

**CANADIAN HUMAN RIGHTS TRIBUNAL**

B E T W E E N:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA  
and the ASSEMBLY OF FIRST NATIONS**

Complainants

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

Commission

- and -

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

Respondent

- and -

**CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA**

Interested Parties

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**FINAL WRITTEN SUBMISSIONS of the ASSEMBLY OF FIRST NATIONS**

---

**David C. Nahwegahbow**, IPC, LSM  
NAHWEGAHBOW, CORBIERE  
Genoodmagejig/Barristers & Solicitors  
5884 Rama Road, Suite 109  
Rama, ON L3V 6H6  
T: 705.325.0520  
F: 705.325.7204  
[dndaystar@nncfirm.ca](mailto:dndaystar@nncfirm.ca)

**Co-Counsel for Complainant,  
Assembly of First Nations**

**Stuart Wuttke**  
ASSEMBLY OF FIRST NATIONS  
55 Metcalfe Street, Suite 1600  
Ottawa, ON K1P 6L5  
T: 613.241.6789 Ext. 228  
F: 613.241.5808  
[swuttke@afn.ca](mailto:swuttke@afn.ca)

**Co-Counsel for Complainant,  
Assembly of First Nations**

TO: The Registry Office  
**CANADIAN HUMAN RIGHTS TRIBUNAL**  
160 Elgin Street, 11<sup>th</sup> Floor  
Ottawa, ON K1A 1J4

AND TO: **Jonathan Tarlton, Melissa Chan, Patricia MacPhee & Nicole Arsenault**  
Atlantic Regional Office  
JUSTICE CANADA  
Duke Tower, 5251 Duke Street, Suite 1400  
Halifax, NS B3J 1P3

**Terry McCormick & Ainslie Harvey**  
Aboriginal Law Section  
DEPARTMENT OF JUSTICE BC REGION  
900-840 Howe Street  
Vancouver, BC V6Z 2S9

Counsel for the Respondent, the Attorney General of Canada

AND TO: **Robert W. Grant, Q.C., Anne Levesque, Michael A. Sabet, David P. Taylor, Sébastien Grammond & Sarah Clarke**  
JURISTES POWER | POWER LAW  
130 Albert Street, Suite 1103  
Ottawa, ON K1P 5G4

Counsel for the Complainant, First Nations Child and Family Caring Society of Canada

AND TO: **Daniel Poulin, Sarah Pentney & Samar Musallam**  
Litigation Services Division  
CANADIAN HUMAN RIGHTS COMMISSION  
344 Slater Street, 9th Floor  
Ottawa, ON K1A 1E1

Counsel for the Commission

AND TO: **Michael Sherry**  
BARRISTER & SOLICITOR  
1203 Mississauga Road  
Mississauga, ON L5H 2J1

Counsel for the Interested Party, Chiefs of Ontario

AND TO: **Justin Safayeni**  
STOCKWOODS LLP BARRISTERS  
TD North Tower  
77 King Street West, Suite 4130  
P.O. Box 140  
Toronto-Dominion Centre  
Toronto, ON M5K 1H1

Counsel for the Interested Party, Amnesty International

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## INTRODUCTION OF ISSUES and OVERVIEW

### A) The Importance of the Children

1. In his Opening Statement to this Tribunal Panel the former National Chief Shawn A-in-Chut Atleo of the Assembly of First Nation (“AFN”), declared “how very important this case is to First Nations people, to the Chiefs, to our Elders, but more importantly to First Nation children.” He wanted to ensure that the Tribunal does not “lose sight of the human dimension of this case – the kids,” because “[t]hey are the most vulnerable, but at the same time hold the greatest promise for our people, and the reconciliation of First Nation peoples with Canadian society.”
2. Elder Robert Joseph who, when speaking about his people the Kwakwaka’wakw, stated children are at the centre of the universe and their well-being is paramount<sup>1</sup>, sacred<sup>2</sup>. As a means to demonstrate the central importance of a child to the family among the Kwakwaka’wakw, Elder Joseph described a ceremony called *Heiltsu gula*, meaning “enough time has passed.” The *Heiltsu gula* transpired when a child reached 10 moons and was thereby deemed to be a permanent member of the family. Before then, children were thought to hover between the spirit and mortal worlds.<sup>3</sup>
3. The *Heiltsu gula* was a huge event. The entire village – along with others – would attend, in acknowledgement of the child’s permanence among family. It was a powerful and purposeful ceremony held in a ceremonial house called a *Gukwdzi* (or ‘Bighouse’),<sup>4</sup> as a means to declare the sacredness of the family’s bond to the child.

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<sup>1</sup> Pg. 31, Vol. 42, Dr. Amy Bombay Transcript.

<sup>2</sup> Pg. 32, Vol. 42, Dr. Amy Bombay Transcript.

<sup>3</sup> Pg. 14, Vol. 42, Elder Joseph Transcript.

<sup>4</sup> Pg. 14-15, Vol. 42, Elder Joseph Transcript.

4. Elder Joseph stated *Heiltsu gula* was a transformative moment in a child's life<sup>5</sup> and significant in that at 10 moons (or 10 months) the family and community could exhale and celebrate the child's permanence. The family affirmed they would do all that they can to ensure the child's safety and wellbeing.<sup>6</sup>
5. Matriarchs were vital to the ceremony and served as mentors to the child. They would talk to the child about the meaning of life among the people and most notably showed the child the meaning of love.<sup>7</sup>
6. Elder Joseph explained the spiritual importance the *Heiltsu gula*. Keepers of the chants would sing to create sanctuary in the *Gukwdzi*; a speaker would rise and tell of the high purpose of gathering; from behind a screen – a metaphorical barrier between the spirit and mortal worlds – extended family would emerge led by the parents, cradling their child; the medicine people would follow with an abalone shell; and finally a matriarch would snip a lock of hair from the child and sing it in the shell.<sup>8</sup> All of this care was taken to bind the child to family.
7. Toward the end of the *Heiltsu gula* a vase was carefully filled with healing water, *kwa-lasta*, "life-giving water", in which a matriarch bathed the child. Okra was applied to the faces of the child and to those participating. It served as an invitation to become a part the child's life and marked the commencement of the responsibilities of the many guardians and mentors charged with caring for the child throughout the course of life. Finally, wristlets and armlets were placed on the child to signify protection from harm.<sup>9</sup>

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<sup>5</sup> Pg. 15, Vol. 42, Elder Joseph Transcript.

<sup>6</sup> Pg. 14-15, Vol. 42 Elder Joseph Transcript.

<sup>7</sup> Pg. 16, Vol. 42, Elder Joseph Transcript.

<sup>8</sup> Pg. 17-18, Vol. 42, Elder Joseph Transcript.

<sup>9</sup> Pg. 18, Vol. 42, Elder Joseph Transcript.

8. Afterward all would break out in song about the child achieving *Heiltsu gula*; the young men would be invited, along with the matriarchs, to protect the child, provide mentorship and commit to being part of the child's life forever.<sup>10</sup>
9. This story emphasizes the importance that used to be prevalent in the community as to the responsibility undertaken by the whole village to raise a child<sup>11</sup> but has been crudely broken by the current child welfare regime.
10. The *Heiltsu gula* is representative of the kinds of ceremonies held by First Nations communities throughout Canada, telling of the importance of children to the community and the sacred meaning of family. The ceremony offers insight into the Kwakwaka'wakw's *Gukwdzi* and demonstrates how much children were loved and believed central to the universe.<sup>12</sup>
11. This is an important juxtaposition with the Indian residential school system because, according to Elder Joseph, one of the greatest tragedies of that system was that the children never experienced love, was simply absent in their lives for a long time.<sup>13</sup> Many children underwent the unimaginable transition from being the centre of life itself to a non-entity with no value whatsoever in a residential school,<sup>14</sup> an unacceptable discriminatory practice intended to break First Nation families – a practice that continues today.

## **B) Historic Disadvantage and the Impact of Indian Residential Schools**

12. This complaint is about discrimination, which arises in contemporary terms but has historical origins.<sup>15</sup> The AFN focuses on the impact of Indian Residential Schools (“IRS”), and historic disadvantage as means of redress for the continuing discrimination against First Nations children and families.

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<sup>10</sup> Pg. 19, Vol. 42, Elder Joseph Transcript.

<sup>11</sup> Pg. 19, Vol. 42, Elder Joseph Transcript.

<sup>12</sup> Pg. 16, Vol. 42, Elder Joseph Transcript.

<sup>13</sup> Pg. 16, Vol. 42, Elder Joseph Transcript.

<sup>14</sup> Pg. 35, Vol. 42, Elder Joseph Transcript.

<sup>15</sup> Pg. 71, Vol. 1, Opening Statement of former National Chief Shawn A-in-Chut Atleo.

13. The AFN asserts that the federal government discriminates against First Nation children on reserve through a systematic under-funding and structures of funding for child welfare services in ways that deny substantive equality to First Nations children on reserve. This must be considered in light of the historical disadvantage First Nation children on reserve face as a result of more than a century of discriminatory federal policies.<sup>16</sup> These policies were aimed not at nurturing and supporting children as should have been the case, but rather their purpose was assimilation – “to kill the Indian in the child”. This underscores the fundamental inequity in the provision of child welfare services to First Nations children on reserves, constituting “discrimination” under the *Canadian Human Rights Act (CHRA)*.
14. The AFN and the First Nations Child & Family Caring Society of Canada (Caring Society) filed this complaint in 2007 under sections 5(a) and (b) of the *CHRA*. The Complainants allege that the Respondent, the Minister of the Department of Indian Affairs and Northern Development, now also known as Aboriginal Affairs and Northern Development Canada (AANDC), provides “inequitable levels of child welfare funding to First Nations children and families on-reserve”.
15. This under-funding is tantamount to discrimination in the provision of services on the grounds of race and national or ethnic origin contrary to subsections 5(a) and (b) of the *CHRA* which states:
  5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public;
    - (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
    - (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

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<sup>16</sup> Pg. 71-72, Vol. 1, Opening Statement of former National Chief Shawn A-in-Chut Atleo.

16. This complaint raises complex legal and factual issues resulting in many days of hearings during which the Tribunal has heard from numerous witnesses. In particular, in relation to the issues of historic disadvantage and the impact of IRS, the Tribunal has heard uncontested expert evidence from Dr. John Milloy on the history of IRS, Dr. Amy Bombay on the intergenerational impact of IRS and Elder Robert Joseph on the importance of the child.
17. The historical contextual evidence shows us patterns of conduct on the part of the Department, which continue to the present time and is evidence of perpetuation of historical disadvantage or racial discrimination. The most significant of these is the removal of children and chronic underfunding. There are also patterns of overbearing Departmental control over the lives of First Nations; as well as knowledge of problems, and neglect, which in the case of IRS, was verging on manslaughter. Finally, the historical context provides clear evidence of a transition from IRS to child welfare, and the Department's undeniable role in First Nation child welfare.
18. The AFN limits its submissions to the issue of historic disadvantage. Further, having been invited to do so by the Panel, the AFN also addresses the issue of fiduciary obligations of the Crown as represented by AANDC. With regard to all the other important issues raised by this complaint, the AFN defers to the Commission and the Caring Society.

### **C) Charter and Mandate of the Assembly of First Nations**

19. As set out in the National Chief's Opening Statement, the AFN is a national organization that represents and advocates on behalf of First Nations in Canada. There are approximately 633 First Nation communities in Canada, with multiple languages, cultures and with high degree of diversity amongst them. Some are in urban areas, some in rural and remote areas. There is diversity in First Nation economies as well, with some relying on traditional economies and others relying more heavily on the wage economy. Most communities have

reserves, which are of varying sizes. Moreover, arising from the constitutional history of Canada, the First Nation relationship that was originally with the British Crown is now primarily with the Federal Crown (“Crown”). Therefore, the AFN takes the position that child welfare for First Nations, particularly on reserve, is a matter of federal rather than provincial responsibility.

20. Beyond the reserves, First Nations also have their traditional territories, over which they possess both Treaty and inherent Aboriginal rights, including the right of self-government – such rights being affirmed and protected under s. 35 of the *Constitution Act, 1982*. This unique constitutional status is one of the commonalities shared by First Nations peoples, along with rich Indigenous cultures, and a growing youth population. First Nations also share a history of externally imposed attempts at assimilation and a continued denial of their rights, responsibilities and cultures by the Crown. This reality directly contributes to social conditions that have been obstinate to overcome.
  
21. The AFN was established pursuant to and operates under the Charter of the Assembly of First Nations, under which the principal objects are:
  - To protect our succeeding generations from colonialism;
  - To reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of our First Nations large and small;
  - To establish conditions under which justice and respect for the obligations arising from our international treaties and from international law can be maintained, and
  - To promote social progress and better standards of life among our peoples...
  
22. The AFN also derives authority from specific mandates provided from time to time by resolutions from First Nation Chiefs-in-Assembly. It is pursuant to both

the broader Charter objectives and a resolution of the Chiefs that AFN was specifically mandated to pursue this complaint in 2006. Resolution No. 53/2006 directs as follows:

THEREFORE BE IT RESOLVED that the AFN Chiefs-in-Assembly approve the submission of a joint complaint by the AFN and the First Nation Child and Family Caring Society to the Canadian Human Rights Commission regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Department of Indian and Northern Affairs Canada's (INAC) funding formula for First Nations Child and Family Services known as Directive 20-1 and the 1965 Welfare Agreement in Ontario.

23. As indicated by the National Chief, filing this complaint was a last resort. The culmination of a series of failed efforts made to resolve the child welfare issue in a collaborative fashion among First Nations, the AFN and with the federal government. The National Chief stated to this Tribunal that:

The first attempt was the *Joint National Policy Review*, completed in 2000, on behalf of the AFN and the Department of Indian and Northern Affairs Canada, known now as Aboriginal Affairs and Northern Development Canada. This report found that federal child welfare funding for First Nation children on reserves was 22% less than that received by other children served by the province. This was followed by the *Wen:de* series of reports beginning in 2005, where experts found that the funding on reserve needed to be substantially increased to achieve basic equity. Resolution 53/2006 noted that, by 2006, very little progress was made to implement the recommendations in these reports, which resulted in a failure to address the deficiencies in services provided to First Nation children on-reserve. In fact, Resolution 53/2006 expressed concern that the "number of First Nations children entering the care of the child welfare system continues to

rise at an alarming rate with an estimated 27,000 First Nations children currently in care.<sup>17</sup>

**D) Intergenerational Impact of Residential Schools, the Prime Minister's Apology and *Reconciliation***

24. The AFN submits that the current situation of First Nation children on reserve is related to the legacy of Indian Residential Schools. The Panel heard extensive evidence on the history of IRS, their intergenerational impacts and the connection to child welfare. The historical facts regarding IRS are not in dispute. Moreover, as the National Chief set out in his Opening Statement and the Prime Minister stated in his historic apology delivered in the House of Commons on June 11, 2008, there is no doubt that IRS has created intergenerational impacts.<sup>18</sup>
25. The National Chief stated to the Tribunal that the Apology "is so important, not just for survivors, but also for reconciliation between First Nations and Canada and to the role of this Tribunal in that reconciliation process." The Apology reads:

For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities...Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

. . . . .

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<sup>17</sup> Pg. 76-77, Vol. 1, Opening Statement of former National Chief Shawn A-in-Chut Atleo.

<sup>18</sup> Pg. 54, Vol. 43, Elder Joseph Transcript; see also, CHRC BOD, HR-3, Tab 10.

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language....

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

. . . . .

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.

26. In filing this human rights complaint, the AFN submits that, with regard to child welfare, rather than relieving the heavy burden placed on the shoulders of First Nations communities, the federal government is reverting to the same discriminatory patterns that prevailed during the IRS era, as noted above, particularly, underfunding and the removal of First Nations children from their homes and communities.
  
27. With respect to reconciliation contained within the Apology the National Chief asks: “how do we achieve *reconciliation*? How do we overcome the impacts? How do we turn the page?”<sup>19</sup> In AFN’s submission, it will take more than an apology, short-term healing programs and financial compensation to effectively achieve reconciliation. Reconciliation demands nothing less than fundamental change in the way government approaches First Nations. It will involve active listening on the part of federal officials; respect for First Nation culture, traditions and laws; mutuality in the development and implementation of federal child welfare programs for First Nations, and better resourcing. Ultimately, it involves restoring First Nation self-determination.
  
28. The AFN submits that the reconciliation process requires the participation of not only First Nations and the Crown but also this Tribunal.<sup>20</sup> The Crown sponsored IRS program exploited the vulnerability of First Nations peoples. Combined with a lack of accountability and no cry of foul by those who should have been overseeing federal officials charged with managing the system, IRS thrived. Its legacy continues to tarnish Canada’s human rights record. The *CHRA* provides the Tribunal with the power to cure the deficiencies that allowed the IRS system flourish unabated. The Tribunal has the authority to level a slanted field between First Nations and the Crown; reinstate power to First Nation communities and families; and ensure federal accountability, so that the historic discrimination

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<sup>19</sup> Pg. 89, Vol. 1, Opening Statement of former National Chief Shawn A-in-Chut Atleo.

