report of the Special Rapporteur on the human right to safe drinking water and sanitation***, U.N. Doc. A/HRC/27/55 (30 June 2014) at para. 78, Amnesty BOA, Tab 58.
[55] ***CRC Concluding Observations***, at paras. 33, 56, Amnesty BOA, Tab 40.

36. The Tribunal properly recognized that Canada's international human rights obligations cannot be met simply by increasing the level of resources devoted to First Nations children. Instead, an effective remedy must also have regard to the way in which those resources are structured and delivered to ensure the lasting protection of children's rights. It is essential that s. 53 of the *CHRA* be interpreted in a broad and liberal manner that affords the Tribunal sufficient latitude to craft remedial orders that meet these objectives.

37. ***Second***, the Tribunal properly ordered compensation for the victims of Canada's discriminatory practices. In addition to increasing resources and implementing the necessary structural changes, remedies for breaches of international obligations also normally include providing compensation to victims who have suffered damages as a result of those breaches.[56] Where discriminatory conduct is at issue, compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.[57] That is what the Tribunal did here.

C. The Importance of Self-Determination in the Definition of "First Nations Child"

38. The Tribunal ordered Canada to fully implement Jordan's Principle in its provision of child and family services and to pay compensation to First Nations children living on or off reserve whose request for essential services under Jordan's Principle was denied or unreasonably delayed.[58] Both of these orders apply to "First

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[56] **Crawford, *Brownlie's Principles of Public International Law***, 8th ed. (Oxford: Oxford University Press, 2012), p. 571, Amnesty BOA, Tab 28; ***ILC Articles on Responsibility***, article 36, Amnesty BOA, Tab 56.
[57] ***B.J. v. Denmark***, CERD/C/56/D/17/1999 (CERD 2000), Amnesty BOA, Tab 26.
[58] Compensation Decision at para. 250, Amnesty BOA, Tab 3.

Nations children", which led to the important question of the appropriate definition of a "First Nations child" for the purposes of Jordan's Principle. Canada advances a definition of "First Nations child" that is based primarily on registration under the *Indian Act*.[59] Canada's definition does not include children who are recognized by First Nations as citizens or members but who do not have status (or eligibility for status) under the *Indian Act*.

39. The Tribunal rejected Canada's narrow definition, largely on the grounds that it failed to account for the role of self-determination and self-governance by First Nations. An order made pursuant to s. 53 of the *CHRA* must itself be fully consistent with international human rights law if it is to serve as an effective remedy for Canada's discriminatory practices. The Tribunal reasonably considered and applied these principles in determining the definition of "First Nations child" to be used for the purposes of Jordan's Principle.

40. In particular, the ""First Nations Child" Decision reflects and is consistent with four principles of international law that are particularly relevant in considering the reasonableness of the Tribunal's definition of "First Nations child":

> (a) **Self-Determination and Self-Identification**: The definition should recognize and promote the right of First Nations to make their own decisions about matters central to their identity and integrity as peoples.
>
> (b) **The Right to Culture and Cultural Identity**: An imposed definition that is arbitrarily narrow and exclusive risks infringing the right to culture.

[59] Memorandum of Fact and Law of the Applicant at para. 147.

(c) **Best Interests of the Child**: The definition should abide by the overarching "best interests of the child" principle enshrined in the CRC.

(d) **Special Measures to Redress Discrimination:** The definition should have regard to the special measures afforded to Indigenous persons and the requirement to implement them without discrimination.

41. Canada's obligations under international human rights law require it to take necessary steps, to the maximum of its available resources, to facilitate and promote the enjoyment of those rights.[60] This obligation requires Canada to prioritize the needs of the most marginalized.[61] The Tribunal's decision is consistent with these principles.

42. Ultimately, any understanding or interpretation of "First Nations child" that automatically excludes children solely because of definitions arbitrarily and unilaterally imposed by the State will fall short of the standards of international human rights law. The present interpretation and implementation of Jordan's Principle is based on a federally-imposed definition that knowingly excludes some

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[60] See, e.g., ***CESCR No. 24***, para. 23, Amnesty BOA, Tab 45 ("The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment.")

[61] ***ICESCR***, Article 2(1), Amnesty BOA, Tab 41. Special Rapporteur Olivier De Schutter articulated this obligation after his country visit to Canada in 2012, noting:

> Canada has a duty to dedicate the maximum amount of available resources to progressively achieve the full realization of economic, social and cultural rights . . . and to prioritize the needs of the most marginalized. The concept of progressive realization recognizes the obstacles faced by countries, even developed countries like Canada. Like others, Canada has experienced an increase in its public debt in recent years. Nevertheless, the current situation does not justify refraining from taking action . . . . Canada has the fiscal space to address the basic human needs of its most marginalized and disempowered."

