Court File No.: T- 762-11

**FEDERAL COURT**

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

Applicant

and

**GRAND CHIEF STAN LOUTTIT IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE FIRST NATIONS OF MUSHKEGOWUK COUNCIL, GRAND CHIEF STAN LOUTTIT IN HIS PERSONAL CAPACITY, AND GEORGE WESLEY**

Respondents

# MEMORANDUM OF FACT AND LAW

## PART I – STATEMENT OF FACTS

### Overview

1. This application for judicial review is in respect of decisions made by the Canadian Human Rights Commission (the "Commission") on March 23, 2011 in which the Commission requested the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal") to institute an inquiry into complaints made by the respondent Mushkegowuk First Nation against the Departments of Indian and Northern Affairs Canada ("INAC") and Public Safety and Emergency Preparedness ("Public Safety"), as these departments were then known. The Attorney General seeks an order setting the Commission's referral decisions aside, and dismissing the complaints.

2. The thrust of the complaints filed with the Commission is that INAC and Public Safety have failed to provide adequate or sufficient funding to the Nishnawbe–Aski Police Service Board (the "NAPS Board") that services the complainants' communities, and that this alleged under-funding has resulted in their receiving lower quality policing services and facilities relative to other communities in Ontario and elsewhere in Canada. In essence, the complaint is over the level of funding provided pursuant to a tri-partite agreement entered into between the federal government, the Ontario Government and the Nishnawbe–Aski Nation.

3. In deciding to refer the complaints to the Tribunal for inquiry, the Commission decided that no comparative analysis is required in order to establish discrimination in relation to the provision of "services" within the meaning of section 5 of the *Canadian Human Rights Act* (the "*Act*"). Nevertheless, the Commission went on to decide that it would be "helpful" to compare the facilities and resources of the NAPS detachments in Mishkeegogamang and Kasechewan with the Ontario Provincial Police ("OPP") detachments in Pickle Lake and Moosonee, respectively, notwithstanding the fact that the OPP is entirely within provincial jurisdiction and is funded entirely by the provincial government, with no involvement of the federal government.

4. The analytical approach adopted by the Commission in its decisions is wrong in law and could not sustain a possible finding that the federal government discriminated against the complainants in relation to the provision of "services" within the meaning of section 5 of the *Act*. Rather than refer the complaints to the Tribunal for an inquiry, the proper course of action for the Commission was to have dismissed the complaints pursuant to paragraph 44(3)(*b*) of the *Act*.

**The complaints**

5. The three respondents to this application (i.e. the complainants before the Tribunal) are the regional tribal council for the Mushkegowuk First Nations, the Grand Chief of the Mushkegowuk Council, and a member of the Kasechewan First Nation.

6. In 2007, the respondents filed a joint human rights complaint with the Commission and the Ontario Human Rights Commission naming Her Majesty the Queen in right of Canada and Ontario as respondents. The essence of the complaints filed against the governments of Canada and Ontario are set out in paragraph 22 of the revised summary of the complaint filed with the Commission:

> 22. The complainants and Mushkegowuk First Nations have the right to receive police services and facilities that any member of the general public in Ontario also receives either directly or indirectly from the respondents. However, the reality shows that there is a very large difference between the police services and facilities that members of the Ontario general public receive compared to the Mushkegowuk First Nations. The respondents' practices, including their considerable underfunding of the Nishnawbe-Aski Police Service, that cause this adverse differentiation in the provision of police services and facilities are discriminatory, particularly since the Mushkegowuk First Nations are made up of Aboriginal people who generally live on reserve.[1]

7. The NAPS Board is funded pursuant to an agreement entered into between the Nishnawbe- Aski First Nation, the Government of Canada and the Government of Ontario. This agreement, which is referred to as the Nishnawbe–Aski Police Service Agreement ("NAPS Agreement"), was entered into by the federal government under the auspices of Public Safety's First Nations Policing Program ("FNPP"), a discretionary and non-statutory transfer payment program of the federal government.