<sup>20</sup> Pg. 90, Vol. 1, Opening Statement of former National Chief Shawn A-in-Chut Atleo.

that triumphed in residential schools is not perpetuated any further by contemporary federal policies.

29. The Supreme Court of Canada continues to declare that it is impossible to get a complete appreciation of the situation of Aboriginal peoples, without the historical context – this extends to First Nations child welfare. Therefore, though the detailed historical evidence is at times unpleasant and horrific the AFN led the evidence nonetheless because it is imperative for the Tribunal to more fully understand the dynamic and psychological impacts that are the IRS ongoing legacy. As the evidence has demonstrated, these impacts continue to reverberate beyond the 15% or so of the Aboriginal population who actually attended IRS and like an infection continue to flow across generations into the hearts, minds and lives of present generations of parents and children.
30. The expert evidence of Drs. Milloy and Bombay combined with the testimony of Elder Joseph provide this Panel with a solid factual basis upon which to assess whether existing federal First Nations child welfare funding policies discriminate against First Nations children on reserve because they tend to perpetuate historic disadvantage or whether they promote *reconciliation*. The AFN submits the Crown policies relating to child welfare are discriminatory and offend the principles of reconciliation and a nation-to-nation relationship.

**E) *The United Nations Declaration on the Rights of Indigenous Peoples***

31. The *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), was adopted by the UN General Assembly on September 13, 2007 and subsequently endorsed by Canada on November 12, 2010, stating:

The Government's vision is a future in which Aboriginal families and communities are healthy, safe, self-sufficient and prosperous within a Canada where people make their own decisions, manage their own affairs and make strong contributions to the country as a whole.

32. *UNDRIP* is an international instrument available to Canadian courts and tribunals in interpreting the rights of Indigenous peoples' and related State obligations, particularly under human rights statutes. The National Chief stated that *UNDRIP* ought to be considered by the Tribunal in evaluating whether AANDC is discriminating against First Nation children on reserve in the funding and provision of child welfare services.
33. *UNDRIP*'s preamble acknowledges that Indigenous peoples have suffered from historic injustices. It points to the need for States and Indigenous peoples to enter into processes of mutual respect and partnership. It also recognizes the right of Indigenous families and communities to retain shared responsibility for the upbringing and well-being of their children.
34. The substantive provisions of *UNDRIP* also have application. Article 7 recognizes Indigenous peoples have the right not to have their children forcibly removed; Article 8 recognizes the right to be free from forced assimilation; Articles 21 and 22 obligate States to take measures, especially for children, to ensure continuing improvement of social and economic conditions, and to provide protection from violence and discrimination.
35. The AFN submits that the current AANDC funding policies for First Nations child welfare on reserves fail to meet both the vision and the substantive provisions of the *UNDRIP* and the *CHRA* because such policies perpetuate historic disadvantage and promote the continued removal of First Nations children from their homes rather than promote the social well-being of First Nations children and their families within their own homes and communities.

## PART I – STATEMENT OF FACTS

### A) Introduction

36. The AFN statement of facts covers two key subject areas: (1). the historical context, and (2) the impacts of IRS. The historical context includes an overview of the past relationship between the Crown and First Nations, and the political and constitutional evolution of the Crown/First Nations relationship from the *Royal Proclamation, 1763* to *Confederation* and the contemporary era.
37. The first area draws primarily on the uncontested evidence of the expert witness, Dr. John Milloy -- the review of historical context mainly on the history of Indian Residential Schools (IRS), from inception to closure ending with the transition to the current child welfare system.
38. The second subject relates to the impacts of the IRS system and the intergenerational impacts in particular. These facts are drawn from the largely uncontested expert evidence of Dr. Amy Bombay and as the testimony of Elder Robert Joseph.
39. Dr. Milloy was qualified by the Tribunal as an expert in the history of Indian Residential Schools.<sup>21</sup> His expert report, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (“*A National Crime*”),<sup>22</sup> is based on research initially prepared for the Royal Commission on Aboriginal Peoples (RCAP) in 1996.<sup>23</sup> Dr. Milloy’s evidence provides detailed insight into how IRS were created; the neglectful management and operations of the schools; the disturbing underlying ideology; the true nature of the objectives

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<sup>21</sup> Pg. 4-5, Vol. 33, Dr. John S. Milloy Transcript.

<sup>22</sup> Dr. John Milloy’ Expert Report, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg, MB: University of Manitoba Press, 1999). [“*A National Crime*”]. Ex. AFN-1.

<sup>23</sup> *A National Crime*, Preface; also, pg. 45, Vol. 33, Dr. John S. Milloy Transcript.

of the system; and, how it all culminated in terms of negligent care of Indian children and their education, amongst many other things.<sup>24</sup>

40. Dr. Bombay was qualified by the Tribunal as a psychological expert on the effects and transmission of stress and trauma on well-being, including inter-generational transmission of trauma among offspring of IRS survivors, and the application of the concepts of collective and historical trauma.<sup>25</sup> Much of her interdisciplinary research looks at the long-term effects of IRS, with a particular focus on the inter-generational effects of IRS.<sup>26</sup> Dr. Bombay's evidence focuses on the children and grandchildren of those who attended residential school relative to those whose families were not affected.<sup>27</sup> Dr. Bombay's research integrates perspectives from various fields of psychology, including health psychology, social psychology and cultural psychology, while also drawing from neuroscience and behavioural neuroscience.<sup>28</sup> Her expert report is an article in which she was the lead author, published in *Transcultural Psychiatry*, entitled *The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma*,<sup>29</sup> and her testimony was provided in a power point presentation.<sup>30</sup>
  
41. In testimony, Dr. Bombay stated both collective and historical damage are concepts that have gained acceptance in the psychological community but until recently there had not been sufficient empirical evidence relating to the latter concept. Dr. Bombay's work also provides statistical support for historical trauma in the context of the IRS system and enables a better understanding of the extent of the true damage done by that system. Dr. Bombay's findings are consistent with a comparative body of research conducted among groups that

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<sup>24</sup> Pg. 36, Vol. 33, Dr. John S. Milloy Transcript.

<sup>25</sup> Pg. 4 and 52, Vol. 40, Dr. Amy Bombay Transcript.

<sup>26</sup> Pg. 60, Vol. 40, Dr. Amy Bombay Transcript.

<sup>27</sup> Pg. 60, Vol. 40, Dr. Amy Bombay Transcript.

<sup>28</sup> Pg. 61, Vol. 40, Dr. Amy Bombay Transcript.

<sup>29</sup> Dr. Amy Bombay's Expert Report, "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma" (2013), CHRC BOD, Ex. HR-13, Tab 314.

<sup>30</sup> Dr. Amy Bombay's Power Point Presentation, CHRC BOD, Ex. HR-14, Tab 337.

have undergone major collective traumas<sup>31</sup> – trauma that has happened to a group of people sharing a common identity, such as Holocaust survivors, Japanese Americans subjected to internment during the Second World War, and survivors of the Turkish genocide of Armenians.<sup>32</sup>

42. Elder Robert Joseph, an IRS survivor himself, was tendered as an Elder witness, enabling him to testify not just as to his own experiences and observations but also to provide testimony derived in his capacity as Elder, including oral historical evidence. By agreement among all parties, Elder Joseph’s testimony was presented pursuant to the Federal Court’s *Aboriginal Litigation Practice Guidelines*, dated October 16, 2012 and both adopted and adapted by this Panel for the purposes of these proceedings.
43. In accordance with the *Practice Guidelines*, the appropriate protocols were observed for receiving Elder evidence; former National Chief Shawn A-in-chut Atleo was called to introduce Elder Joseph and confirm his status as an Elder in the First Nations community. Former National Chief Atleo, a member of the Nuu-Chah-Nulth people, called Elder Robert Joseph “a revered and respected Elder and Chief”<sup>33</sup> of the Kwakwaka’wakw people, and he confirmed that he had known Elder Joseph for most of his life, and in a very deep way for at least 10 or 15 years.<sup>34</sup> He concluded by saying that Elder Joseph:

“... is held in esteem as a respected Elder and a Chief in his own right, beyond that which he carries in his own village and, as such, holds the respect as holding that high level of moral authority amongst our people and our leaders, not just within our home territories on Vancouver Island, but I think much more broadly than

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<sup>31</sup> Pg. 64, Vol. 40, Dr. Amy Bombay Transcript.

<sup>32</sup> Amy Bombay, Kim Matheson, & Hymie Anisman, “Intergenerational Trauma: Convergence of Multiple Processes Among First Nations People in Canada”, November 4, 2009, 5:3 JAH 6, pg. 15.

<sup>33</sup> Pg. 10, Vol. 43, National Chief Atleo Transcript.

<sup>34</sup> Pg. 14, Vol. 43, National Chief Atleo Transcript.

that, and recognized by mainstream society as carrying that level of authority and respect as well.”<sup>35</sup>

## **B) Historical Context: Overview of the Crown-First Nation Relationship**

44. Dr. Milloy stated the roots of the Canadian residential school system go back “to the history of the pre-Confederation period of Imperial control of Indian Affairs.”<sup>36</sup> Accordingly, it is important to understand the Crown-First Nation relationship in its earliest beginnings and as it has evolved over time.
45. Dr. Milloy testified that the relationship between the Crown and First Nations started out as one of equals. He stated that “[f]rom the 1760’s forward we had a wonderful military alliance between the Iroquoian people and the Ojibway people and others to defend the British”. Noting the 250<sup>th</sup> anniversary of the *Royal Proclamation of 1763* had just passed, Dr. Milloy said that the *Proclamation* is “... still celebrated by aboriginal people, as their contact, their promises with ... the Crown ... On the basis of that we had these military alliances”.<sup>37</sup>
46. In the *Sioui* the Supreme Court of Canada said “... that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.”<sup>38</sup> More recently, the Ontario Court of Appeal characterized it as a “nation-to-nation relationship”.<sup>39</sup> Taken together, these cases provide additional historical context on the relationship between the Crown and First Nations as upheld by the Courts.

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<sup>35</sup> Pg. 14-15, Vol. 43, National Chief Atleo Transcript.

<sup>36</sup> John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg, MB: University of Manitoba Press, 1999). [“*A National Crime*”], pp. 8-9.

<sup>37</sup> Pg. 63, Vol. 33, Dr. John S. Milloy Transcript.

<sup>38</sup> *R. v. Sioui*, [1990] 1 SCR 1025, at p. 1053.

<sup>39</sup> *Chippewas of Sarnia Band v. Canada (Attorney General)*, 51 OR (3d) 641; [2001] 1 CNLR 56 (ON CA), at paras. 56 and 60. [“Chippewas of Sarnia”]

47. Moreover, the Indian Department, precursor to AANDC, was founded in 1754 to function as a foreign office of the British Imperial Government.<sup>40</sup> Sir William Johnson was the first Superintendent of the Northern District, which expanded to cover Quebec (Canada) after the English prevailed over the French in the *Seven Years War*.<sup>41</sup> The Supreme Court of Canada, in *Sioui*, described the role of First Nations in this conflict:

[B]oth the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies."<sup>42</sup>

48. The British endeavoured to maintain their wartime policy of peace and friendship with First Nations even after their victory over the French, for the security of their colonies.<sup>43</sup> Some of France's former Indian allies, who had not yet entered into peace with the English, distrusted the English; they were angered by encroachments on their lands and reacted to the English assuming control of former French forts. The discontent led to an uprising led by the Ottawa Chief Pontiac in the period leading up to 1763. The regime respecting the rights of First Nations in the *Royal Proclamation of 1763* was issued in response to the Pontiac Uprising in an effort to address and allay the concerns of First Nations, particularly with regard to trade and protection of land rights.
49. Dr. Milloy testified the *Royal Proclamation* recognized First Nations as self-governing entities.<sup>44</sup> It also recognized First Nation land rights; established Imperial protective control over Indian lands; undertook to protect Indian lands

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<sup>40</sup> *A National Crime*, at p. 12.

<sup>41</sup> *Chippewas of Sarnia*, para. 49.

<sup>42</sup> *R. v. Sioui*, [1990] 1 SCR 1025, at p. 1054.

<sup>43</sup> *Chippewas of Sarnia*, para. 50.

<sup>44</sup> *A National Crime*, at p. 12.

from squatters; and prohibited the private purchase of Indian lands, making such lands inalienable except upon surrender to the Crown.<sup>45</sup>

50. In addition to issuing the *Royal Proclamation*, Sir William Johnson convened a treaty gathering at Niagara in 1764. The Ontario Court of Appeal in the *Chippewas of Sarnia* case described that gathering in the following terms:

After setting out its policy in the *Royal Proclamation*, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the *Royal Proclamation* would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the *Royal Proclamation* respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the *Royal Proclamation* to the First Nations can be traced to this extraordinary assembly and the treaty it produced.

The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown's promise to all of the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.

The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established

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<sup>45</sup> Chippewas of Sarnia, para. 53.

friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.<sup>46</sup>

51. The *Royal Proclamation of 1763* is the founding British/Canadian constitutional document for the relationship between the Crown and First Nations in Canada. It is also the legal basis upon which the Crown entered into land cession treaties whereby First Nations agreed to share the land with the newcomers in what is now known as Canada, both before and after *Confederation*. Interestingly, the western treaties also promised education, according to Dr. Milloy.<sup>47</sup>
52. The Indian Department and relations with First Nations was an Imperial concern from 1763, administered primarily by the Governor General through Royal Prerogative.<sup>48</sup> Indian policy was formulated in London and instructions to the Governor were issued from England. The Superintendent General of Indian Affairs was the Governor General's Civil Secretary. Colonial legislatures had no jurisdiction over Indian Affairs.
53. As the Ontario Court of Appeal stated in *Chippewas of Sarnia*, over the years the Indian Department underwent many changes, however, Imperial jurisdiction over Indian Affairs persisted through many constitutional changes that occurred in Canada.<sup>49</sup>
54. In the constitutional evolution of Canada as we know it, the starting point is the *Royal Proclamation of 1763*, which in addition to addressing First Nations relations, erected four colonial governments, including the government of Quebec. The *Proclamation* did away with French Civil Law and established

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<sup>46</sup> *Chippewas of Sarnia*, paras. 54, 55 and 56.

<sup>47</sup> Pg. 95-96, Vol. 33, Dr. John S. Milloy Transcript.

<sup>48</sup> *Chippewas of Sarnia*, para. 51.

<sup>49</sup> *Chippewas of Sarnia*, para. 51.

British colonial rule in the province of Quebec. In 1774, the *Quebec Act*<sup>50</sup> restored French Civil Law as well as French language and religious rights. The *Constitutional Act of 1791*<sup>51</sup> divided Quebec into Upper and Lower Canada. The *Union Act*<sup>52</sup> of 1840 united Upper and Lower Canada into the Province of Canada, with a single government under the Governor General. The Imperial government devolved control over Indian Affairs to the Province of Canada in 1860<sup>53</sup>, where it remained until *Confederation* in 1867.

55. Throughout the period of Imperial control, and until 1867, the Indian Department, despite its many changes, remained a clientele department responsible for all aspects of Indian Affairs, including treaty relations, as well as education, health and social welfare. When Canada evolved into a federated state in 1867, the former functions and associated departments of the unitary government of the former Province of Canada were distributed between the Dominion and the Provinces. The Indian Department, and responsibility for all aspects of Indian Affairs, became a matter of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, while the provinces in general became responsible for the property and civil rights of non-Indians.
56. Although Indian Affairs remained an Imperial matter until 1860, the relationship between the Crown and First Nations changed as Dr. Milloy indicated in his testimony. The military alliance with First Nations was maintained after 1763, during the *American Revolution*, and until the *War of 1812*, however, after that, the relationship began to change:

By 1820 or so, in this part of the country, these people [Indians] were in a relatively desperate state. The fur trade had gone away ... and indeed there was enough of the white population and enough construction had gone forward, the canals particularly, that

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<sup>50</sup> *Quebec Act, 1774* (U.K.), R.S.C. 1985, App. II, No. 2.

<sup>51</sup> *Constitutional Act, 1791* (U.K.), R.S.C. 1985, App. II, No. 3.

<sup>52</sup> *Union Act, 1840* (U.K.), R.S.C. 1985, App. II, No. 4.

<sup>53</sup> *A National Crime*, pg. 20.

it was believed in 1925 when the British did a survey in Canada asking the question how would we defend what would be Ontario and Quebec, and the answer came back, well, we have all these settlers here; right?

. . . . .

The only report -- or the first report that doesn't mention First Nations people at all. All the other plans which had gone on previously were about our reliance on First Nations people. Now they were adrift economically, they had no -- they were retired in terms of their military utility, this sort of thing.

This pleased the British government greatly for one reason... Government expenses are much too high, you must reduce, reduce, reduce, and they argued that the Indian Affairs Department should have its budget cut, and from 1815 after the Napoleonic war all the way down to 1828-29, the Department began to disappear. Men were laid off and not rehired, budgets were cut, et cetera, and so forth.

In 1828, the final word came forward from the British government, close it all down; right? We don't need the Indians any longer, we don't need an Indian Affairs Department; that's it.