See United Nations Human Rights Council, **Report of the Special Rapporteur on the right to food**, Olivier De Schutter, Addendum, Mission to Canada, UNHRCOR, 22nd Sess, A/HRC/22/50/Add.1 (2012), para 39-40, Amnesty BOA, Tab 59.

First Nations children, due in part to overreliance on *Indian Act* status. Canada has admitted before the Human Rights Committee that "Indian status is not a legislated approximation of any First Nation culture."[62] Implementation of Jordan's Principle cannot effectively remedy discrimination as long as the federal government unilaterally denies certain First Nations children access to remedial services. The "First Nations Child" Decision recognizes and reflects this fundamental principle.

(i) The Right to Self-Identification and Self-Determination

43. Determination of who may or may not be considered First Nations in any context is inextricably linked to the exercise of the right to self-determination, which is protected under international human rights law.

44. Respect for this right is an obligation in itself, and as such it was reasonable— and, indeed, necessary — for the Tribunal to require that its orders be interpreted in a manner that protects and fulfils this right. Respect for the right of First Nations to make their own decisions is also a means to mitigate the risks of exclusion associated with the imposition of arbitrary definitions of identity by the State or other authorities external to First Nations.

45. The right to self-determination is enshrined in Article 1 of both the *ICCPR* and the *ICESCR*, which state that "all peoples have the right of self-determination." The *UNDRIP* also affirms the right, particularly, of Indigenous peoples to self-

[62] ***Human Rights Committee***, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/*2010, UN Doc CCPR/C/124/D/2020/2010 (11 January 2019) para 5.32, Amnesty BOA, Tab 52.

determination.[63] Beyond its codification in these instruments, the right to self-determination has evolved into a *jus cogens* norm.[64] According to the International Court of Justice it is "one of the essential principles of contemporary international law".[65]

46. The *UNDRIP* provides additional guidance on the scope of the right to self-determination for Indigenous peoples. Specifically, the *UNDRIP* affirms the right of Indigenous peoples "to autonomy or self-government in matters relating to their internal and local affairs,"[66] including, the right to determine their own identity or membership in accordance with their customs and traditions."[67]

47. Indeed, self-determination (including its corollary, Free, Prior and Informed Consent (**"FPIC"**)) lies at the heart of Indigenous rights as enshrined in the *UNDRIP*.[68] Throughout, the *UNDRIP* requires States parties to respect Indigenous decisions, work to protect and uphold those decisions, and support the continuation and revitalization of Indigenous decision-making institutions.[69]

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[63] ***UN Declaration***, Article 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."), Amnesty BOA, Tab 53.

[64] **Isabelle Schulte-Tenckhoff, "*Treaties, Peoplehood, and Self-determination*,"** in Indigenous Rights in the Age of the UN Declaration, ed. Elvira Pulitano (Cambridge: Cambridge University Press, 2012) at 77, Amnesty BOA, Tab 31; **Kathleen McVay, "*Self-determination in New contexts: The Self-determination of Refugees and Forced Migrants in International Law*"**, in Merkourios Utrecht Journal of International and European Law at 42, Amnesty BOA, Tab 29.

[65] ***Case Concerning East Timor (Portugal v Australia)*** Merits, Judgment, ICJ Reports 1995 4 at 102, at para 29, Amnesty BOA, Tab 27.

[66] ***UN Declaration***, Article 4, Amnesty BOA, Tab 53.

[67] ***UN Declaration***, Article 33.1, Amnesty BOA, Tab 53.

[68] The ***UN Declaration*** references FPIC most directly at Article 19 ("States shall consult with and cooperate in good faith with Indigenous peoples concerned through their won representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."), Amnesty BOA, Tab 53.

[69] See e.g., ***UN Declaration***, Preamble, Articles 5, 18, 19, 20, 23, 26, 27, 30, 32, 36, and 38, Amnesty BOA, Tab 53.

48. The right of Indigenous peoples to define themselves and the membership of their Nations is underscored by Article 8 of the American Declaration on the Rights of Indigenous Peoples, adopted by the Organization of American States on June 15, 2016:[70]

> Indigenous persons and communities have the right to belong to one or more indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people. No discrimination of any kind may arise from the exercise of such a right.