8. Under the FNPP, the federal government provides funding for First Nations police services based on tripartite agreements between the federal

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[1] Summary of Complaint, Application Record (A.R.), p.

government, the provincial/territorial government, and the First Nation or Inuit community. The federal government provides 52% and the provincial or territorial government pays 48% of the contribution towards the cost of the First Nations policing service.

9. The respondents' complaint is that the Governments of Ontario and Canada do not provide adequate funding under the NAPS Agreement, with the result that the Mushkegowuk First Nations receive lower quality policing compared to non-Aboriginal Ontarians.[2]

## The Commission's investigation

10. The Commission treated the respondents' complaint as two complaints filed against INAC (Commission file number 20070826) and Public Safety (Commission file number 20070993). The Commission assigned the complaints to an investigator, whose report is dated December 23, 2010.

11. The investigator characterizes the complaint as one of adverse differential treatment in the provision of police services and facilities based on the respondents' race, and national or ethnic origin. The "Investigation Process" identified in the report sets out the following as "Step 1":

> The investigation will examine whether there is support for the complainants' allegation of adverse differential treatment by considering:
>
> i. Are the complainants treated differently in the provision of policing as compared to non-Aboriginals?
>
> ii. Does the treatment result in negative consequences for the complainants?
>
> iii. Is the differential treatment based on one or more prohibited grounds of discrimination?[3]

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[2] Summary of Complaint, Application Record (A.R.), p. 50
[3] Investigator's report, para. 2, A.R. p. 18

12. In the course of addressing these questions, the investigator responded to the Government's submission that the provision of funding under the tri-partite NAPS Agreement did not constitute a "service" within the meaning of section 5 of the *Act*. While noting the Government's position on this issue, the investigator concluded that the funding of policing did confer a benefit and was a "service customarily available to the public."[4]

13. Referring to the Federal Court's decision in *Morris v. Canada*, 2005 F.C.J. No. 731, the investigator rejected the notion that a comparative analysis was required in order to establish discrimination under the *Act*. Nevertheless, stating that a comparator group may be "helpful" in illustrating the unequal levels of policing service provided by NAPS and the OPP, the investigator proceeded to engage in a "brief comparison" of the policing service and infrastructure in Mishkeegogamang and Kasechewan with those in Pickle Lake and Moosonee, respectively.[5]

14. Based on this "brief comparison", the investigator concluded that the buildings and resources in the communities served exclusively by the OPP appeared to be in better shape than those in the NAPS communities, and that the officers in the NAPS officers worked longer shifts more frequently, worked alone more often, and had greater problems finding accommodation than their OPP counterparts. The investigator further concluded that the level of funding provided by the federal government, which she characterizes as "differential treatment", has led to a shortage of police officers and services, as well as difficult and unsafe working conditions for the NAPS officers.[6]

15. As a result of her "preliminary comparative analysis", the investigator concluded that individuals living in communities served by NAPS were disadvantaged in comparison to other non-First Nations communities (i.e. Pickle Lake and Moosonee). To the investigator, "...it appear[ed] that this

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[4] Investigator's report, para. 22, A.R. p. 21
[5] Investigator's report, para. 27, A.R. p. 23
[6] Investigator's report, paras 35 and 54, A.R. pp 26 & 28

adverse differential treatment *may* be linked to the complainants' national and ethnic origin", hence warranting further inquiry by the Tribunal.[7]

**Public Safety and INAC's response to the investigator's report**

16. By letter dated January 27, 2011, counsel for Public Safety and INAC responded to the investigator's report. In these submissions, they re-iterated their earlier position that they were not responsible for providing policing to the complainants, in that this was a role carried out by the NAPS and by the OPP, which is responsible for providing police services in respect of the parts of Ontario that do not have municipal police forces under section 19(1) of Ontario's *Police Services Act*.[8]