There was a sort of administrative rebellion on behalf of launched by two of the governors, the Governor of upper and lower Canada, Sir John [James] Kemp and Sir John Colborne in Upper Canada. And they said this is dangerous, they still live amongst us, there are many of them, and this is ungrateful. Many of the Indian men are veterans of the past wars, of the war of 1812 particularly, right, and we owe them some honour and we owe them some responsibility, and we have a better idea."<sup>54</sup>

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<sup>54</sup> Pg. 63-65, Vol. 33, Dr. John S. Milloy Transcript.

57. That “better idea” was the “civilization policy,” which led to the assimilation policy and eventually Indian Residential Schools.

### **C) The Vision: The Circle of Civilized Conditions**

#### **i. An Imperial Heritage**

58. Although the notion of “civilization” and residential schools was introduced under the French Regime in a policy coined “*Frenchification*”<sup>55</sup>, the idea of residential schools was first brought forward in the British Imperial period by the Governor of Upper Canada, Sir Peregrine Maitland, in the context of a proposal he made in 1820 to the Colonial Office “for ameliorating the condition of the Indians in the neighbourhood of [the Colonial] settlements.” The proposal contained all the elements of the policy eventually adopted by the Imperial Government in the 1830’s, and implemented by the Department, including focus on the children and education.<sup>56</sup>
59. The churches became involved when “education”, in addition to religious instruction, came into focus in the 1820’s when the Methodists under the leadership of the Rev. W. Case began opening day schools. In fact, Maitland cooperated with the Methodists and Chief Peter Jones in founding the River Credit settlement of Mississaugas. The Anglican Church Missionary Society became active in this way as well in the Grand River area, and later the Roman Catholics when they opened a day school on Manitoulin Island at Wikwemikong in the 1840’s.<sup>57</sup>
60. In the 1830’s, Sir George Murray, the Secretary of State for the Colonies, in the British Imperial Government, announced the “civilization policy”. It was a radical change to the long-standing policy pertaining to First Nations of Upper and Lower Canada as reflected in the *Royal Proclamation of 1763*. According to

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<sup>55</sup> *A National Crime*, pg. 13.

<sup>56</sup> *A National Crime*, pg. 14-15.

<sup>57</sup> *A National Crime*, pg. 14 and 15.

Murray, the *Proclamation* had “reference to the advantage which might be derived from their [the tribes] friendship in times of War rather than to any settled purpose of gradually reclaiming them from a state of barbarism and of introducing amongst them the industrious and peaceful habits of civilized life.”

61. Though it reflected the pervasive racist discourse, Murray’s policy was based on good intentions and was part of world-wide humanitarian movement. It had behind it the good intention of ameliorating the conditions of the Aboriginal communities by encouraging religious knowledge and education generally. Indians in what is now southern Ontario were in a state of relative distress from increasing settlement and decreasing game.<sup>58</sup> According to Dr. Milloy, this sense of responsibility to civilize the Indians was known as the “White Man’s Burden”<sup>59</sup> for which Dr. Milloy stated continues to be reflected today in relation to the Crown’s discriminatory policies relating to First Nation child welfare.<sup>60</sup>
62. In theory, the process was simple: missionaries went out into the wilderness and set up a mission station, and then they would invite the Aboriginal people to join them and convince them to take up a settler life based on agriculture. Later, they would introduce them to commercial society, and so on, until the Aboriginals become indistinguishable in terms of their social, economic and political systems.<sup>61</sup>
63. Initially, First Nations people liked the new “policy of civilization” because, firstly, they were in economic difficulties and needed to find a new basis for life, and secondly, they had no problem with agriculture as some First Nations people such as the Iroquois had been farming in that area since time immemorial. More importantly, they liked the idea because it meant they remained as self-

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<sup>58</sup> *A National Crime*, pg. 11.

<sup>59</sup> Pg. 61-62, Vol. 33, Dr. John S. Milloy Transcript.

<sup>60</sup> Pg. 200-218, Vol. 33, Dr. John S. Milloy Transcript.

<sup>61</sup> Pg. 62, Vol. 33, Dr. John S. Milloy Transcript.

governing nations on their reserves, and so there was an idea of a partnership developing with the British Imperial government.<sup>62</sup>

64. It is important to note that this “policy of civilization” was a co-operative effort between the mission societies, the Department and the Band Councils, which called for the tribes to be located on serviced settlement sites on their respective reserves. The tribes were provided with houses, barns, churches, schools and training in agriculture.
  
65. Dr. Milloy also notes that initially the policy was not a total departure from the *Royal Proclamation of 1763*. The civilization policy was implemented within the constitutional framework of the *Proclamation*, which recognized the First Nations people as self-governing entities within the Empire, who were to remain so despite the Imperial government’s new, radial plan to introduce so-called ‘civilization’. The Imperial government did not presume to override the Indians governing functions or their right of self-government in their service of ‘civilization’. The Department functioned as it always had since its inception in 1754 as a diplomatic institution, a foreign office unable to command or persuade, but rather requiring the consent of the Indians in all aspects of development affecting their lives<sup>63</sup>:

“The continuation of this constitutional protocol meant that First Nations governments were more than equal partners in the implementation of the policy. They could and did control developments in their communities, including decisions on reserve schools, resource development, and the extent to which tribal funds would be employed for such purposes. “Civilization,” for Imperial policy makers, was to result in the creation of self-sufficient and yet self-governing Aboriginal nations seated

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<sup>62</sup> Pg. 67-68, Vol. 33 Dr. John S. Milloy Transcript.

<sup>63</sup> *A National Crime*, pg. 11-12.

securely on their land, guaranteed quiet possession of their reserves by the terms of their treaty.”<sup>64</sup>

66. Progress under this new policy was rapid and gained the confidence of Sir John Colborne, Governor of Upper Canada, and in 1836, in the opinion of one of Colborne's senior Indian Department agents, the Indians were on their way to becoming self-sufficient.<sup>65</sup>
  
67. In the 1840's, however, the situation took an unfortunate downturn. In 1842, the *Bagot Commission* was set up under Governor Sir Charles Bagot, and after a two-year review of reserve conditions, he reported the Indians were only in a “half-civilized state”. Similarly, in 1856, Sir E. Head's Commission concluded that “any hope of raising the Indians as a body to the social and political level of their white neighbours, is yet a glimmering and distant spark.” These conclusions indeed had negative consequences for the Indians as they formed the basis of a re-formulation of the “policy of civilization” in order to improve its performance. New initiatives in “education” and “land-holding” were proffered which, according to Dr. Milloy, led inexorably to the introduction in 1857 of a new central dynamic for the policy – assimilation.<sup>66</sup>
  
68. The Bagot Commissioners saw “education” as the most important element of the civilizing system. They saw the continuation of the on-reserve schools as a necessity and proposed the beginning of “as many manual labour and Industrial schools” as possible, which were to be off-reserve boarding institutions that were intended to isolate the Indian children from the influence of their parents.<sup>67</sup> This proposal for residential education gained the support of Governor General Lord Elgin, the “Father of Responsible Government”, and the Rev. Egerton Ryerson, Superintendent of Education in Upper Canada, two very influential

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<sup>64</sup> *A National Crime*, pg. 12.

<sup>65</sup> *A National Crime*, pg. 12.

<sup>66</sup> *A National Crime*, pg. 12.

<sup>67</sup> *A National Crime*, pg. 13.

people in the British Colony who agreed with the *Bagot Commission Report's* recommendations.<sup>68</sup>

69. The second key element for the *Bagot Commission* was “industry”. It was believed that the increase in knowledge through education would be useless unless the individual could harness their industriousness, which flowed through individual ownership of land. This notion was antithetical to the First Nations people who, as an ancient custom, and as an essential part of their culture, held their land in common, yet the Department sought the Band Councils approval anyway to sub-divide their land. They, of course, achieved limited success as each Council firmly rejected their proposal however this was offset by the Department’s success with the other element, education.<sup>69</sup>
70. The 1840’s saw much development in education as many schools had been constructed in partnership with the churches. Although the goal remained the same, *civilization*, the degree of sophistication increased until Department officials and their missionary partners became much more discriminating about the potential of Aboriginal people to achieve civilization. Although all Indians were to receive so-called ameliorative attention, from the *Bagot Commission* forward, Department officials took the position that adults could only make limited progress. Thus, by the end of the 1840’s, the Department and churches narrowed their civilizing plan on the children and to residential school education.<sup>70</sup>
71. As mentioned, the *Head Commission* was equally critical of the progress being made on the civilizing front with the Indians, coming to the conclusion that the benevolent experiment was to a great extent a failure. The Department’s reaction to this involved the introduction of a new law in June 1857 called the *Act to Encourage the Gradual Civilization of the Indian Tribes in the Province*,

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<sup>68</sup> *A National Crime*, pg. 15.

<sup>69</sup> *A National Crime*, pg. 16.

<sup>70</sup> *A National Crime*, pg. 17.

which was essentially the beginning of a new policy – the “policy of assimilation”. The troubling aspect for the Department and the churches was that, upon graduation, the individual would return to their community only to retrogress to their former cultural ways, becoming “cultural backsliders”.

72. This Act introduced the idea of “enfranchisement”, whereby an Indian sufficiently advanced would give up his tribal affiliation. It was intended to counteract cultural backsliding by encouraging individual land ownership, and was considered a straight-forward solution to the development problem facing the Department in the 1850’s. Whereas under the traditional policy the Imperial government would have sought the consent of the Band Council, this time, however, the Department circumvented the Band Councils and unilaterally re-formulated a new civilizing system. This was to be the last re-formulation of the civilizing system in the period of Imperial control of Indian Affairs which came to an end in 1860, after which the local Colonial government took over until *Confederation* in 1867.<sup>71</sup>
73. The impact of the *Act* was profound as it re-defined “civilization”. According to Dr. Milloy, the prior Imperial goal of creating “communities of self-sufficiency” on reserve lands was abandoned in favour of assimilating the Indian individual. In other words, the attack was now on the individual rather than the collective, with progress toward that goal being measured in the reduction of the size of First Nations through enfranchisements.<sup>72</sup>
74. From the Indian’s perspective, the implications for continued tribal existence were immediately known as they understood the *Gradual Enfranchisement Act* to be an attempt to “break them to pieces.” The reaction from First Nation governments was resolutely negative. It did not meet their views and they petitioned Governor Head for the repeal of the Act. But, their pleas fell on deaf

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<sup>71</sup> *A National Crime*, pg. 18-19.

<sup>72</sup> Pg. 72, Vol. 33, Dr. John S. Milloy Transcript; *A National Crime*, pg. 19

ears as the Missionaries and Departmental officials “were totally out of sympathy with Aboriginal leaders.”<sup>73</sup>

75. Despite the Department’s earlier predictions, in 1863, only three (3) individuals volunteered to be enfranchised.<sup>74</sup> The Department pinned the failure of enfranchisement on the Indian parents in the communities. The government thought the Indians had to be dealt with by the coercive force of law and, in the Department’s opinion, self-government and civilization were incompatible. Thus, the government felt pressed to abolish First Nations governments, which were seen as roadblocks on the road to civilization.
76. After *Confederation*, the policy of assimilation was continued with even greater determination, justified as a “benevolent duty” it became the “national goal” of Canada. According to Sir John A. Macdonald, Canada’s first Prime Minister, the so-called benevolent colonizers were “to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit to change.”<sup>75</sup>
77. Pursuant to section 91 (24) of the *British North America Act, 1867*, now the *Constitution Act, 1867*, the newly minted federal department of Indian Affairs passed *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs...1869*, which was essentially a repeat of the earlier 1857 Act. However, this new Act abolished First Nations self-government.<sup>76</sup> It exchanged traditional government with “municipal government” and gave extensive control to the federal government through its Indian Affairs Department. Later, with the *Indian Acts* of 1876 and 1880, along with the *Indian Advancement Act of 1884*, the government took for itself the power to unilaterally mould and influence every aspect of reserve life in order to achieve

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<sup>73</sup> *A National Crime*, pg. 19.

<sup>74</sup> Pg. 76, Vol. 33, Dr. John S. Milloy Transcript.

<sup>75</sup> *A National Crime*, pg. 6; also, pg. 80, Vol. 42, Elder Joseph Transcript.

<sup>76</sup> *A National Crime*, pg. 20-21.

its desired end – enfranchisement and assimilation – in their seeing to the disappearance of First Nations people in Canada altogether.<sup>77</sup>

**ii. The Founding Vision for Indian Residential School Education, 1879-1929**

78. Dr. Milloy testified that the centrepiece of the assimilation policy was the IRS system and he described it as follows:

“The Imperial policy heritage of the 1830’s, 1840’s and 1850’s, supplemented by federal legislation and programming in the first decade of Confederation, was both the context and the rationale for the development of residential schools, which in turn constituted part of the most extensive and persistent colonial system – one that marginalized Aboriginal communities within its constitutional, legislative, and regulatory structure, stripped them of the power of self-government, and denied them any degree of self-determination. As a consequence, Aboriginal people became, in the course of Canada’s first century, wards of the Department of Indian Affairs and increasingly the objects of social welfare, police, and justice agencies.”<sup>78</sup>

79. The *Davin Report*<sup>79</sup> of 1879 is often characterized as the genesis of the IRS system, but as outlined above, there were already residential schools in existence by the time Davin issued his report. Rather, Dr. Milloy says “... the *Davin Report* may be properly credited with moving the MacDonald Government to inaugurate industrial schools in the 1880s...”<sup>80</sup> The *Davin Report* came about because Sir J.A. MacDonald gave Nicholas Flood Davin, an unsuccessful Tory candidate in the 1878 election, a commission to “report of the working of

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<sup>77</sup> *A National Crime*, pg. 21.

<sup>78</sup> *A National Crime*, pg. 9.

<sup>79</sup> Nicholas Flood Davin, Minister of the Interior (Government of Canada), “Report on Industrial Schools for Indians and Half-Breeds (‘The Davin Report’), CHRC BOD, Ex. HR-12, Tab 266.

<sup>80</sup> *A National Crime*, pg. 8.

Industrial Schools . . . in the United States and the advisability of establishing similar institutions in the North-West Territories of the Dominion.”<sup>81</sup>

80. The need for such a study arose shortly after *Confederation*, in 1870, when the Dominion obtained former Hudson’s Bay Company territory through the Rupert’s Land Order-in-Council.<sup>82</sup> Later, Sir John A’s *National Policy* would seek to tame this vast wilderness and make it profitable and governable. However, the federal government had become fearful of potential uprisings and the danger posed to their occupation of their newly acquired lands in the northwest. As Dr. Milloy pointed out in his testimony, one of the problems was that First Nations people and the Métis were under considerable stress due to the disappearance of the buffalo and also starvation, leading to considerable disquiet in those regions,<sup>83</sup> which is echoed today with the harsh living conditions many First Nation communities continue to experience.

81. Sir John A. MacDonald<sup>84</sup> was concerned about this threat and so commissioned Nicholas Flood Davin to produce a report on the possibility of having residential schools in western Canada as an aide to promoting its peaceful settlement and development. The pressure also came from the churches, the Indian Affairs Department in the west, and the Mounties. Dr. Milloy testified:

“The idea came from the churches, right. When we negotiated the western treaty after we got hold of the northwest in 1870, we slowly but surely began to negotiate treaty with Aboriginal people. After all, that had worked for the British in Canada, negotiating these treaties and making promises and people became loyal to the Crown that way. So we were going to do it again in the west and we did do it in the west and got treaties negotiated, as you know, from 1870 to 1890, all the way to the Rockies and then north in Treaty 8 and then back to the east.

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<sup>81</sup> *A National Crime*, pg. 7, and Pg. 93, Vol. 33, Dr. John S. Milloy Transcript.

<sup>82</sup> Pg. 93, Vol. 33, Dr. John S. Milloy Transcript.

<sup>83</sup> Pg. 93, Vol. 33, Dr. John S. Milloy Transcript.

<sup>84</sup> Pg. 94, Vol. 33, Dr. John S. Milloy Transcript.

So all this was very good and in those treaty promises we promised education, or schoolhouses or school teachers depending on what treaty and the churches pushed for that to be acted upon and they lobbied Macdonald to provide money for education as he had promised, or as the government had promised in the treaties. That was one of the two.

The other two was pressure from members of the Indian Affairs Department in the west and the Mounties saying that the treaties were really not enough, they were a good start, but we needed to get people on the Reserves and get them farming because they were facing this starvation and, therefore, we needed farm instructors to be sent out. In a year or so Macdonald gets farm instructors sent out. And we needed residential schools for Indians and for Metis people to be built in those places.”<sup>85</sup>

82. The report is entitled, *Report on Industrial Schools for Indians and Half-Breeds*, and was submitted in 1879. Introduced into evidence as Exhibit HR-12, Tab 266, it is recognized as the “manifesto” for residential school education according to Dr. Milloy.<sup>86</sup> Though it was essentially a recapitulation of what was already taking place, it did serve to solidify aspects of the IRS system. To fulfill his mandate, Davin visited US officials, and studied the residential schools in the US, called “industrial schools”. There he was told that day schools had been a failure “because the influence of the wigwam was stronger than the influence of the school”.<sup>87</sup> The answer was to separate the children from the parents, and remove them from their home environments. This became a central recommendation in the *Davin Report*.
83. The *Davin Report* was adopted by Sir John A. MacDonald in 1883<sup>88</sup> which is when the federal government begins to fund residential schools and they begin

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<sup>85</sup> Pg. 95-96, Vol. 33, Dr. John S. Milloy Transcript.