49. In this context, an interpretation of Jordan's Principle that removes, displaces, or undermines the authority of First Nations to make crucial decisions about their identity and membership fails to align with Canada's human rights obligations. Had the Tribunal adopted such an approach, or reached a decision at odds with the key principle of self-determination, it would have acted unreasonably.

(ii) The Right to Culture and Cultural Identity

50. An arbitrarily narrow definition of "First Nations child" imposed by the federal government will have negative repercussions that undermine the remedial objective of Jordan's Principle and the Tribunal's remedial orders.

51. The right to culture—and the right to take part in one's culture—is recognized under Article 15 of the *ICESCR* and Article 27 of the *ICCPR*. Article 27 specifically stipulates that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture."

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[70] OAS, American Declaration on the Rights of Indigenous Peoples, OAS General Assembly, *American Declaration on the Rights of Indigenous Peoples*: resolution/ adopted by the General Assembly, 15 June, 2016, AG/RES.2888 (XLVI-O/16) (the "***OAS Declaration***"), Article VIII, Amnesty BOA, Tab 54.

52. The *UNDRIP* further affirms that States are under a positive obligation to protect Indigenous peoples' full enjoyment of their human rights, either as individuals or as a collective, including the right to culture.[71] The *UNDRIP* also underlines the particular importance of maintaining cultural connection for children, "including those living outside their communities."[72]

53. The right to culture, and particularly the ability to enjoy culture "in community," can be negatively impacted by artificial regimes of identification. Indigenous peoples themselves have highlighted the dangers of strict, State-imposed definitions of Indigenous identity, which risk excluding some groups that should qualify as Indigenous.[73] Even where States do not intend harm, exclusion from State-imposed categories of identity can negatively impact an individual's ability to experience culture in community.[74] In part because of this risk, and in recognition of the long history of attacks on Indigenous culture and identity, international human rights bodies have never adopted a formal definition of "Indigenous peoples."[75] They

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[71] *See, e.g.*, ***UN Declaration***, Article 8 (prohibiting forced assimilation of Indigenous culture) and Article 11 (protect Indigenous peoples "right to practice and revitalize their cultural traditions and customs."), Amnesty BOA, Tab 53.

[72] ***UN Declaration***, Article 14.3, Amnesty BOA, Tab 53.

[73] ***Commission on Human Rights***, *Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System*, 55th session, UN Doc E/CN.4/1999/83 (25 March 1999), para 56, Amnesty BOA, Tab 55.

[74] See, e.g., ***Human Rights Committee***, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/*2010, UN Doc CCPR/C/124/D/2020/2010 (11 January 2019) paras 3.2 and 3.3, Amnesty BOA, Tab 52.

[75] During the many years of debate at the Working Group on Indigenous Populations, the observers from indigenous organizations unanimously rejected the idea of a formal definition of indigenous peoples that would be adopted by States (**Secretariat of the Permanent Forum on Indigenous Issues, "*The concept of indigenous peoples*"** *Convention of Biological Diversity*, UN Doc UNEP/CBD/WS-CB/LAC/1/INF/1 (16 November 2006) at para. 3, Amnesty BOA, Tab 61. In so doing, they endorsed the Martinez Cobo report (E/CN.4/Sub.2/1986/7/Add.4, Amnesty BOA, Tab 60), in regard to the concept of "indigenous". The Cobo report emphasized that the idea of a definition of "indigenous" has to be understood within the long history of attacks on Indigenous culture and identity:

> Much of their land has been taken away and whatever land is left to them is subject to constant encroachment. Their culture and their social and legal institutions and systems have been constantly under attack at all levels, through the media, the law and the public educational

have in fact turned their attention to the question of adopting a definition and explicitly declined to do so, for reasons grounded in human rights. A definition does not appear in the *UNDRIP*.

(iii) The Best Interests of the Child

54. The "best interests of the child" must be central to any meaningful implementation of Jordan's Principle. That principle, enshrined in the *CRC* and cited by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration),*[76] will not be served by a definition of "First Nations child" that irrationally deprives children of necessary services.

55. Article 3.1 of the *CRC* sets out that "[i]n 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." According to the Committee on the Rights of the Child, government, parliament and the judiciary must take active measures to implement this principle, and systematically consider it in every decision and action, including the allocation of resources.[77]

> systems. It is only natural, therefore, that there should be resistance to further loss of their land and rejection of the distortion or denial of their history and culture and defensive/offensive reaction to the continual linguistic and cultural aggressions and attacks on their way of life, their social and cultural integrity and their very physical existence. They have a right to continue to exist, to defend their lands, to keep and to transmit their culture, their language, their social and legal institutions and systems and their way of life, which have been illegally and unjustifiably attacked. **It is in the context of these situations and these rights that the question of definition should arise**."