17. The responding submissions further noted that INAC had no role in the FNPP or the NAPS Agreement, and was improperly named as a respondent to the complaints.[9]

18. Public Safety and INAC also submitted that the analytical approach adopted by the investigator by engaging in a comparison between the policing provided by the NAPS in Mishkeegogamang and Kasechewan on the one hand against the policing provided by the OPP in Pickle Lake and Moosonee on the other, was legally flawed. As noted in the responding submission, the federal government is not responsible for the provision of police services or facilities in Ontario, which is a matter of provincial jurisdiction. By comparing the quality of police services and facilities provided by the province to those provided by the NAPS (for which the investigator claimed the federal respondents are responsible), the investigator established the level of services provided by the OPP in the two selected communities as the benchmark against which the services provided by NAPS were to be measured. As noted in the submission, the fatal flaw with this analytical

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[7] Investigator's report, para. 64, A.R. p. 29
[8] Letter to John Chamberlin dated January 27, 2011, A.R., pp 63-64

approach is that the federal government has no control, role or responsibility over the delivery or funding of police services in the two comparator communities selected by the investigator.[10]

19. Subsequent to delivery of Public Safety and INAC's responding submissions, the Tribunal issued its decision in the case of *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*. In this decision, the Tribunal stated as a matter of law that a comparator is required in order to establish adverse differentiation under s. 5(b) of the *Act*, and that s. 5(b) does not allow for a comparison between two different "service-providers".[11]

**The Commission's decisions**

20. In its decisions rendered on March 23, 2011 the Commission adopted the reasoning and recommendation of the Commission's investigator that the complaints be referred to the Tribunal for further inquiry.[12]

21. On the legal questions as to whether a comparator is required and whether the comparison can be between two service-providers, the Commission recognized that the Tribunal's decision in *First Nations Child and Family Caring Society of Canada* supported the Government's position. However, the Commission did not consider itself "bound" by the Tribunal's decision, and noted that in *Morris v. Canada, supra*, the Federal Court had rejected a requirement for a comparative analysis to prove discrimination.[13]

22. In terms of the selection of the OPP detachments in Pickle Lake and Moosonee, the Commission defended these choices on the basis that the

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[9] *Ibid*, p. 64
[10] Letter to John Chamberlin dated January 27, 2011, A.R., pp 66-67.
[11] *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*, 2011 CHRT 4 at paras 107and 128-131
[12] Commission's decision, A.R. p. 11-13
[13] Commission's decision, A.R. p. 12

selection of a particular comparator is a "specialized inquiry", that is usually "case-specific and fact-driven", that was squarely within the Commission's expertise.[14]

## PART II – POINTS IN ISSUE

23. The issue on this application is whether the Commission's decision to refer the complaints against Public Safety and INAC to the Tribunal for a hearing should be set aside on the basis that the Commission erred in concluding that no comparator was required to establish discrimination, and in concluding the existence of evidence of differential treatment by comparing the level of funding provided by the federal Government to the NAPS against the level of funding provided by the Ontario Government to the OPP for the Pickle Lake and Moosonee detachments.

24. While the Attorney General of Canada does not raise the issue as to whether the provision of funding under the NAPS Agreement constitutes the provision of a "service" within the meaning of section 5 of the *Act*, it reserves the right to advance this argument should the complaint proceed before the Tribunal.

## PART III – SUBMISSIONS

### 1) The standard of review

25. The Attorney General submits that the standard of review of the Commission's decisions that no comparator is required to establish differential treatment, and that a comparison can be conducted between the federal and Ontario governments is correctness.

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[14] *Ibid.*

26. In *Dunsmuir*, the Supreme Court reconsidered the analytical process employed to determine the applicable standard of review of administrative decision-makers. The number of standards of review was reduced from three to two: correctness and reasonableness.[15]

27. The reasonableness standard of review recognizes that deference should be accorded to administrative decision-makers in deciding questions that could fall within a range of possible, acceptable outcomes. Deference is appropriate where administrative decision-makers are called upon to decide questions that fall within their experience and specialized area of expertise.