<sup>86</sup> Pg. 97, Vol. 34, Dr. John S. Milloy Transcript.

<sup>87</sup> *A National Crime*, p. 8.

<sup>88</sup> Pg. 99, Vol. 33, Dr. John S. Milloy Transcript.

to pop up all over the place, especially in the west according to Dr. Milloy.<sup>89</sup> Thus, residential schools became part of the accepted means of colonizing the western frontier and ensuring that the path to settlement on the frontier was peaceful.<sup>90</sup>

84. According to Dr. Milloy, Davin's report, constituted the "official" justification for the concerted attack by church and state upon Aboriginal culture, and it underpinned a curricular and pedagogical strategy that transformed the schools into sites of re-socialization:

"The thought even before the deed – that is before the residential school system took full physical shape across the country – was violent in its intention to "kill the Indian" in the child for the sake of Christian civilization. In that way, the system was, even as a concept, abusive."<sup>91</sup>

85. The Department took action to disrupt the parenting process, the results of which were, of course, very damaging as it constituted a serious interruption<sup>92</sup> in the ability of Aboriginal cultures to care for their children.<sup>93</sup> Separating "savage parent" from child was an attempt to overcome what the Department considered was the failure of the day schools, which allowed the Indian child to return home to its parents. Day schools could not educate Aboriginal children, the Department opined, as they found further difficulty in justifying this program as the expense was high and served only a small demographic. Also, the distance many children had to travel proved to be a barrier, and for certain parts of the year, such as in winter time, attendance was low.<sup>94</sup> Similarly, the current policies of the Crown continues to separate First Nations children from their parents and then funds the children's welfare less than their provincial counterparts, drawing

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<sup>89</sup> Pg. 102, Vol. 33, Dr. John S. Milloy Transcript.

<sup>90</sup> Pg. 156, Vol. 34, Dr. John S. Milloy Transcript.

<sup>91</sup> *A National Crime*, pg. xiv-xv.

<sup>92</sup> Pg. 31, Vol. 43, Elder Joseph Transcript.

<sup>93</sup> Pg. 6, Vol. 42, Elder Joseph Transcript.

<sup>94</sup> *A National Crime*, pg. 24.

the historical context forward of disrupting families and inflecting serious damage.

86. However, the *Davin Report* and the IRS system also needs to be understood within what Dr. Milloy calls “the context of the prevailing racial discourse”:

“Davin talks about in his report, you know, the problem here is he says these people have been caught, right. If we weren't suddenly arriving, right, with railroads and new economies, et cetera, they would have had the time to move along from, you know, the hunting and gathering which was about the buffalo, to agriculture, et cetera.

Now suddenly we're here and the only way to expedite that crisis is to provide education. Education can speed everything up for these people.

So you can see that old idea of cultural evolution. And you can see as well in the Davin Report, the idea of the need for separation, right; the whole idea that had come out of the eastern experience in the 1840s of cultural backsliding.

Not only could you not, he said, do much with the old people, they were -- well, you could get them to dress a bit better, he said, and maybe you could teach them some agricultural skills, but if you were talking about the future, it was the children and you had to liberate the children, he said, from the influence of the teepee, out from under their parents, right, where they could be put in school and properly socialized, then they could move on.”<sup>95</sup>

87. Lawrence Vankoughnet, the Deputy Superintendent General of Indian Affairs, under Sir John A. MacDonald, in a memo to the Prime Minister, said:

“Give me the children and you may have the parents, or words to that effect, were uttered by a zealous divine in his anxiety to add to

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<sup>95</sup> Pg. 98-99, Vol. 33, Dr. John S. Milloy Transcript.

the number of whom his Church called her children. And the principle laid down by that astute reasoned is an excellent one on which to act in working out that most difficult problem – the intellectual emancipation of the Indian, and its natural sequel, his elevation to a status equal to that of his white brother. This can only be done through education ..... Only by a persistent continuance in a thoroughly systematic course of educating (using the word in its fullest and most practical sense) the children, will the final hoped and long striven for result be attained.”<sup>96</sup>

88. The focus was on the children because adult Indians were, as explained in J.A. Macrae’s report of 1886, who was the Department’s Inspector of Schools for the North West, “physically mentally and morally...unfitted to bear such a complete metamorphosis.”<sup>97</sup>

89. Within the first decade of *Confederation* assimilation had become official government policy:

“Of all the initiatives that were undertaken in the first century of *Confederation*, none was more ambitious or central to the civilizing strategy of the Department, to its goal of assimilation, than the residential schools system. In the vision of education developed by both church and state in the final decades of the nineteenth century, it was the residential school experience that would lead children most effectively out of their “savage” communities into “higher” civilization” and “full citizenship”.<sup>98</sup>

#### **D) The System at Work, 1879 to 1946**

##### **i. “A National Crime”: Building and Managing the System, 1879 to 1946**

90. Shortly after *Confederation*, in 1868, the federal government assumed the funding for “schools frequented by...Indians”, some fifty-seven (57) schools,

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<sup>96</sup> *A National Crime*, pg. 7.

<sup>97</sup> *A National Crime*, pg. 25.

<sup>98</sup> *A National Crime*, pg. 21-22.

only two (2) of them were residential schools: Mount Elgin and Mohawk. These are what Dr. Milloy called the early “manual labour schools”. A decade later the number of residential schools had grown to four (4) with the addition of Shingwauk and Wikwemikong, all of which were in Ontario.

91. After the adoption of the *Davin Report* in 1883, the numbers mushroomed and by 1923 the Department had maintained responsibility over seventy-one (71) schools – sixteen (16) industrial schools and fifty-five (55) boarding schools – with 5,347 children in their care and in residence<sup>99</sup>. Dr. Milloy explained that “boarding schools” were small schools usually associated with a community, whereas “industrial schools” were big flagship schools located away from communities.<sup>100</sup> *Davin’s Report* had recommended the industrial school model. By 1923, the distinction was eliminated and all were known as residential schools. By 1931, that number grew to a high of eighty (80).<sup>101</sup>
92. In this first period of Canada’s control over the system, which Dr. Milloy identifies as stretching from 1883 to 1907, there was a great rush of buildings being constructed and approvals being given for its expansion.<sup>102</sup> For decades the school system grew almost without any planning or restraint, and as a whole, was constantly underfunded. Dr. Milloy writes the Department’s method of financing and managing the schools, and their lack of effective oversight, led to their rapid deterioration and overcrowding. This in turn created extremely unhealthy living conditions for the children, which Dr. P. Bryce exposed in his first report in 1907<sup>103</sup> and later called a “national crime” in his report of 1922.<sup>104</sup>
93. The expansion of the school system was not carefully planned. The churches pushed for expansion of the system according to their mission strategies and

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<sup>99</sup> *A National Crime*, pg. 52.

<sup>100</sup> Pg. 106-107, Vol. 33, Dr. John S. Milloy Transcript.

<sup>101</sup> *A National Crime*, pg. 102.

<sup>102</sup> Pg. 103, Vol. 33, Dr. John S. Milloy Transcript.

<sup>103</sup> *A National Crime*, pg. 77.

<sup>104</sup> *A National Crime*, pg. 51-52.

budgets, as the Department acquiesced to their streams of petitions for funding and subsidy.<sup>105</sup> Politics also played a role.<sup>106</sup> The system grew and was shaped, in the main, by federal reactions to the force of missionary effects and in response to persistent lobbying by church hierarchies. There was no sign at the time that that trend was abating, and the Department had no policy of consulting Aboriginal communities in any way during these processes.<sup>107</sup>

94. Lawrence Vankoughnet, who served as Deputy Superintendent General of Indian Affairs from 1874 until 1893, was an enthusiastic supporter of the IRS system and was important in setting out the schools system's underlying financial structure. He advised to Sir John A. Macdonald that the IRS were the best way of advancing the Indians in civilization. More importantly, he said "it would be well to give a grant of money annually to each school established by any denomination for the industrial training of Indian children."<sup>108</sup> His recommendations were based on the funding arrangements established in pre-*Confederation* Ontario, where at that time, schools were given an annual student grant up to an authorized number of students.
  
95. According to Dr. Milloy, "the whole thing got out of hand" because lots of grants were made to fund the schools, then the schools began to run deficits and the churches would come back and ask for more money to run the schools.<sup>109</sup> So, in 1892, the government decided to take control of the system by introducing a comprehensive per capita funding system by way of an Order-in-Council. The Department had introduced per capita funding earlier, but 1892 was "an attempt to regulate it".<sup>110</sup> The Order-in-Council of 1892 extended per capita funding to all residential schools. At the same time, the Order-in-Council "gave pervasive

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<sup>105</sup> *A National Crime*, pg. 55-56.

<sup>106</sup> *A National Crime*, pg. 57-58.

<sup>107</sup> *A National Crime*, pg. 59.

<sup>108</sup> *A National Crime*, pg. 61.

<sup>109</sup> Pg. 110-111, Vol. 33, Dr. John S. Milloy Transcript.

<sup>110</sup> Pg. 113, Vol. 33, Dr. John S. Milloy Transcript.

authority to the Department of Indian Affairs in exchange for that financial contribution.”<sup>111</sup>

96. The 1892 Order-in-Council was an effort to bring in better cost controls by the Department asserting more management authority and by introducing a “forced system of economy”.<sup>112</sup> However, according to Dr. Milloy, Vankoughnet’s per capita system remained too open-ended. This is because the Department did not have any sense of where it stood financially in terms of the operation of the school until it received the bills for equipment, materials and other things. Again, according to Dr. Milloy, the per-capita system was problematic because it did not meet the real cost of operating the schools, meaning the churches had to absorb the costs that were not covered, however, as the churches were also financially overborne, they would request further funding from the Department anyway. The whole process was unpredictable, and as time moved on, became increasingly expensive.<sup>113</sup>
97. With regard to the “forced system of economy”, the Department had the authority to institute “rules...laid down from time to time...to keep the schools at a certain standard of instruction, dietary and domestic comfort”, which was contained in the *Regulations Governing the Per Capita Grant to Industrial Schools* that were developed in conjunction with the churches, and later formalized in a separate Order-In-Council in 1894.<sup>114</sup>
98. The *Regulation* concerned the administrative operation of the school system and instituted stricter Departmental control.<sup>115</sup> The Department would determine who worked in the school, including all principals, teachers and staff, which children got into the school, how long they stayed, and under what circumstances they were to be discharged. The churches’ role was to maintain

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<sup>111</sup> Pg. 112-113, Vol. 33, Dr. John S. Milloy Transcript.

<sup>112</sup> *A National Crime*, pg. 62.

<sup>113</sup> *A National Crime*, pg. 63.

<sup>114</sup> *A National Crime*, pgs. 63-64.

<sup>115</sup> *A National Crime*, pg. 64.

records of attendance and discharge and keep the requisite financial records. Amongst this arrangement as well were the standards of care to be maintained, which were dictated by the Department.<sup>116</sup>

99. This attempt between 1892 and 1894 by the federal government to bring order to the system was recognized as a total failure within the decade. This blanket condemnation was issued by Duncan Campbell Scott, Deputy Superintendent of Indian Affairs from 1913 to 1932, who began to realize the deficit in operating the system was unabatedly mounting. Dr. Milloy wrote that the Department and church ledgers were overtaken in red ink because Industrial schools in general ran large deficits despite the rules and arrangements that had been laid down in the Orders of 1892 and 1894.<sup>117</sup>
100. Moreover, conditions in IRs were not improving. By 1907, Dr. P.H. Bryce reported the deplorable condition of the school system, and the dangerous health conditions therein, which, for him, were directly attributable to the Department's maladministration of the system.<sup>118</sup> In his subsequent report, he described it as a "criminal disregard" of the Department's constitutional duty toward First Nations people.<sup>119</sup>
101. According to Dr. Milloy, one of the weak links in the per capita funding mechanism was the ability of the schools to acquire and retain pupils. This was the basis, counted quarterly, that the total financial grant was calculated. Recruitment and compulsory education that sustained high enrolments were critical elements in the residential school system's financial structure and its

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<sup>116</sup> *A National Crime*, pg. 64.

<sup>117</sup> *A National Crime*, pg. 66.

<sup>118</sup> *A National Crime*, pg. 90.

<sup>119</sup> *A National Crime*, pg. 52.

vitality. These issues constituted significant management challenges for the churches and the Department.<sup>120</sup>

102. Not surprisingly, the most common factor restraining enrolment was the widespread and persistent reluctance of parents to send their children to the schools:

“We think we are capable of taking care of our children when not at school. The whiteman loves his children and likes to have them round him in the evening and on the days in which school is not open. We also love our children with just as warm an affection as the whiteman and we want to keep them round us.”<sup>121</sup>

103. Their reluctance was stemmed in part from the harsh and severe punishment the children were receiving while away at school. The records indicate that Departmental officials were aware of the situation<sup>122</sup>, and recognized such punishment as fatal to the prospects of success which of course had a negative impact on recruitment. In addition to excessive punishment and discipline, the schools were working the children too hard with manual labour associated with agriculture to the point of ill-treatment.<sup>123</sup>

104. Later, in 1919, the unresolved issues relating to recruitment were addressed when Duncan Campbell Scott, who had earlier opposed compulsion, decided in favour of it. He decided it was impossible to effectively “recruit for the schools under the present voluntary system.” An amendment to the *Indian Act*, 1920 made it mandatory for every child between the ages of seven and fifteen to attend school. Section 10 set out the mechanics of enforcement: truant officers,

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<sup>120</sup> *A National Crime*, pg. 67.

<sup>121</sup> *A National Crime*, pg. 67.

<sup>122</sup> *A National Crime*, pg. 68.

<sup>123</sup> *A National Crime*, pg. 67-68.

and, “on summary conviction,” penalties of fines or imprisonment for non-compliance.<sup>124</sup>

105. According to Dr. Milloy, in 1907 the IRS system reached a point of crisis, in which two things happened:

Two things happened -- and I said 1907 was an important period, and it is, because it sort of comes to a crisis in 1907, the funding business, and it comes to a crisis because one of the impacts of overcrowding is finally recognized and publicized. Dr. Bryce was the department's Medical Officer, and he did a survey -- and the survey is in the text -- he surveyed a number of the residential schools across the country, he sent them out a questionnaire, they filled in the questionnaire and they sent it back.<sup>125</sup>

106. Bryce's report grabbed the headlines.<sup>126</sup> What it revealed was a pretty horrifying situation in terms of the health of the students. As will be expanded upon later, the schools were rife with tuberculosis.<sup>127</sup>

Indian boys and girls are dying like flies in these situations or shortly after leaving them"...“Even war seldom shows as large a percentage of fatalities as does the education system we have imposed on our Indian wards.”<sup>128</sup>

107. The other thing that happened in 1907, the crisis prompted the Department to bring further reforms to the management system in IRS. From 1908 until 1911, negotiations take place between the Department and the churches, which result in a new system, according to Dr. Milloy:

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<sup>124</sup> *A National Crime*, pg. 71.

<sup>125</sup> Pg. 129, Vol. 33, Dr. John S. Milloy Transcript.

<sup>126</sup> *A National Crime*, pg. 91.

<sup>127</sup> Pg. 131, Vol. 33, Dr. John S. Milloy Transcript.

<sup>128</sup> *A National Crime*, pg. 90.

So that leads, in 1908, I think it was, up through 1910, a series of negotiations between the churches and the government and the signing in 1911 -- where am I, of contracts signed by the churches with the government for each of the schools sort of thing. The contracts maintain the per capita. There's still going to be a per capita system and it adds a series of other administrative riders and this stays the -- those contracts are the final administrative and financial management system from 1911 down to 1957 when a new system of funding is brought in.<sup>129</sup>

108. This reform was urgently required because of the deficits that were mounting but also because of the growing conviction that the schools were not succeeding in their “civilizing” the children – nothing short of reconstructing the school system was suggested.<sup>130</sup> These reforms phased out industrial schools, increased per-capita grants, while the federal government took on a greater role in the overall administration:

The Departmental Secretary, J.D. McLean, certainly wanted it to appear that a new administrative and financial day had dawned. He noted that, as the government was to pay “a much larger proportion of the total cost of Indian education than before,” it is “compelled to assume a proportionately larger measure of responsibility as to the conduct of these schools.”<sup>131</sup>

109. However, the school system did not escape its past as it soon fell back into funding and management difficulties. Although the 1911 contracts with the churches were an attempt to freshen their relationship with the Department, it was, in effect, just more of the same. These contracts were to be reviewed and renewed at the end of five years but they never actually were. Soon there was no basis of any enforceable agreement between the parties, who then, shortly

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<sup>129</sup> Pg. 134, Vol. 33, Dr. John S. Milloy Transcript.

<sup>130</sup> *A National Crime*, pgs. 71-72.