(**Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities**, Study of the problem of discrimination against indigenous populations, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (1987), paras 374, 375), Amnesty BOA, Tab 60 (emphasis added).

[76] [1999] 2 SCR 817 at paras. 69-71, Amnesty BOA, Tab 21.

[77] ***CRC No. 15***, at para. 12, Amnesty BOA, Tab 38.

56. The *CRC*'s obligations carry special significance in the context of Indigenous children. The Committee on the Rights of the Child has observed 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"[78] The Committee goes on to explain that "[m]aintaining 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."[79] This principle is echoed in the American Declaration on the Rights of Indigenous Peoples.[80]

57. In keeping with the best interests of the child principle, international human rights law further emphasizes the importance of eliminating barriers to children receiving the care and services they need. In the context of the right to health—according to which States are called to recognize the right of the child "to the enjoyment of the highest attainable standard of health"[81]—the Committee on the Rights of the Child has emphasized that States have "a strong duty of action . . . to ensure that health and other relevant services are available and accessible to all children, with special attention to under-served areas and populations."[82] This means that health services "must be available in sufficient quantity and quality, functional, within the physical and financial reach of all sections of the child population, and

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[78] ***CRC***, Article 30, Amnesty BOA, Tab 34. The importance of this right is highlighted in ***CRC No. 15***, at para 5, Amnesty BOA, Tab 38.
[79] ***CRC No. 15,*** at para 46, Amnesty BOA, Tab 38.
[80] ***OAS Declaration***, Article XVII(2), Amnesty BOA, Tab 54.
[81] ***CRC***, Article 24.1, Amnesty BOA, Tab 34.
[82] ***CRC No. 15***, at para 28, Amnesty BOA, Tab 38.

acceptable to all,"[83] and further, "[b]arriers to children's access to health services, including financial, institutional and cultural barriers, should be identified and eliminated."[84]

58. Similarly, Article 2 of the *ICESCR* sets out that a State party must "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." In interpreting this provision, the Committee on Economic, Social and Cultural Rights, specified that the "means" used by a State "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party."[85] In the context of the right to health, full discharge entails "timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services," as well as the "implementation of programmes that address the underlying determinants of health."[86]

59. Canada's obligation to respect the best interests of the child requires that any definition of "First Nations child" not serve as a barrier to vulnerable children accessing needed care. The "First Nations Child" Decision is consistent with this fundamental aspect of Canada's international human rights obligations.

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[83] ***CRC No. 15***, at para 25, Amnesty BOA, Tab 38.
[84] ***CRC No. 15***, at para. 29, Amnesty BOA, Tab 38.
[85] ***CESCR No. 9***, at para 5, Amnesty BOA, Tab 43.
[86] ***CRC No. 15***, at para 2, Amnesty BOA, Tab 38.

(iv) Special Measures Must Be Non-Discriminatory

60. As outlined above, Indigenous children are entitled to special measures for the protection and fulfillment of their human rights.[87] Discrimination against any individual or group is strictly prohibited under international law, but special attention must be given by States to ensure that discrimination against children—particularly against children from groups in vulnerable situations that have suffered a history of discrimination—does not occur.[88] To this end, Indigenous children are entitled to special protections and access to remedial measures where discrimination has occurred.

61. To meet their purpose and qualify as valid, special measures must be applied in a non-discriminatory manner. The prohibition against racial discrimination has achieved the status of a peremptory norm in international law,[89] and has been codified and incorporated into a wide variety of international legal instruments.[90]

62. In this case, the Tribunal ordered that the federal government must "cease relying upon and perpetuating definitions of Jordan's Principle that are not in

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[87] **Committee on the Elimination of Racial Discrimination**, *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009), para 15, Amnesty BOA, Tab 48. ("Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practice their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them . . . Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.").

[88] See e.g. ***CRC No. 19 (2016)***, at paras. 42-44**,** Amnesty BOA, Tab 39.

[89] **Crawford, *Brownlie's Principles of Public International Law***, 8th ed. (Oxford: Oxford University Press, 2012), pp 594-596, Amnesty BOA, Tab 28.