28. The correctness standard continues to apply where administrative decision-makers are called upon to decide questions that are characterized as truly jurisdictional or legal questions that are of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker. Because of their impact on the administration of justice as a whole, such legal questions require uniform and consistent answers.[16]

29. In *First Nations Child and Family Caring Society of Canada* the Tribunal properly characterized the very questions before the Court in this application as true questions of law.[17]

30. Decisions made by the Commission to refer complaints to the Tribunal for further inquiry under section 44 of the *Act* are generally deserving of deference, because they usually have an essential factual component. This is not the case for decisions that can be characterized as true questions of jurisdiction or *vires*, or questions of general law that are of central

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[15] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 45
[16] *Dunsmuir, supra*, at paras. 47-49, 55 and 60
[17] *First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian and Northern Affairs Canada*, 2011 CHRT 4 at para 107

importance to the legal system as a whole and outside the Commission's specialized area of expertise.[18]

31. The questions of law raised in this case can readily be characterized as being of central importance to the legal system. This is not a context-specific setting, and there is no factual component entailed in the analysis. The answer to these questions will impact all future discrimination claims made pursuant to section 5(b) of the *Act*, as well as other provisions of the legislation.[19] They may also potentially impact the interpretation of similar language appearing in the provincial and territorial human rights statutes.[20]

32. Moreover, the notion of comparing how the federal government treats one category of Canadians with how provincial governments treat other categories of Canadians engages a comparison of separate constitutional actors within their respective spheres of responsibility as assigned by the *Constitution Act, 1867*. Whether s. 5(b) of the *Act* authorizes such an analysis attracts a correctness standard of review.

33. The questions of law raised in this case also fall outside the specialized area of expertise of the Commission. The Commission's specialized expertise relates to fact-finding and the determination of human rights context, not pure questions of law or of jurisdiction.[21] The Commission is no better placed than the Court to answer the legal questions raised in this case.

34. In previous cases, this Court has held that the correctness standard applies to the question as to whether the Commission has applied the correct test for discrimination under the *Act*.[22]

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[18] *Dunsmuir, supra*, at paras 59 and 60; *Canada (Attorney General) v. Watkin*, 2008 FCA 170
[19] Subsections 6(b) and 7(b) of the *Act* also refer to "differentiate adversely" in relation to commercial premises and residential accommodation, and employment respectively.
[20] *Mowat v. Canada*, 2009 FCA 309 at para 44
[21] *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571;
[22] *Powell v. TD Canada Trust*, 2007 FC 1227 at para. 21

35. However, even if the standard of review is reasonableness, the Commission's decision is unreasonable.

**2) The Commission erred in concluding that a comparator group is not required to establish discrimination.**

36. The governing provision of the *Act* for the purposes of the issues raised in this application is section 5(b), which provides as follows:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
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> (*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.

37. As framed by the respondents and the Commission, this is a complaint about "differential treatment" in the provision of services. The respondents allege that the federal Government has treated them adversely in relation to another group contrary to s. 5(b) of the *Act.*

38. The respondents describe the comparison in their complaint as involving alternatively "any member of the general public in Ontario" (paragraph 22) and "non-Aboriginal Ontarians" (paragraphs 25, 27, 28 and 31).

39. The Commission itself acknowledged in its report that a comparative analysis was required when it carried out its investigation. In paragraph 2 of the investigator's report, which is deemed to constitute the Commission's reasons for decision,[23] the investigator accepted that the first step in the discrimination analysis was to consider whether the complainants were treated differently in relation to the provision of policing as compared to non-

Aboriginals. Later in the document, however, the investigator suggests that "it is not always necessary to provide a comparator group when addressing historical disadvantage", although she admits that "comparative analysis is helpful."

40. This is an error of law. A comparative analysis is not merely "helpful"; it is mandated by section 5(b) of the *Act*.