<sup>131</sup> *A National Crime*, pg. 74.

afterward, let their relationship drift into an “unbusinesslike lack of arrangement” and eventually into discord.<sup>132</sup>

110. None of the churches could live within the limits of their per-capita grants, and the Department’s reforms were ultimately inadequate:

“The weight of underfunding that had pressed down on church and Departmental budgets and had driven the schools into debt was nothing compared to the consequences of that seen in the deplorable condition of so many of the schools themselves. Badly built and ill-maintained, they were both the cause and the context of a dreadful crisis in sanitation and health.”<sup>133</sup>

111. The *Industrial School Era* came to a close around 1922 after which all schools were termed “residential”. This was the same year the Ontario Provincial Tuberculosis Commission published a pamphlet by Dr. P.H. Bryce, the former Chief Medical Officer of the Indian Department, entitled *The Story of a National Crime being an Appeal for Justice to the Indians of Canada*. His report condemned the Department for failing to act “...in the face of the white plague, tuberculosis.” Dr. Bryce charged that the “trail of disease” he had previously reported to the Department in 1907 had remained “unchecked by any serious efforts on the part of the Department of Indian Affairs.”<sup>134</sup>

**ii. “The Charge of Manslaughter”: Disease and Death, 1879 to 1946**

112. The issues of health and conditions in the residential schools were the subjects of two reports in 1907 and 1980, respectively: Dr. P.H. Bryce’s first report and a report by F.H. Paget’s done in 1908. The Bryce report brought the consequences for the children of all the health issues, overcrowding, the lack of

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<sup>132</sup> *A National Crime*, pgs. 74-75.

<sup>133</sup> *A National Crime*, pg. 75.

<sup>134</sup> *A National Crime*, pg. 51.

proper sanitation and ventilation, and the failure of administrative controls, into horrifying focus.<sup>135</sup>

113. The Honourable S.H. Blake, a lawyer conducting a review of the Anglican mission work, told Minister Frank Oliver that:

The appalling number of deaths among the younger children appeals loudly to the guardians of our Indians. In doing nothing to obviate the preventable causes of death, brings the Department within unpleasant nearness to the charge of manslaughter.<sup>136</sup>

114. The cause of the tragic “trail of disease and death” lay in the construction, administration and funding of the residential school system. In this way, chronic underfunding was connected to child deaths in the schools. Bryce estimated that 24% of children in IRS died of TB.<sup>137</sup> Dr. Milloy in his testimony said the rate was probably as high as 42%.<sup>138</sup> According to Duncan Campbell Scott, Deputy Superintendent of the Department of Indian Affairs, “fifty per cent (50%) of the children who passed through these schools did not live to benefit from the education which they had received therein.”<sup>139</sup>

115. The children died in astonishing numbers due to the Department’s underfunding of the school system, which took expression in many horrific forms: overcrowding, poor hygiene, poor diet, amongst others.<sup>140</sup> The increasing number of deaths was directly contributable to removing children from healthy traditional lifestyles to the confines of badly constructed schools made worse over time by neglectful and inadequately funded maintenance programs. Added to this was the careless administration of the health regulations, a lack of

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<sup>135</sup> *A National Crime*, pg. xv and 77.

<sup>136</sup> *A National Crime*, pg. 77 and Pg. 133, Vol. 33, Dr. John S. Milloy Transcript.

<sup>137</sup> Pg. 131-132, Vol. 33, Dr. John S. Milloy Transcript.

<sup>138</sup> Pg. 131-132, Vol. 33, Dr. John S. Milloy Transcript.

<sup>139</sup> *A National Crime*, pg. 51.

<sup>140</sup> *A National Crime*, pg. xv.

adequate medical services, and the negative effect on the Indian children of the harsh and alien routines of the schools' modes of education.<sup>141</sup>

116. The Department's underfunding meant the schools were not only cheaply built but also badly and poorly constructed.<sup>142</sup> The Department and the churches were aware of these problems, or could have been, Dr. Milloy writes, however, the scope of these problems were published in a single report submitted in 1908 by F.H. Paget, an accountant with the Department. His report revealed that the schools ran the gamut from good to deplorable. The majority – fifteen out of the twenty-one – were in the latter category. Paget's report reiterated the connection Bryce had made the year earlier in 1907, which was the connection between the condition of the schools and the ill-health of the children, particularly through tubercular infection."<sup>143</sup>

117. The root cause overcrowding and the deteriorating and deplorable conditions of the school buildings can all be traced back to the funding arrangements, and especially to the per-capita system, established in the early 1890's. This is because the per-capita system was based on enrollment which meant that in order for the churches to increase the per-capita they had to increase the amount of students attending their schools. And so they did to the point of overcrowding which was a practice that contributed directly to the health problems in the schools.<sup>144</sup> According to Dr. Milloy, the emphasis on recruitment and enrollment created anxiety in the churches as "[t]he per capita grant system encourage[d] the taking in of those physically and intellectually unfit simply to keep up numbers." It was known that schools routinely admitted unhealthy

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<sup>141</sup> *A National Crime*, pg. 77.

<sup>142</sup> *A National Crime*, pg. 78-79.

<sup>143</sup> *A National Crime*, pg. 82-83.

<sup>144</sup> *A National Crime*, pg. 87.

students without any medical check. This state of affairs was not restrained in any effective manner by the Department.<sup>145</sup>

118. The 1892 and 1894 Orders-in-Council and the 1911 contracts established the government's responsibility for providing medical services to the schools, and provided for the right to inspect the schools. The 1894 Regulations also required a medical certificate before admission. However, the implementation of these regulations left much to be desired, according to Dr. Milloy.<sup>146</sup>
119. It is noteworthy that few federal government representatives were willing to defend the record of the schools, but despite the gravity of the situation as laid out by Bryce and supported by local officials, no full investigation was ever launched.<sup>147</sup>
120. The *Bryce Report* (1907) made a number of recommendations regarding the tuberculosis epidemic that were part of the contract discussions leading up to 1911. These included urging the government to press on with residential education with the stress on reserve-based boarding schools, and to place the management of the schools wholly in Departmental hands, relegating the churches to an advisory capacity. Bryce also made recommendations to insure that "the health interests of the pupils be guarded by a proper medical inspection and that the local physicians be encouraged through the provision at each school of fresh air methods in the care and treatment of cases of tuberculosis", i.e., sanatoria.<sup>148</sup>
121. Unfortunately, the Bryce recommendations did not make it into the contracts of 1911. "By the end of the *First World War*, it was "business as usual," business

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<sup>145</sup> *A National Crime*, pg. 88.

<sup>146</sup> *A National Crime*, pg. 89.

<sup>147</sup> *A National Crime*, pg. 92.

<sup>148</sup> *A National Crime*, pg. 93.

as it had been since the 1880's."<sup>149</sup> In 1922, Bryce wrote *The Story of a National Crime*.<sup>150</sup> He laid the blame for the continuing death of children after 1907 on "the dominating influence" of Duncan Campbell Scott, who had become "the reactionary" Deputy Superintendent General. In 1913, Scott prevented "even the simplest effective efforts to deal with the health problem of the Indians along modern scientific lines."<sup>151</sup>

122. During the *First World War* (1911-1918) the budget for medical services in the residential schools declined:

"Bryce estimated that only \$10,000 a year was put into the budget to discharge the government's medical responsibility to some 105,000 people spread across the country in 300 bands, while in the City of Ottawa, which had a similar population, the Province spent three times that amount on tuberculosis patients alone."<sup>152</sup>

123. The Department was progressively less capable of dealing with tuberculosis, and it was completely unarmed in the face of the Spanish influenza that struck the county in 1918-19 and killed an estimated 4,000 Aboriginal people, a high mortality in comparison with the general Canadian population, which was due to the "poor living conditions, poor nutrition and lack of access to medical care" pertaining to the schools.<sup>153</sup>

124. The children in the schools were completely defenceless and the conditions were described as "nothing less than criminal..." with the children who died being buried like paupers with two to a grave. Reports such as Bryce's that charted the persistence of all the conditions that were known to undermine the health of the children, and considering the actions such as those of Scott, reveal

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<sup>149</sup> *A National Crime*, pg. 94.

<sup>150</sup> Pg. 143, Vol. 33, Dr. John S. Milloy Transcript.

<sup>151</sup> Pg. 144, Vol. 33, Dr. John S. Milloy Transcript.

<sup>152</sup> *A National Crime*, pg. 96.

<sup>153</sup> *A National Crime*, pg. 96.

“the neglect, the lack of love, for those suffering and dying in the careless arms of school authorities.”<sup>154</sup>

125. Dr. F.A. Corbett was a Regina physician commissioned by Scott in 1920 and again in 1922 to survey the western boarding schools. Effectively, he was to cover the same ground Bryce had covered in 1907 and in 1909. Corbett found that little had changed and he reported many signs of gross neglect on the part of the Department.<sup>155</sup> According to Corbett, the churches could, even within their budgetary limits, have taken more effective care of the children, and the Department, too, could have done better if not through improved funding at least through its authority. However, neither the Department nor the churches took any curative action effectively relegating the Orders-in-Council of 1892 and 1894 “administrative fictions”.<sup>156</sup>

126. Some of the images of the children depicted by Dr. Corbett are painful, like the little girl he found in the infirmary at the Sarcee Boarding School outside Calgary:

The condition of one little girl found in the infirmary is pitiable indeed. She lies curled up in a bed that is filthy, in a room that is untidy, dirty and dilapidated, in the northwest corner of the building with no provision of balcony, sunshine or fresh air. Both sides of her neck and chest are swollen and five foul ulcers are discovered when we lift the bandages. This gives her pain, and her tears from fear of being touched, intensifies the picture of her misery.<sup>157</sup>

127. The reality was that the school system drifted without any concerted intervention:

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<sup>154</sup> *A National Crime*, pg. 97.

<sup>155</sup> *A National Crime*, pg. 98.

<sup>156</sup> *A National Crime*, pg. 101.

<sup>157</sup> *A National Crime*, pg. 100.

“Many, many children – perhaps as high as fifty percent according to Scott’s estimate – would not “attain maturity and be able to exercise any civilizing influence” in their communities...a significant cause of this lay with personnel in the Department and in the churches involved directly in the management of the system.”<sup>158</sup>

128. Wartime reductions ushered in yet another era of underfunding. However, initially after the war, there were advances in the level of the per-capitas but they were never really enough to satisfy the churches’ appetites for government funds, nor to prevent them from again “encountering huge deficits.” In 1932, it was found necessary to make a flat decrease in per-capita grants. Later, other cuts followed.<sup>159</sup> Privately, however, senior staff within the Department knew the per-capita average in 1938 was exceptionally low and inadequate in relation to other residential child-care facilities.<sup>160</sup>
129. The persistence of underfunding undercut the maintenance and repair of buildings. By the *Second World War*, the Department was so far behind that they estimated they had less than half the funds necessary to meet repair commitments. A Departmental survey in 1922 concluded that of the seventy-five schools the great majority were not “modern up to date buildings in good condition,” nor were they “adequate for the purpose of Indian education.” A small number were condemned as “dilapidated and inadequate.”<sup>161</sup>
130. Badly maintained buildings due to underfunding continued to translate into bad health. According to Dr. Milloy, the condition of TB deaths in the schools continued. However, it becomes a national controversy, which by 1938, comes to a head:

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<sup>158</sup> *A National Crime*, pg. 101.

<sup>159</sup> *A National Crime*, pg. 103; also, pg. 164-167, Vol. 33, Dr. John S. Milloy Transcript.

<sup>160</sup> *A National Crime*, pg. 103.

<sup>161</sup> *A National Crime*, pg. 104.

In 1938, it comes to a head because provincial ministers of health come together and come down to Ottawa and knock on the prime minister's door and the Ministry of Indian Affairs pointing out that Ottawa spends more per capita on tuberculosis treatment than the Department does on Indians and the tuberculosis rates are very negative for Indians.

And what's going on, of course, is that Indians are coming into my community, they say, and sneezing on us, right? That they come in and they are -- they spread the plague of tuberculosis through Canada. And that's the only way that the then Deputy Minister, who's a medical doctor, of course, the Deputy Minister of Indian Affairs, managed to get some money into the tuberculosis treatment, both for the general population and for the children in the schools.

. . . . .

It's at that point that the Department begins to put money into it and the slope down in terms of tuberculosis infection begins to be perceived.<sup>162</sup>

131. Connected to this issue is evidence of the persistent and abundant failure of the churches and Department to adequately parent the children, which was due in part, as well, to underfunding. There were many cases where the children were not being adequately fed, clothed, or taught and, finally, discipline often crossed the line into abuse.<sup>163</sup>

### iii. **The Parenting Presumption: Neglect and Abuse**

132. From 1879 to 1946, Dr. Milloy writes that sensitivity to the plight of the children was rare and a "voluminous catalogue of mistreatment" was mounting.<sup>164</sup> The Department and the churches failed to "be humane and kindly" to the children,

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<sup>162</sup> Pg. 144-146, Vol. 33, Dr. John S. Milloy Transcript.

<sup>163</sup> *A National Crime*, pg. 105-107.

<sup>164</sup> *A National Crime*, pg. 110.

and they did not meet their parental responsibilities or the needs of the children. Also, according to Dr. Milloy, they did not provide an education adequate enough so as to justify the children's removal from their parents and communities. This is partly due to chronic underfunding, but also because the teachers and staff were not of the requisite quality for the difficult task of parenting the children.<sup>165</sup>

133. The Department and churches were overwhelmed.<sup>166</sup> They had neither the necessary financial or administrative resources, but more seriously, they lacked the moral resources, even by European-Christian standards, according to Dr. Milloy, to rectify the persistent problems within the schools and to properly parent the children. Neglect was a habit in the schools and harsh discipline and excessive cruelty were routine, at time they were excused or ignored, however the Department made no attempt to halt the system or change it. Instead the system prevailed despite the Department's own reports that called for urgent and necessary change.

134. Underfunding was the overriding dynamic that determined the quality of the "dietary" (or scale of rations<sup>167</sup>) in the schools. Many of the principals could not comply with the dietary regulations because the per-capita level was too low, or because they did not have a large enough student authorization (or student enrolment). The economic situation did not change between 1915 and 1938, and, later, cuts in the Departmental budget during the *Depression* and *Second World War* made the task of feeding the children even more difficult:<sup>168</sup>

"The final irony ... was that ... children on entering the schools likely left behind a better diet, provided by communities that were

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<sup>165</sup> *A National Crime*, pg. 111.

<sup>166</sup> Pg. 50, Vol. 34, Dr. John S. Milloy Transcript.

<sup>167</sup> *A National Crime*, pg. 116; also, pg. 170-171, Vol. 33, Dr. John S. Milloy Transcript.

<sup>168</sup> *A National Crime*, pg. 118.

still living on the land, than that which was provided to them by school authorities.”<sup>169</sup>

135. The inadequacy of the per-capita grants was a universal reality for the schools.<sup>170</sup> The absence of adequate funding meant the schools had to fall back on the school’s revenue producing potential, the farm, or rely on charity. Despite the situation in the schools, Ottawa did not intervene to ensure that the children were adequately clothed and fed, though officials in the field, from the earliest days of the system, called for such action. The system was allowed to drift and problems continued.<sup>171</sup>
136. The “parenting presumption” was at the heart of the school system and it was the presumption drawn from the non-Aboriginal community, that the teachers, administrators, principals in the schools were more appropriate parents for young Aboriginal children than their own biological parents.<sup>172</sup> Dr. Milloy wrote that could not have been true as he cites numerous examples of incidents, problems and issues with respect to the care of the children. These incidents and problems arose for the greater part because operating a residential school was a complex and stressful task.<sup>173</sup> Dr. Milloy explained that the schools were “sites of the struggle against poverty”, and in them was an atmosphere of considerable stress that dulled the staff’s sensitivity toward the children. This negative situation created a brooding culture of violence which was further exacerbated because of staff inadequacies as caregivers.<sup>174</sup>
137. Although the Department set standards to which the churches were to abide, the churches were persistently negligent, as many cases of egregious abuse and examples of incompetent and/or cruel staff were reported to the Department

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<sup>169</sup> *A National Crime*, pg. 121.

<sup>170</sup> *A National Crime*, pg. 125.

<sup>171</sup> *A National Crime*, pg. 127; also, pg. 173-175, Vol. 33, Dr. John S. Milloy Transcript.

<sup>172</sup> Pg. 70, Vol. 34, Dr. John S. Milloy Transcript.

<sup>173</sup> Pg. 71-75, Vol. 34, Dr. John S. Milloy Transcript.

<sup>174</sup> *A National Crime*, pg. 129; also, pg. 175, Vol. 33, Dr. John S. Milloy Transcript.

throughout this period. Frequently, the Department would turn its back on its own wards and refuse to take seriously the complaints of the children's biological parents when they would complain about the treatment of their child.<sup>175</sup> According to Dr. Milloy, the Department was not up to the difficult challenge that residential school education presented.

138. Instead of employing competent staff, the Department ran the system with mission workers which allowed it to be run more economically than it would be if the system had to compete with provincial education systems. The schools had become a dumping ground for less-competent church staff.<sup>176</sup> This amongst other things created considerable stress on the system. A high turnover rate was prevalent across Canada due to the low-level salaries and the working conditions. The management structure compounded these problems as the working conditions destroyed staff morale and drove them to resignation.<sup>177</sup>
139. Like the Orders-in-Council of 1892 and 1894, the Department's stance on their right to ensure proper treatment of the children was also an administrative fiction. In the schools, strict codes of discipline governed every activity as the principals and staff "disciplined" children with impunity. Some children were punished so harshly that they ran away from the school, which, according to Dr. Milloy, was "one of the most reliable indicators of abuse" (i.e. the runaway). In some cases, they ran away during the winter months only to freeze to death outside in the bitter Canadian cold.<sup>178</sup>
140. Abuse flourished in the schools as the Department made no serious response to the dozens of incidents involving severe punishment or neglect that caused injury or death. Abuse was a persistent phenomenon in the schools and the

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<sup>175</sup> *A National Crime*, pg. 130.