[90] See, e.g., ***CRC***, Article 2, Amnesty BOA, Tab 34; ***ICCPR***, Articles 2.1 and 24.1, Amnesty BOA, Tab 46; ***ICESCR***, Article 2.2, Amnesty BOA, Tab 41; ***CERD***, Articles 1.1 and 2, Amnesty BOA, Tab 47; ***UDHR***, Articles 2 and 7, Amnesty BOA, Tab 49; and ***UN Declaration***, Article 2, Amnesty BOA, Tab 53.

compliance with the Panel's orders," which call for the application of Jordan's Principle to "**all** First Nations children, whether resident on or off reserve."[91] The Tribunal noted the "racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems" including the *Indian Act*.[92] The Tribunal reasonably noted that it would be self-defeating to impose an order to remedy one form of discrimination that embodied another.[93] It was reasonable and appropriate for the Tribunal to ensure that measures put in place in response to the Tribunal decision work to eradicate discrimination and not reinforce discriminatory practices in respect to access to services and benefits.

PART V - STATEMENT OF ORDER SOUGHT

63. Amnesty respectfully requests that the Court consider the principles of international law set out above in deciding the issues on these applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2021.

Justin Safayeni / Stephen Aylward

STOCKWOODS LLP

Lawyers for the Respondent, Amnesty International

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[91] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 at para. 135 [emphasis added], Amnesty BOA, Tab 2.
[92] "First Nations Child Decision" 2020 CHRT 20 at para. 21, Amnesty BOA, Tab 4.
[93] *Ibid*.

PART VI - LIST OF AUTHORITIES

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APPENDIX "A"

STATUTES AND REGULATIONS

Canadian Human Rights Act, RSC 1985, c. H-6, s. 5, 50, 53

Denial of good, service, facility or accommodation **5** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public **(a)** to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or **(b)** to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	**Refus de biens, de services, d'installations ou d'hébergement** **5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : **a)** d'en priver un individu; **b)** de le défavoriser à l'occasion de leur fourniture.
Conduct of inquiry **50 (1)** After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations. **Power to determine questions of law or fact** **(2)** In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter. **Additional powers** **(3)** In relation to a hearing of the inquiry, the	**Fonctions** **50 (1)** Le membre instructeur, après avis conforme à la Commission, aux parties et, à son appréciation, à tout intéressé, instruit la plainte pour laquelle il a été désigné; il donne à ceux-ci la possibilité pleine et entière de comparaître et de présenter, en personne ou par l'intermédiaire d'un avocat, des éléments de preuve ainsi que leurs observations. **Questions de droit et de fait** **(2)** Il tranche les questions de droit et les questions de fait dans les affaires dont il est saisi en vertu de la présente partie. **Pouvoirs** **(3)** Pour la tenue de ses audiences, le membre instructeur a le pouvoir : **a)** d'assigner et de contraindre les témoins à comparaître, à déposer

member or panel may **(a)** in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the complaint; **(b)** administer oaths; **(c)** subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law; **(d)** lengthen or shorten any time limit established by the rules of procedure; and **(e)** decide any procedural or evidentiary question arising during the hearing. **Limitation in relation to evidence** **(4)** The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence. **Conciliators as witnesses** **(5)** A conciliator appointed to settle the complaint is not a competent or compellable witness at the hearing. **Witness fees** **(6)** Any person summoned to attend the hearing is entitled in the discretion of the member or panel to receive the same fees and allowances as those paid to persons summoned to attend before the Federal Court.	verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables à l'examen complet de la plainte, au même titre qu'une cour supérieure d'archives; **b)** de faire prêter serment; **c)** de recevoir, sous réserve des paragraphes (4) et (5), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire; **d)** de modifier les délais prévus par les règles de pratique; **e)** de trancher toute question de procédure ou de preuve. **Restriction** **(4)** Il ne peut admettre en preuve les éléments qui, dans le droit de la preuve, sont confidentiels devant les tribunaux judiciaires. **Le conciliateur n'est ni compétent ni contraignable** **(5)** Le conciliateur n'est un témoin ni compétent ni contraignable à l'instruction. **Frais des témoins** **(6)** Les témoins assignés à comparaître en vertu du présent article peuvent, à l'appréciation du membre instructeur, recevoir les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Complaint dismissed

53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim

Rejet de la plainte

53 (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

Plainte jugée fondée

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en oeuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un

for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and **(e)** that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice. **Special compensation** **(3)** In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly. **Interest** **(4)** Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.	préjudice moral. **Indemnité spéciale** **(3)** Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré. **Intérêts** **(4)** Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

APPENDIX "B"

BOOK OF AUTHORITIES

TAB DESCRIPTION

AUTHORITIES

First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (excerpts)

2. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 (excerpts)

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