41. Section 5(b) of the Act requires there to be evidence of adverse differentiation. To differentiate adversely requires a comparison between two groups or individuals. To "differentiate" is to "recognize or identify as different", to "distinguish". This is by necessity a relational exercise which requires comparison. As stated by the Chairperson of the Tribunal in *First Nations Child and Family Caring Society of Canada*:

> "Differentiate" involves being different from something or someone else. It involves distinguishing, or the drawing of a distinction. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, by definition, it is necessary to compare the situation of the complainant with that of a different individual.[24]

42. The jurisprudence of the Tribunal and the Federal Court supports the requirement of a comparator analysis in establishing a complaint of adverse differentiation.

43. In *Re Singh*, Justice Hugessen set out the following formula for establishing the existence of a discriminatory practice under s. 5(b) of the *Act*:

> The wording of our section 5 is also instructive. While paragraph (*a*) makes it a discriminatory practice to deny services, etc. to an individual on prohibited grounds, paragraph (*b*) seems to approach matters from the opposite direction, as it were, and without regard to the person to whom the services are or might be rendered. Thus it is a discriminatory practice.
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> **5.** ... in the provision of ... services ... customarily available to the general public

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[23] *Sketchley v. Canada (Attorney General)*, 2005 FCA 404

[24] *First Nations Child and Family Caring Society of Canada*, *supra* at para113

...

(*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

Restated in algebraic terms, it is a discriminatory practice for A, in providing services to B, to differentiate on prohibited grounds in relation to C. Or, in concrete terms, it would be a discriminatory practice for a policeman who, in providing traffic control services to the general public, treated one violator more harshly than another because of his national or racial origins.[25]

44. The following statement of Justice Mactavish's in *Walden* is to the same effect:

> Equality is an inherently comparative concept. In order to determine whether there has been adverse differential treatment on the basis of a proscribed ground, it is therefore necessary to compare the situation of the complainant group with that of a different group.[26]

45. In *Wignall*, Justice O'Reilly concluded that:

> A court or tribunal cannot decide whether a person has been discriminated against without making comparisons to the treatment of other persons. Comparisons are inevitable.[27]

46. The Commission relied on the Federal Court of Appeal's judgment in *Morris* as support for its conclusion that a comparative analysis is not required to establish differential treatment. This is a misinterpretation of the *Morris* decision. In *Morris*, Justice Evans simply stated that the legal definition of a *prima facie* case does not require the Commission (or complainant) to adduce any *particular type of evidence* to prove the facts necessary to establish discrimination. The Court emphasized, however that "...comparative evidence of discrimination comes in many more forms than the particular one identified in [*Shakes v. Rex Pax Ltd.* (1982) 3 C.H.H.R. D/1001)."[28] In other words, the Court rejected a one-size-fits-all evidentiary approach for

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[25] *Singh (Re)*, [1989] 1 F.C. 430, cited in *Watkin, supra*, at para 27
[26] *Canada (Attorney General) v. Walden*, 2010 FC 490 at para 78
[27] *Wignall v. Canada*, 2003 FC 1280 at para 22
[28] *Morris v. Canada*, 2005 FCA 154 at para 28

establishing differential treatment. It did not reject the requirement that a comparative analysis be carried out.

**3) The Commission erred in concluding that s. 5(b) allows for comparisons between two service-providers**

47. The Commission chose to compare the level of funding provided by the federal Government under the NAPS Agreement to the level and quality of services and infrastructure funded by the Ontario Government in respect of the OPP detachments in two northern Ontario communities. The selection of a comparator group against which to compare the treatment afforded to the complainant may be a fact-specific exercise to which the Commission may be entitled to deference in some cases. However, the Commission's decision to compare the respondent to another service-provider is an entirely different matter, particularly when the other service-provider is a different level of government over which the Commission has no constitutional jurisdiction. This is an error of law.