<sup>176</sup> *A National Crime*, pg. 130-131.

<sup>177</sup> *A National Crime*, pg. 134-135.

<sup>178</sup> *A National Crime*, pg. 138-139.

Head office, regional, school, and church files are replete with incidents.<sup>179</sup> Dr. Milloy has stated there was a Departmental tradition of having the churches investigate themselves with the result often being that the abusers of the children were exonerated of incidents often involving very serious abuse. More often than not, no further action would be taken by the Department, and sometimes the abusers simply left one residential school only to be transferred to another.<sup>180</sup>

141. The record of abuse continued to accumulate each year the schools were in operation. Abuse of many forms was a problem the Department did not deal with despite this continuing record of ill-treatment toward the children.<sup>181</sup> Even sexual abuse was not addressed in a meaningful way. Instead of running to the aid of the children, the Department routinely and often aggressively protected the system and their reputation.<sup>182</sup>

142. According to Dr. Milloy, “[t]he record of abuse that was compiled by the action of some and the persistent inaction of the Department, decade by decade, did more than “bring contempt” on the schools, it also created a sorrowful history that will not fade out of the human consciousness very rapidly.” Abuse had long-term consequences for the children and their communities. It, too, had immediate consequences for the educational function of the system. For Dr. Milloy, abuse was self-defeating and it was more than a moral failure, it was a tactical mistake and it disrupted the context in which the cultural transformation was to take place.”<sup>183</sup>

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<sup>179</sup> *A National Crime*, pg. 140.

<sup>180</sup> *A National Crime*, pg. 144-148.

<sup>181</sup> Pg. 89, Vol. 34, Dr. John S. Milloy Transcript.

<sup>182</sup> *A National Crime*, pg. 144-145.

<sup>183</sup> *A National Crime*, pg. 155; also, pg. 123, Vol. 34, Dr. John S. Milloy Transcript.

#### iv. Teaching and Learning, 1879 to 1946

143. The schools ultimately failed to reach their educational goals. In many cases, the graduates could hardly speak English, which was a common complaint, and which happened to be one of the sole reasons the children were in residential school. The majority of graduates returned to their families and communities wholly unprepared to lead their communities to a new future despite their years of attendance in these schools.
144. Initially, graduates were to be absorbed by the non-Aboriginal communities but this initiative came to be recognized as a gross miscalculation on the part of the Department. Employment in these non-Aboriginal communities was not readily available, but the graduates also faced a great deal of racial prejudice which happened to undermine the entire effort. This led the Department to conclude as early as 1889 that “there appears to be no alternative but to return the [children] to the reserves.”<sup>184</sup>
145. Attempts at increasing the level of training were thwarted by the system’s most persistent nemesis, underfunding, which determined the practical curriculum more so than the curricular philosophy or pedagogy from the Department.<sup>185</sup> Underfunding meant the schools had to engage the children’s labour in order for the school to support itself. In this way, “training” had a two-fold purpose: one was education and the other was “work as education”, however a balance between the two was rarely maintained, as labour easily overwhelmed education. This led one Departmental official, M. Benson, to conclude in 1918 that the children were “worked too hard and taught too little...the time devoted to chores and their sheer drudgery reduced the educational potential of the children’s labour.”<sup>186</sup>

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<sup>184</sup> *A National Crime*, pg. 158; also, pg. 131-136, Vol. 34, Dr. John S. Milloy Transcript.

<sup>185</sup> *A National Crime*, pg. 168.

<sup>186</sup> *A National Crime*, pg. 168-169.

146. This lack of progress, or “retardation”<sup>187</sup> as it was termed, negatively affected the children’s’ educational performance. In 1945, while there were 9,149 residential school students, there were just over 100 students enrolled in grades above grade 8. In one research study, it was estimated in the period between 1890 and 1950 at least sixty percent (60%) of children in federal schools (residential and day schools) failed to advance past Grade 3.<sup>188</sup>
147. With regard to the literary curriculum, its failure was due in large part to the pedagogy the schools used in teaching the Indian children. Simply, their life experiences were different than that of white children. It was suggested that these differences should have been incorporated and adapted into a curriculum more responsive to their learning needs. Dr. Milloy testified that “a cultural critique” started to emerge about the curriculum: what it meant was that the “white child curriculum” was unsuitable to the learning needs of the Indian child, and thus the curriculum should have been amended to suit the children’s cultural differences, not the other way around.<sup>189</sup>
148. This idea evolved into a trend that progressed to full-blown cultural relativism among non-Aboriginal Canadians in the 1970’s however the revolutionary potential of that discourse was never realized, and was never integrated into the Department’s educational philosophy.<sup>190</sup> “Cross-cultural teaching” required special teachers who had superior skills – the best that could be produced – but the reality was that the residential school teachers did not even approach normal provincial standards.<sup>191</sup>
149. J.A. Macrae reported as early as 1886 that the teachers in the school system were “illiterate persons, ignorant of the first elements of teaching and powerless

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<sup>187</sup> Pg. 149, Vol. 34, Dr. John S. Milloy Transcript.

<sup>188</sup> *A National Crime*, pg. 171; also, pg. 142, Vol. 34, Dr. John S. Milloy Transcript.

<sup>189</sup> *A National Crime*, pg. 172; also, pg. 176-182, Vol. 34, Dr. John S. Milloy Transcript.

<sup>190</sup> *A National Crime*, pg. 175; also, pg. 187-189, Vol. 34, Dr. John S. Milloy Transcript.

<sup>191</sup> *A National Crime*, pg. 175-176.

to impart any ideas that they may have possessed regarding the simplest subjects.”<sup>192</sup>

150. The situation became more impossible when language was added to the equation. Most children came to these schools with one language and none of them were allowed to speak it.<sup>193</sup> It was generally acknowledged that only the most carefully planned program and most skillful teaching could show satisfactory results, but such was rarely at hand.<sup>194</sup> And, the resistance of the children to dropping their own language for English met the various types of opposition from these unskilled teachers, the most common technique being punishment or “coercion”.<sup>195</sup>
151. Language was the most critical part of the civilizing strategy and the schools fell far short of their goal.<sup>196</sup> They were unsuccessful in teaching the students the colonizer’s language and they had failed to prepare them for a new life. Dr. Milloy writes that “...in many cases, as studies in the 1960s revealed, because of their extended isolation from their families, the persistent denial of their culture and the abuse, many returned unable to lead any sort of productive life, old or new.”<sup>197</sup>

## **E) The Federal Government's Closing of the Residential School System**

### **i. Integrated Day Schools**

152. Although assimilation was still a desirable end to the “Indian problem”, Parliament had amended the *Indian Act* in 1951 in accordance with the recommendations of a special joint committee of the House of Commons established in May 1946 to accommodate certain “Indian aspirations”. Some of these aspirations pertained to the Department granting a degree of self-

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<sup>192</sup> *A National Crime*, pg. 177.

<sup>193</sup> Pg. 47, Vol. 42, Elder Joseph Transcript.

<sup>194</sup> *A National Crime*, pg. 183.

<sup>195</sup> *A National Crime*, pg. 183.

<sup>196</sup> *A National Crime*, pg. 185; also, pg. 201, Vol. 34, Dr. John S. Milloy Transcript.

<sup>197</sup> *A National Crime*, pg. 185; also, pg. 206-207, Vol. 34, Dr. John S. Milloy Transcript.

government to communities and establishing a committee to investigate treaty violations and land claims. However, these proposed changes never saw the light of day as the 1951 amendments were largely re-statements of earlier *Indian Acts*, and the revisions being “limited to simply revising current practices inherited from the nineteenth century”.<sup>198</sup>

153. Education, however, was the exception as both the Department and Parliament agreed “that wherever and whenever possible Indian children should be educated in association with other children.” This was the establishment of a new policy. From this point forward, approximately 1948, the Department re-directed its efforts and resources from the residential school system to this “policy of integration” which also included the creation of a day school system. The residential schools were to be closed. Now, Indian children were to be integrated by “transferring [them] to provincial schools, and federal schools to provincial administrative school units.”<sup>199</sup>
154. Closing residential schools was a task of considerable magnitude, according to Dr. Milloy, as there were seventy-two (72) schools with an enrolment of 9,368 children, as of 1948, operating in the Northwest Territories and every province in Canada with the exception of New Brunswick, Prince Edward Island and Newfoundland. In addition to the numbers and prevalence of the schools, it was also difficult because of First Nation rejected “integration” as a continuation of Canada’s policy of assimilation. First Nations had become more politically organized too at the national level during this period as they sought control over “Indian education”.<sup>200</sup>
155. The Department was faced not only with the challenge of creating an integrated education system in cooperation with provincial governments, but also with providing all of the other services for Aboriginal people that are provided by the

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<sup>198</sup> *A National Crime*, pg. 190; also, pg. 181, Vol. 33, Dr. John S. Milloy Transcript.

<sup>199</sup> *A National Crime*, pg. 189-190.

<sup>200</sup> *A National Crime*, pg. 190.

Canadian government.<sup>201</sup> This new attitude towards integration created a sense of “public governmental paternity” that affected the Department’s approach to Indian children, the closing of the residential school system, and in their working toward another system, an integrated system of education.<sup>202</sup>

156. The new emphasis on an integrated system of education did not improve the condition of the residential schools. Instead, the residential school system became an increasingly “unwanted child” of the Department of Indian Affairs after this new emphasis. Nor did the funding improve after this new emphasis was adopted.<sup>203</sup> The idea of *integration* was the Department’s idea.<sup>204</sup> Their intention was to integrate Indian people into the general population, that is, to be placed administratively in a place that integrates them with other Canadians. The idea itself however was born in the United States where Aboriginal children were educated along with non-Aboriginal children in state schools rather than in federal day schools or federal residential schools. The Department was keen to the idea due to its economic appeal however they overlooked the cultural crises that Aboriginal children would suffer in provincial schools – a crisis according to Dr. Milloy that is still un-ending.<sup>205</sup>
157. From the Department’s point of view, the provincial government possessed the expertise and the staff to provide welfare services and other similar services. Therefore the best option available to the Department was to connect Aboriginal people to provincial services.
158. Later, Indian Affairs gave itself the green light to increasingly dis-establish residential schools, close the system, and move children into day schools across the country. Despite the Department’s decision to close schools, the residential school system continued for approximately another four decades;

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<sup>201</sup> Pg. 186, Vol. 33, Dr. John S. Milloy Transcript.

<sup>202</sup> Pg. 180, Vol. 33, Dr. John S. Milloy Transcript.

<sup>203</sup> Pg. 181, Vol. 33, Dr. John S. Milloy Transcript.

<sup>204</sup> Pg. 182, Vol. 33, Dr. John S. Milloy Transcript.

<sup>205</sup> Pg. 183-184, Vol. 33, Dr. John S. Milloy Transcript.

and even though the number of residential schools falls from the 1940's to the 1980's, there is a noted increase in the number of residential school students at the same time.<sup>206</sup>

159. In 1930, there were 78 residential schools, which decline to 12 in 1980. The Department-church partnership ends in 1969; and federal funding for IRS ends in 1986, which signals the end of the IRS period, according to Dr. Milloy. However, in 1953<sup>207</sup>, despite the decline in the number of schools, there was a growth in student population to approximately 11,000 children in residential schools across Canada.<sup>208</sup>
160. According to Dr. Milloy, the Department found itself at this time with "...not only with the challenge of creating an integrated education system in cooperation with provincial governments, but also with providing all those other services for Aboriginal people that are provided by the Canadian government" at the same time.<sup>209</sup> When Aboriginal people became Canadian citizens in 1948, the Department felt the pressure and the necessity to provide to First Nations people the same sorts of services at the same levels of quality that other Canadians enjoyed, which was a Herculean task.<sup>210</sup>
161. The challenge of providing social services was that First Nations people live in difficult places to access meaning that they are not easily connected to a range of social services like hospitals and welfare offices and job retention services.<sup>211</sup> According to Dr. Milloy, it was a major challenge to achieve integration of the existing system(s) on top of moving Aboriginal children to integrated day schools and managing a residential school system.<sup>212</sup> Later, when the residential schools were in the process of closing, the children had to live at home with their

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<sup>206</sup> Pg. 185-186, Vol. 33, Dr. John S. Milloy Transcript; also, pg. 11, Vol. 34, Dr. John S. Milloy Transcript.

<sup>207</sup> Pg. 12, Vol. 34, Dr. John S. Milloy Transcript.

<sup>208</sup> Pg. 185-186, Vol. 33, Dr. John S. Milloy Transcripts.

<sup>209</sup> Pg. 186, Vol.33, Dr. John S. Milloy Transcript.

<sup>210</sup> Pg. 187, Vol. 33, Dr. John S. Milloy Transcript.

<sup>211</sup> Pg. 188, Vol. 33, Dr. John S. Milloy Transcript.

<sup>212</sup> Pg. 188, Vol. 33, Dr. John S. Milloy Transcript.

parents<sup>213</sup> which presented unique problems of their own which were largely the product of the parents' earlier residential school education.

162. Rather than take the children out of the community as the Department had done before with residential schools, now they were to remain in their communities and the Department was to provide services to those children and their families across the country.<sup>214</sup> In an attempt to address these needs in the communities, the Department hired what Dr. Milloy called "a cadre of female social workers" in the 1950's, and the Department came to be known as 'Colonel Jones' Lost Brigade'.<sup>215</sup> Colonel Jones was a former army officer who ran the Department at the time. The Lost Brigade was tasked with running social development programs in the communities focused on the children and their families. In addition, the children were to be provided care from welfare agencies and medical facilities.<sup>216</sup>
163. In order for this new system to work an infrastructure had to be created: "The reserves had to be connected; schools buses had to be purchased; provincial school boards had to agree to take the children, or in places where there were no provincial schools, schools had to be built, and run by the Department of Indian Affairs. And, again, those children have to be transported to those places to and fro."<sup>217</sup> For the Department, it took a long time for the logistical difficulties to be realized, however the easiest thing to do was to integrate the First Nations children into day schools and get them out of residential schools by negotiating their integration with provincial school boards, not with the provinces, but with local provincial school boards.<sup>218</sup>

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<sup>213</sup> Pg. 188, Vol. 33, Dr. John S. Milloy Transcript.

<sup>214</sup> Pg. 189, Vol. 33, Dr. John S. Milloy Transcript.

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<sup>216</sup> Pg. 191, Vol. 33, Dr. John S. Milloy Transcript.

<sup>217</sup> Pg. 193, Vol. 33, Dr. John S. Milloy Transcript.

<sup>218</sup> Pg. 193, Vol. 33, Dr. John S. Milloy Transcript.

164. The opportunity to garner new funding by integrating First Nations children was too appealing for local school boards to ignore. This is because these schools could expand without increasing local taxes by accepting funding from the Department of Indian Affairs. Soon the provinces also began to intervene and sign agreements with the Department to open up schools and get funding.<sup>219</sup>
165. So, in places where there is a local cooperative school board, like Brantford, where the First Nation children can integrate quickly into the local school, the local IRS (Mush Hole) emptied quickly. But it also filled up almost immediately with long distance placements, for example, with Cree children from Northern Quebec. This was to balance enrolments. Family allowance was used as an incentive to get First Nation families to send their children to residential school in such instances. For First Nations families, when their children attended school they received a 'family allowance' which was only available if your child was in school.<sup>220</sup> For the Department, the family allowance was a point of leverage against the family and community because under threat of withholding the family allowance, as a 'scare tactic', the Department could manipulate the enrolment and attendance at the schools.<sup>221</sup> They could control and move people from one place to another.<sup>222</sup>
166. This was how the population of Indian children attending the residential school system was slowly whittled down, according to Dr. Milloy, by moving the children into local schools. A problem that soon arose involving social workers and their discretion on whether the First Nation families, who now had the responsibility of raising their child on their own, were capable of doing so. Some social workers

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<sup>219</sup> Pg. 194, Vol. 33, Dr. John S. Milloy Transcript.

<sup>220</sup> Pg. 196, Vol. 33, Dr. John S. Milloy Transcript.

<sup>221</sup> Pg. 196-197, Vol. 33, Dr. John S. Milloy Transcript.

<sup>222</sup> Pg. 197, Vol. 33, Dr. John S. Milloy Transcript.

apparently thought it unwise to put some of these children back into their families. In those cases, some children remained in residential school.<sup>223</sup>

167. After the *Second World War* there is a progressive collapse in the Indian economy until the mid-1970's when over 70 percent of Aboriginal people are on welfare assistance of one kind or another.<sup>224</sup> Essentially, Aboriginal people were pushed out of the Canadian economy with the influx of immigration because they did not have the capitalization or the skills to compete in job markets such as Toronto and Winnipeg.<sup>225</sup> Slowly, there was a dreadful increase in unemployment and the return of people to their communities because there they could collect the family allowance provided their children were in a local day school.<sup>226</sup>
168. From residential schools as educational institutions to residential schools as child welfare institutions, and as the residential schools close those children who could not be integrated successfully into the day school system, with respect to their families and local social welfare services, are found to be wards of the Children's Aid Society across the country and in large numbers.<sup>227</sup>
169. This long and complicated process from residential schools to integration occurred from the 1940's through to the 1980's. Children were removed long distances from their families and from isolated communities, many of them not returning as they are classified as child welfare cases rather than as students going to day school.<sup>228</sup> Elder Robert Joseph stated that there is nothing redeeming at all about removing a child from their family, their community and their language.<sup>229</sup> There were so many children in such cases that the Children's Aid Society would make inquiries with residential schools hoping to get non-

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<sup>223</sup> Pg. 198, Vol. 33, Dr. John S. Milloy Transcript.

<sup>224</sup> Pg. 198, Vol. 33, Dr. John S. Milloy Transcript.

<sup>225</sup> Pg. 199, Vol. 33, Dr. John S. Milloy Transcript.

<sup>226</sup> Pg. 200, Vol. 33, Dr. John S. Milloy Transcript.

<sup>227</sup> Pg. 200-201, Vol. 33, Dr. John S. Milloy Transcript.

<sup>228</sup> Pg. 201, Vol. 33, Dr. John S. Milloy Transcript.

<sup>229</sup> Pg. 87, Vol. 42, Elder Joseph Transcript.

Aboriginal children into them because they needed the space for group homes.<sup>230</sup> According to Dr. Milloy, what was remarkable is that in the post-*Second World War* period there is a flood of children both from Aboriginal and non-Aboriginal families who needed care, according to social workers, and the pattern in the rise in numbers of children who needed it, which is a pattern also seen in Indian residential schools.<sup>231</sup>

170. For residential schools, the increase in numbers meant the Departmental budgets were required to increase as well despite the push to move the children into the provincial sphere of education and close the residential schools. According to Dr. Milloy, the system took on a final identity in this process as something akin to a “Children’s Aid Society characteristic”.<sup>232</sup>
171. After the *Second World War*, Canada become more secular, and in 1969 the historic partnership with the churches was eventually brought to an end.<sup>233</sup> During this time, secular authorities began to form, such as social work organizations and psychologists. They provide a social science reality to what people in the Department had been saying about residential schools for years, which were essentially admonishments about the system and its failures.<sup>234</sup>
172. In the 1960’s and 1970’s the Department started to ask these social scientists, such as psychiatrists and psychologists, for advice regarding children who had attended the residential schools. It was uncertain what the impact of their IRS attendance was on such issues as the loss of culture, and language. For example, Elder Robert Joseph gave evidence that only about 50 people speak Kwakwaka’wakw today.<sup>235</sup> Soon a dialogue developed whereby the social scientists were informing the Department of the negative psychological impact

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<sup>230</sup> Pg. 201, Vol. 33, Dr. John S. Milloy Transcript.

<sup>231</sup> Pg. 202, Vol. 33, Dr. John S. Milloy Transcript.

<sup>232</sup> Pg. 204, Vol. 33, Dr. John S. Milloy Transcript.

<sup>233</sup> Pg. 204, Vol. 33, Dr. John S. Milloy Transcript.

<sup>234</sup> Pg. 205, Vol. 33, Dr. John S. Milloy Transcript.

<sup>235</sup> Pg. 7, Vol. 42, Elder Joseph Transcript; also, pg. 22, Vol. 43, Elder Joseph Transcript.

that the children suffered and were suffering due to the way the IRS system operated.<sup>236</sup> According to Dr. Milloy, Jean Chretien was famously quoted that “it would have been better had no child attended residential school at all, and not to have any education at all rather than go to residential school, that the Department’s experience showed it was not a good thing”.<sup>237</sup>

173. Around 1969, as the system became more secular the Department began to operate entirely on its own and the schools took on new manifestations.<sup>238</sup> The churches left their relationship with the Department without much complaint, as Dr. Milloy describes. Later, however, there would be complaints when the legal cases started in the 1980’s.<sup>239</sup>
174. The last remaining residential schools are essentially residences where children attend a provincial day school during the day and then come back at night, with these residences being run by the government.<sup>240</sup> Dr. Milloy stated that there were some groups of students where this arrangement does not go well for them, emotionally or psychologically, but eventually the residential schools closed their doors.<sup>241</sup> In some cases the schools are taken over by Tribal authorities but not to be operated as schools, but instead operated as Tribal child care institutions intended to undo the damage caused by government’s residential schools. Eventually, however, 99.9 percent of the schools just finally disappear.<sup>242</sup>
175. Despite the changes that had occurred to the Department during the post-war period the notion of assimilation remained as a focus of the residential school system, which of course was the initial concept the system had been predicated

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<sup>236</sup> Pg. 206, Vol. 33, Dr. John S. Milloy Transcript.

<sup>237</sup> Pg. 207, Vol. 33, Dr. John S. Milloy Transcript; also, pg. 215-216, Vol. 34, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 199.

<sup>238</sup> Pg. 207, Vol. 33, Dr. John S. Milloy Transcript.

<sup>239</sup> Pg. 208, Vol. 33, Dr. John S. Milloy Transcript.

<sup>240</sup> Pg. 210, Vol. 33, Dr. John S. Milloy Transcript.

<sup>241</sup> Pg. 210, Vol. 33, Dr. John S. Milloy Transcript.

<sup>242</sup> Pg. 211, Vol. 33, Dr. John S. Milloy Transcript.

upon since the early 1800's. According to Dr. Milloy, there was a "softening" of assimilation in the sorts of outward signs produced from general concepts developing during this time in Canadian society, such as *multiculturalism*, but in the actual operation of the schools themselves there was no such softening in terms of the curriculum and pedagogy employed.<sup>243</sup> It was just as hardnosed as it ever was in terms of the insistence on cultural change for the sake of becoming Canadian like everybody else.<sup>244</sup>

176. Consistent with this approach, the 1969 White Paper introduced by the Department under Indian Affairs Minister Jean Chretien, was a document that intended to do away with the First Nations special constitutional status in Canada. It suggested the complete and immediate integration of all First Nations people into Canadian society, including the disappearance of treaties and other things relating to this status.<sup>245</sup> The idea proffered was an off-loading of Indians on to the provinces -- piecemeal integration to the point at which the federal government would no longer have any constitutional responsibility, or have any active participation in the delivery of services to First Nation communities.<sup>246</sup>
  
177. According to this theory, full-scale integration would cure Aboriginal poverty and unemployment, and other social problems.<sup>247</sup> However, as Dr. Milloy noted, It would take different forms of economic and social development to cure the problems plaguing Aboriginal people. Even former Prime Minister Pierre Elliott Trudeau suggested that simply living inside a province was not a solution for Aboriginal people, and that, of course, it violated the historic relationship that Aboriginal people have with Canada.<sup>248</sup>

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<sup>243</sup> Pg. 214, Vol. 33, Dr. John S. Milloy Transcript.

<sup>244</sup> Pg. 215, Vol. 33, Dr. John S. Milloy Transcript.

<sup>245</sup> Pg. 216, Vol. 33, Dr. John S. Milloy Transcript.

<sup>246</sup> Pg. 217, Vol. 33, Dr. John S. Milloy Transcript.

<sup>247</sup> Pg. 217, Vol. 33, Dr. John S. Milloy Transcript.

<sup>248</sup> Pg. 218, Vol. 33, Dr. John S. Milloy Transcript.

## ii. Transfer of the Schools into a Component of the Child Welfare System

178. The residential school system operated as “school system” from the 1880’s forward until the 1960’s when it became marked component of the child welfare system. As the educational utility of the system declined it took on a new life and rationale, and it became part of a wider approach to the question of child welfare services.<sup>249</sup> Over a 50-year period, between the 1930’s to the 1980’s, the number of schools declined steadily from 78 schools in 1930 down to 12 schools in 1980. At about 1969 the churches leave as managers of the system and the federal government takes over sole management of the system<sup>250</sup>. Then, at about 1986, there are no more schools remaining under the Federal-Church system which, according to Dr. Milloy, is when federal funding stops for the schools and the “Federal residential school system” comes to an end.
179. After the *Second World War* the “primary role” of many residential schools changed “from one of providing opportunities for academic learning to that of a child caring institution.” The schools had become part of a developing federal-provincial welfare system which was an impediment in their attempts to reduce numbers of enrollments in preparation for closing down the schools. The Department felt that many of the children could not return to their homes because, in their estimation, their parents were not able to assume the responsibility for the care of their children, but the success of the Department’s integration and closure policy depended upon the return of the children to their homes. The Department’s estimation was due to their assessment of the children’s’ parents’ alcoholism in the home and lack of supervision, and that many of the children had precarious family situations.<sup>251</sup>
180. Much of this was a result of the impacts of IRS. Elder Robert Joseph stated that his alcoholism was associated with his deep sense of loneliness and despair,

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<sup>249</sup> *A National Crime*, pg. 211.

<sup>250</sup> Pg. 16, Vol. 34, Dr. John S. Milloy Transcript.

<sup>251</sup> *A National Crime*, pg. 211.

amongst other hard emotions<sup>252</sup>, that he acquired as a he grew up but was the result of his attending residential school.<sup>253</sup>

181. As previously noted, even though the schools were declining in number the enrollment in them was increasing, until it reached the height of its enrollment in 1953 at 11,000. According to Dr. Milloy, the increase can be explained by the new life and rationale the schools developed into where children were being directed into the schools as part of the wider approach to the child welfare system.<sup>254</sup> Children from the far north were put into southern residential schools as part of the effort to *integrate* but also because the Department did not want to build new residential schools in the north.<sup>255</sup>
182. At about 1969, the Department changed its regulations as to who can attend residential schools, placing an emphasis on the children who cannot be integrated. Attendance at the schools was typically dependent upon the felt need of a Department social worker or the Children's Aid Society or the local Indian Agent due to the children not being able to be properly cared for in their own homes and/or their own communities.<sup>256</sup> An emphasis was put on orphans and "neglect" which are, according to Dr. Milloy, non-Aboriginal values and concepts as officially understood and defined in the provincial statute of the province in which the family resided.<sup>257</sup> This was inconsistent with the Aboriginal concept of family because children were cared for collectively by the community and by extended families. But, the Department believed these children needed to be placed or kept in residential school.<sup>258</sup>
183. There were other reasons as well. In some cases, however, a child was sent to the school by their parents because they could not properly care for their child

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<sup>252</sup> Pg. 51, Vol. 42, Elder Joseph Transcript.

<sup>253</sup> Pg. 48, Vol. 42, Elder Joseph Transcript.

<sup>254</sup> Pg. 15, Vol. 34, Dr. John S. Milloy Transcript.

<sup>255</sup> Pg. 15-16, Vol. 34, Dr. John S. Milloy Transcript.

<sup>256</sup> Pg. 19, Vol. 34, Dr. John S. Milloy Transcript.

<sup>257</sup> *A National Crime*, pg. 212.

<sup>258</sup> Pg. 20, Vol. 34, Dr. John S. Milloy Transcript.

themselves.<sup>259</sup> In this way, First Nations families were looking for assistance to raise their families<sup>260</sup> and the schools were a viable alternative<sup>261</sup> and at times were used as a resource by First Nations parents to accomplish a series of things including work opportunities.<sup>262</sup> This pattern of using the schools as a resource existed in a minor way before the *Second World War*.<sup>263</sup>

184. The function and purpose of the schools changed from a purely educational institution to one that was dealing with the influx of children from an existing child welfare movement. However, the old problems of the system continued in the system in every sector, child care and education, with many of them being identified by people working within the system, such as Department officials, principals, church officials, etc. They attributed it to the same old persistent flaw of the system: underfunding.<sup>264</sup>
185. It was recognized as early as 1943 that there would continue to be a need for IRS for orphans and children in disrupted homes. Eventually, as the residential schools began to close such children were to be given priority. By 1969, the Department developed admission regulations that provided for six categories. Categories 1 and 2 could not normally get into IRS because they could be easily integrated. Categories 4, 5 and 6 might be given admission. Category 3 would nearly guarantee the child's enrollment in a residential school:

“...children allocated to category 3 were either those “who were abandoned or orphaned, ...[with] no immediate relatives willing or able to provide guardianship,” or children whose home

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<sup>259</sup> Pg. 22, Vol. 34, Dr. John S. Milloy Transcript.

<sup>260</sup> Pg. 23, Vol. 34 Dr. John S. Milloy Transcript.

<sup>261</sup> Pg. 24, Vol. 34, Dr. John S. Milloy Transcript.

<sup>262</sup> Pg. 25, Vol. 34, Dr. John S. Milloy Transcript.

<sup>263</sup> Pg. 26, Vol. 34, Dr. John S. Milloy Transcript.

<sup>264</sup> Pg. 36, Vol. 34, Dr. John S. Milloy Transcript.

circumstances gave “evidence that serious neglect [was] occurring.”<sup>265</sup>

186. These were the children given an immediate pass into residential schools which eventually became child welfare institutions. One of the problems was that people who were raised in residential schools did not learn the parenting skills that they normally learn had they been living at home and being taught them.<sup>266</sup> There was an informal apprehension process the Department used to remove children from their parents and communities and place them in residential schools.<sup>267</sup> In terms of the Category 3, in 1966, there were about 9,778 children enrolled throughout the system, 75 percent being from homes which by reason of overcrowding and parental neglect were considered “unfit for school” children.<sup>268</sup>
187. According to Dr. Milloy, the only way to close the schools completely was to integrate the children which meant their attendance at a non-reserve day school or to a provincially-operated day school facility, which were the only two ways.<sup>269</sup> For those category 3 children, the Department required that they be placed in a group home, foster care and adoptive care, or something of that nature.<sup>270</sup> The Department was reluctant in allowing the residential schools to take on the role of a child welfare institution as they were wanting of integrated educational services coming from the provinces, to which they were quite successful.<sup>271</sup>
188. In order to conduct integration more effectively section 87 of the *Indian Act* was enacted in 1951 allowing provincial laws to apply on the reserve so that, amongst other things, the *Indian Act* authority cooperated with provincial welfare services and authorities, and to deal with First Nation children:

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<sup>265</sup> A *National Crime*, pg. 212; also, pg. 86, Vol. 35, Dr. John S. Milloy Transcript.

<sup>266</sup> Pg. 90, Vol. 35, Dr. John S. Milloy Transcript.

<sup>267</sup> Pg. 92, Vol. 35, Dr. John S. Milloy Transcript.

<sup>268</sup> Pg. 95, Vol. 35, Dr. John S. Milloy Transcript.

<sup>269</sup> Pg. 98, Vol. 35, Dr. John S. Milloy Transcript.

<sup>270</sup> Pg. 98, Vol. 35, Dr. John S. Milloy Transcript.

<sup>271</sup> Pg. 99, Vol. 35, Dr. John S. Milloy Transcript.

“This made it possible to extend provincial legislation for the protection of dependent, delinquent and neglected children to Indian children and necessitated, in terms of enforcement, action by child welfare authorities...”<sup>272</sup>

189. Ontario is very fast about wanting to participate and contribute to the welfare of Indian people in the province. Dr. Milloy said Ontario kept pushing the federal government to go further and faster.<sup>273</sup> With Ontario provincial government’s cooperation, and the strict application by local Departmental officials of the category admission rules, the Department was equipped in the 1960’s to deal with the social welfare function of the schools and to move forward in closing the schools.<sup>274</sup> Dr. Milloy states there were two ways to provide social welfare services to the children (i) institutional care such as foster homes, adoption homes and group homes, etc., through the support of provincial child welfare organizations, and (ii) day schools by providing services to the child and family within the community.<sup>275</sup>

### **iii. Suicides and Sexual Abuse in the Schools**

190. In the history of the schools there are instances of suicides and attempted suicides by children, and on at least two occasions, one taking place at the Williams Lake School in British Columbia, a group suicide.<sup>276</sup> According to Dr. Milloy, suicide for these children was of escaping an unbearable situation such as being the victim to sexual abuse by staff members, teachers, and others working in the school.<sup>277</sup>
191. The record of sexual abuse in the schools, however, was not very often written down or recorded, according to Dr. Milloy, in terms of the misbehaviour of the

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<sup>272</sup> Pg. 101, Vol. 35, Dr. John S. Milloy Transcript.

<sup>273</sup> Pg. 149, Vol. 35, Dr. John S. Milloy Transcript.

<sup>274</sup> Pg. 103, Vol. 35, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 217.

<sup>275</sup> Pg. 104, Vol. 35, Dr. John S. Milloy Transcript.

<sup>276</sup> Pg. 2, Vol. 35, Dr. John S. Milloy Transcript.