48. A proper discrimination analysis focuses on one service provider and one particular service customarily provided to the general public. These are the fundamental elements in the "algebraic" formula articulated by Justice Hugessen in *Singh, supra.* The Commission's analytical approach is contrary to the Federal Court's approach in *Singh.*

49. The federal government does not have any role in the funding for the Pickle Lake or Moosonee OPP detachments. This is a matter of provincial jurisdiction. The Tribunal Chairperson asked the following rhetorical question in *First Nations Child and Family Caring Society of Canada*:

> How and when could federal government department employers be compared to provincial government employers, and federal departmental funders with provincial departmental funders?

50. The answer is that s. 5(b) of the Act does not contemplate this kind of comparative analysis. Service-provider (or employer) "A" cannot be found to have adversely differentiated against a complainant on the basis of the actions or policies of service-provider or employer "B". In *First Nations Child and Family Caring Society of Canada*, Chairperson Chotalia highlighted the absurdity that would result if such an analysis were permitted under the *Act*:

> Furthermore, the use of more than one service provider expands the reach of the section to nonsensical parameters. Any expansion of s. 5(b) mandates a similar expansion of sections 6(b) and 7(b) of the *Act*. To accept an interpretation that one service provider may be compared to another, and that more than one employer may be compared to another, is to open the flood gates to a barrage of new types of complaints not only in services, but also in employment. For example, an employee of one employer could complain that she is being adversely differentiated against when compared to an employee of a different employer (e.g. an employee of Bank "A" could complain of differential benefits when compared to an employee of Bank "B"; a First Nations employee of a First Nation in Ontario could complain of differential employment policies from an employee of a First Nation in British Columbia). In the area of *services* alone, a customer of Restaurant "A" could complain of differential treatment in services from a customer of Restaurant "B" on the basis of race. A First Nations member of a First Nation in Quebec could complain of differential funding when compared to a First Nations member of a different First Nation in Alberta, arguing that race was a factor as the First Nations only serves First Nations persons.[29]

51. The inappropriateness of such a comparison is ever the more apparent when different levels of government are involved. The federal Government does not have any control over how the provincial Government allocates its resources for off-reserve policing. There cannot be a finding of discrimination as between two different levels of government. This is inconsistent with the division of powers established in the *Constitution Act, 1867*. Each level of government is legally and practically distinct; they cannot be treated as one entity, no matter how unique the circumstances, as

recognized by the Supreme Court of Canada in *R. v. S. (S.)*, [1990] 2 S.C.R. 254.

**Conclusion**

52. In deciding to refer the respondents' complaints to the Tribunal for inquiry, the Commission applied the incorrect test for discrimination. The Commission's decision should be set aside.

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[29] *First Nations Child and Family Caring Society of Canada*, supra, at para 129

## PART IV – ORDER SOUGHT

53. The Attorney General requests an order setting aside the Commission's decision to refer the complaints to the Tribunal for an inquiry, and dismissing the complaint or, in the alternative, referring the matter back to the Commission to be dealt with in accordance with the Court's reasons for judgment. No costs are sought as against the respondents in respect of this application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 16th day of September, 2011.

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## PART V - LIST OF AUTHORITIES

*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190

*Sketchley v. Canada (Attorney General)*, 2005 FCA 404

*Wignall v. Canada, 2003 FC 1280*

*Attorney General) v. Watkin*, 2008 FCA 170

*Morris v. Canada, 2005 FCA 154*

*First Nations Child and Family Caring Society v. Canada (Minister of Indian Affairs and Northern Development)*, [2011] C.H.R.D. No. 4

*R. v. S. (S.)*, [1990] 2 S.C.R. 254

*Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571*

*Powell v. TD Canada Trust*, 2007 FC 1227

*Canada (Attorney General) v. Walden*, 2010 FC 490

## APPENDIX A - STATUTES AND REGULATIONS

*Canadian Human Rights Act, s.* 5, 6, 7, 44