<sup>277</sup> Pg. 3, Vol. 35, Dr. John S. Milloy Transcript.

staff members, administrators, school teachers toward the children.<sup>278</sup> But some of the sexual abuse was recorded in letters the students had written.<sup>279</sup> One of the difficulties in identifying the sexual abuse is determining what sexual abuse was and what was physical abuse or discipline. Relying solely on the written record is unrevealing as to the extent of the abuse until the mid- to late-1980's when direct violations of the children began to surface and the court cases began, particularly in British Columbia.<sup>280</sup>

192. The victimization of the children created a “spillover effect” into their lives as adults and, according to Dr. Milloy, a scientific study was conducted by the Winnipeg General Hospital about the prevalence of this spillover of sexual abuse in the schools flowing into the First Nations communities in terms of the sexual practices that occurred in the communities. A number of women's organizations commented as to the pervasiveness of this problem and the connection to the residential school system.<sup>281</sup>

193. The record of sexual abuse is difficult to quantify, which is why the oral testimony from residential school survivors is so important, because it was a prevalent practice in the schools to take advantage of the children, and when the sexual interference was discovered, the sexual assaulter would often be re-located or transferred.<sup>282</sup> The assaulters were simply moved around rather than disciplined.<sup>283</sup> According to Dr. Milloy, the whole situation goes back to the government's initial decision to remove the children from their parents and communities and into the schools, and in consideration of the inquiries that have taken place with regard to the children's treatment in the schools, one realizes that it was reasonably predictable<sup>284</sup> that the children were being placed in a

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<sup>278</sup> Pg. 7, Vol. 35, Dr. John S. Milloy Transcript.

<sup>279</sup> Pg. 7, Vol. 35, Dr. John S. Milloy Transcript.

<sup>280</sup> Pg. 8, Vol. 35, Dr. John S. Milloy Transcript.

<sup>281</sup> Pg. 9, Vol. 35, Dr. John S. Milloy Transcript.

<sup>282</sup> Pg. 10, Vol. 35, Dr. John S. Milloy Transcript.

<sup>283</sup> Pg. 10, Vol. 35, Dr. John S. Milloy Transcript.

<sup>284</sup> Pg. 12, Vol. 35, Dr. John S. Milloy Transcript.

dangerous place.<sup>285</sup> The prevalence and degree of sexual abuse in the schools is shocking and extremely sad, and the impact on the children and on their communities is perhaps the worst of all the school crises or impacts.<sup>286</sup>

#### **iv. Modifications and the Continuing Failures of the System**

194. The unbearable conditions in the schools during the pre-war period persisted in the post-war period. Nothing in the process of integration itself remedied any of these recurring problems. While the Department turned its back on the residential system, thousands of children remained trapped in the web of excessive punishment, poor building conditions, inadequate food and clothing, incompetent or overworked staff and underfunding, which together threatened the children's safety and undermined the health of the pupils.<sup>287</sup>

195. Dr. Milloy wrote:

“To the old voices of complaint and dissent, Aboriginal people, Departmental staff, and church men and women, were added new ones, the critical voices of professionals: dietitians, doctors and nurses employed by other federal agencies. They, too, found the system wanting and pushed, unsuccessfully in the main, for effective improvements.”<sup>288</sup>

196. In the pre-war period, it was primarily the Department of Indian Affairs itself that performed the oversight as to the condition and operation of the schools system. Later, however, as indicated in the quote above, other federal agencies performed the oversight, such as the Department of Health and Welfare. One such critical report Dr. Milloy referred to was one involving the school diet in the Brandon School which was “insufficient”, to say the least, amongst other

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<sup>285</sup> Pg. 11, Vol. 35, Dr. John S. Milloy Transcript.

<sup>286</sup> Pg. 12, Vol. 35, Dr. John S. Milloy Transcript.

<sup>287</sup> *A National Crime*, pg. 260; also, pg. 15-18, Vol. 35, Dr. John S. Milloy Transcript.

<sup>288</sup> *A National Crime*, pg. 261; also, pg. 19, Vol. 35, Dr. John S. Milloy Transcript.

things.<sup>289</sup> There was a noted failure on the part of the Department of Indian Affairs to exercise its right to compel the schools to comply with the standards. For example, in regard to the Marcoux-Swaile inspection, the Department did nothing in response and the inspection produced no results.<sup>290</sup>

197. Since its inception, the argument about underfunding the schools persisted between the churches and government<sup>291</sup>, and despite some post-war per-capita increases, the system of grants in place was “proving entirely unsatisfactory to the cooperating churches”<sup>292</sup>:

“Underfunding continued to be the universal tag line in descriptions of the system’s shortcomings. It had always been the church’s position that responsibility for any neglect could be found in the government’s penurious approach to residential education. They maintained their claim that because the per-capita grants were too small, they could not compete with Provincial schools and thus they suffered chronic shortages of teachers and maintenance staff, meaning that in some schools, despite the abandonment of the half-day system, “the bulk of ‘chores’ must fall on the shoulders of the few older boys and girls.”<sup>293</sup>

198. The abandonment of the per-capita system in 1957 constituted a radical change in the funding relationship between the schools and the government. The schools were then placed on a “controlled cost basis” where the government would reimburse each school for actual expenditures within certain limitations, which in practice translated into “allowances” for different expenses, such as salaries, transportation, etc. The allowance placed a cap on what the church could spend on these different expenses, all in pursuit of reaching the standards the Department had placed on itself, and in which it was in constant violation. In

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<sup>289</sup> *A National Crime*, pg. 266-267; also, pg. 20-22, Vol. 35, Dr. John S. Milloy Transcript.

<sup>290</sup> *A National Crime*, pg. 266-267; also, pg. 22, Vol. 35, Dr. John S. Milloy Transcript.

<sup>291</sup> Pg. 23, Vol. 35, Dr. John S. Milloy Transcript.

<sup>292</sup> *A National Crime*, pg. 270; also, pg. 26, Vol. 35, Dr. John S. Milloy Transcript.

<sup>293</sup> *A National Crime*, pg. 269; also, pg. 24-25, Vol. 35, Dr. John S. Milloy Transcript.

addition, the Department began to issue directives to the schools calling for more detailed reporting.<sup>294</sup>

199. Despite these changes the system remained the same:

“None of this was enough, however, to prevent a continuation of the problems that were endemic in the system. The post-1957 record of the controlled cost system fell short of its promise; the new financial system did not achieve a significant improvement over what existed in previous decades. There was in fact an underlying contradiction between the policy of closing down the system and that of keeping the schools in peak physical condition, Davey, himself, signalled this when observing that school “expenditures should be limited to emergency repairs which are basic to the health and safety of the children” in cases “where closure is anticipated, due to integration.”<sup>295</sup>

200. The Department was concerned about spending money on a system that was slated to be eventually dismantled much to the annoyance of the National Association of Principals and Administrators of Indian Residences because, from the Association’s point of view, the federal schools were sadly neglected in comparison to the provincial schools.<sup>296</sup> The Department, however, was too heavily committed in other higher priority areas of funding such as integration, developing the physical aspects of the Indian communities, and giving welfare assistance at provincial rates.<sup>297</sup> These were a detriment to maintaining the schools and the Department thought it better to close the system down, seeing that it was in the best interests of the child, in addition to being more in line with integration.<sup>298</sup>

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<sup>294</sup> *A National Crime*, pg. 270-271; also, pg. 26-29, Vol. 35, Dr. John S. Milloy Transcript.

<sup>295</sup> *A National Crime*, pg. 272; also, pg. 30-31, Vol. 35, Dr. John S. Milloy Transcript.

<sup>296</sup> Pg. 31-32, Vol. 35, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 272.

<sup>297</sup> *A National Crime*, pg. 272-273; also, pg. 32-35, Vol. 35, Dr. John S. Milloy Transcript.

<sup>298</sup> Pg. 36, Vol. 35, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 273.

201. The Department was increasingly convinced and made aware of the negative consequences of residential school education, such to the point that the Department itself became a critic against the system. Not just in terms of its failure to get qualified teachers, adequate food, or other things, but more so to the point that it acknowledged that the system was a bad idea from the start, and that it continued to be a bad idea. All of which stemmed, according to Dr. Milloy, from the specific aspect that the system did not serve the best interests of the children<sup>299</sup>, and so the Department turned on the system itself because of its impact on the children.<sup>300</sup>
202. Another modification to the system was the 1947 guidelines for strapping children. It was an attempt to moderate the often disciplinary punishment that went beyond normal limits of the day. It was again amended in 1953.<sup>301</sup> Later, some dialogue began to surface as to the extent of the punishments meted out on the students. An article written by Mary Carpenter in 1974 describes the impact such punishment had on the culture, which Dr. Milloy describes as a catastrophe at the most basic ontological level where Aboriginal people had “lost their way of understanding their world”.<sup>302</sup> These reports of abuse came from the teachers as well where no real action was taken to countervail the continuance of this abuse.<sup>303</sup>
203. Dr. Milloy expressed that the violence against these children took on a different form in consideration of the fact that they were from different cultures, different worlds, and a different spirituality and set of beliefs, and in consideration of the socially oppressive context in which it was taking place, that was an attempt to “kill the Indian in the child”.<sup>304</sup>

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<sup>299</sup> Pg. 37, Vol. 35, Dr. John S. Milloy Transcript.

<sup>300</sup> Pg. 38, Vol. 35, Dr. John S. Milloy Transcript.

<sup>301</sup> Pg. 41, Vol. 35, Dr. John S. Milloy Transcript.

<sup>302</sup> Pg. 47, Vol. 35, Dr. John S. Milloy Transcript.

<sup>303</sup> Pg. 43, Vol. 35, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 281-282,

<sup>304</sup> Pg. 45-46, Vol. 35, Dr. John S. Milloy Transcript.

204. The Department and the churches knew years before this dialogue had surfaced that the school system's record of abuse comprised more than the sum of innumerable acts of violence against individual children:

“From the early history of the school system, it was apparent that the great majority of children on leaving school...rarely fit the vision's model of the enfranchiseable individual.”<sup>305</sup>

205. Not only did children not undergo the great transformation, but they also became stranded between cultures, deviants from the norms of both.<sup>306</sup> These critiques began to surface after the *Second World War* when the system fell under the scrutiny of social scientists.<sup>307</sup> The system did not prepare children for life after school<sup>308</sup> and, according to George Caldwell of the Canadian Welfare Council, it failed to meet the total needs of the child because it failed to individualize:

“The absence of emphasis on the development of the individual child as a unique person is the most disturbing result of the whole system. The schools are providing a custodial service rather than a child development service. The physical environment of daily living aspects of the residential school is overcrowded, poorly designed, highly regimented and forces a mass approach to children. The residential school reflects a pattern of child care which was dominant in the early decades of the 20<sup>th</sup> century, a combined shelter and education at the least possible expense.”<sup>309</sup>

206. The official Departmental position was, in essence, that “more injury is done to the children by requiring them to leave their homes to attend residential schools than if they are permitted to remain at home and not receive formal

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<sup>305</sup> *A National Crime*, pg. 290.

<sup>306</sup> *A National Crime*, pg. 290.

<sup>307</sup> Pg. 134, Vol. 35, Dr. John S. Milloy Transcript.

<sup>308</sup> Pg. 58, Vol. 35, Dr. John S. Milloy Transcript.

<sup>309</sup> *A National Crime*, pg. 291-292; also, pg. 60-61, Vol. 35, Dr. John S. Milloy Transcript.

education.”<sup>310</sup> The problems associated with the schools were receiving some deserved attention, and as integration into provincial schools progressed, enrolment in the residential schools declined and eventually disappeared. In 1968, the Minister, Jean Chretien, commented as enrollment steadily declined and integration progressed that it was all for the best: “It has been found that for the average Indian child, remaining a member of the family unit can be more beneficial than the best residential school care.”<sup>311</sup> Dr. Milloy stated that this comment, that it’s best for children to be raised by their own parents in as healthy circumstances as possible<sup>312</sup>, is the exact opposite assumption to which the whole residential school system began. The opposite assumption being that the Aboriginal family needs to be disrupted and the children removed to an institution dominated by white people and white ideologies and white ontologies.<sup>313</sup>

#### **v. Racial Prejudice and Discrimination in the Policy and Operation of the Schools**

207. According to Dr. Milloy, the only people in the country whose identity is defined by law are First Nations people, and he understands that others have referred to that as racial discrimination, and with regard to the policies underlying residential schools, the fact that it was based on the eradication of a culture is reason enough to believe the policies were based on racial prejudice and discrimination.<sup>314</sup> Residential schools had a discriminatory purpose and operated on a negative prejudice toward First Nations people as a group and toward their ideas and beliefs.<sup>315</sup>

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<sup>310</sup> *A National Crime*, pg. 292; also, pg. 63, Vol. 35, Dr. John S. Milloy Transcript.

<sup>311</sup> Pg. 65, Vol. 35, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 293.

<sup>312</sup> Pg. 65, Vol. 35, Dr. John S. Milloy Transcript.

<sup>313</sup> Pg. 65, Vol. 35, Dr. John S. Milloy Transcript.

<sup>314</sup> Pg. 109, Vol. 35, Dr. John S. Milloy Transcript.

<sup>315</sup> Pg. 109, Vol. 35, Dr. John S. Milloy Transcript.

208. The heritage left behind by residential schools, on the 85 percent of student who did not attend, is aptly put in the following quote: “Thank God the majority of Indian children did not go to residential school”.<sup>316</sup>
209. According to Dr. Milloy’s expert opinion, it is probably more accurate to state that residential schools have negatively affected every First Nations person.<sup>317</sup> The fact is that First Nation children who did not attend IRS still lived in the same communities as those who did and in this way they were affected by the spill-over and flow-back of the residential school experience.<sup>318</sup> Aboriginal communities are the poorest communities across the country and their children are apprehended at much greater numbers than children from other groups. Aboriginal people also fill up Canadian jails in greater proportions than other groups.<sup>319</sup> The intergenerational impacts have disrupted the children whose parents, siblings and grandparents attended IRS, and in this way, residential schools continue to affect the First Nations population.<sup>320</sup>

#### **F) The Intergenerational Impacts of Residential Schools**

210. Dr. Amy Bombay’s research and expert testimony highlight the fact that the IRS system impeded the transmission of traditional, positive child-rearing practices such as the *Heiltsu gula* and instead institutionalized negative parental role models for children who attended residential schools. The result is the provision of care of children and healthy families in subsequent generations is less than adequate. In other words, IRS has destroyed the *Heiltsu gula* and broken down First Nation child-centered family models by effectively killing the Indian in the child. Subsequently, the complaint before the Tribunal is the same IRS thread woven into current Crown policy on First Nation child welfare.

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<sup>316</sup> Pg. 111, Vol. 35, Dr. John S. Milloy Transcript.

<sup>317</sup> Pg. 111, Vol. 35, Dr. John S. Milloy Transcript.

<sup>318</sup> Pg. 113, Vol. 35, Dr. John S. Milloy Transcript.

<sup>319</sup> Pg. 176, Vol. 35, Dr. John S. Milloy Transcript.

<sup>320</sup> Pg. 115, Vol. 35, Dr. John S. Milloy Transcript.

211. Dr. Bombay testified that collective and historical traumas are concepts that have gained acceptance in the psychological community, but there had not been sufficient empirical evidence of the latter concept until recently. Dr. Bombay's work provides statistical evidence for the concept of historical trauma. She explained that much of the early work on this topic used qualitative research methodologies, in which information such as interviewee responses and word data are used to explore topics that have not truly been explored before.<sup>321</sup>
212. In addition to qualitative analyses, Bombay and her colleagues also conduct quantitative research methods, which are typically used when more specific hypotheses are being tested. Quantitative investigations typically comprise more specific and narrow questions to the subject sample(s), and collecting numerical data, and analyzing the data with the help of various statistical procedures carried out using statistical software programs.<sup>322</sup> In many cases, psychological constructs such as psychological distress are measured quantitatively through the use of standardized self-report scales that are widely used to measure the given variable and accepted by experts in the field.<sup>323</sup>
213. In Dr. Bombay's paper, "The Impact of Stressors on Second-Generation Indian Residential School Survivors"<sup>324</sup>, the Beck Depression Inventory (BDI) Short Form was used to assess depressive symptoms among First Nations adults who were children of IRS survivors and First Nations adults whose families were not affected by this policy. The BDI is a list of 13 items that reflect increasing degrees of depressive symptomatology, and it is a widely used and accepted measure. In this study, children of IRS survivors reported higher levels of depressive symptoms relative to controls in a convenience sample of 143 First Nations adults (individuals over the age of 18).<sup>325</sup> In this same study, it was also

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<sup>321</sup> Pg. 61, Vol. 40, Dr. Amy Bombay Transcript.

<sup>322</sup> Pg. 64, Vol. 40, Dr. Amy Bombay Transcript.

<sup>323</sup> Pg. 65, Vol. 40, Dr. Amy Bombay Transcript.

<sup>324</sup> Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), *Transcultural Psychiatry* 48(4) 367-391, pg. 373.

<sup>325</sup> Pg. 71, Vol. 40, Dr. Amy Bombay Transcript.

found that children of survivors reported greater adverse childhood experiences, greater traumas in adulthood, and higher levels of perceived discrimination, all of which appeared to contribute to the greater depressive symptoms in the residential school offspring.<sup>326</sup> It was also found that “their parent’s Survivor status moderated the effects of later stressor encounters to promote depressive symptoms”, such that residential school offspring were also more affected by these stressors.<sup>327</sup>

214. Dr. Bombay believed that particular study (“The Impact of Stressors”) to be the first to document and identify potential mediators (which is a statistical term that refers to identifying the mechanisms that account for this process and intervening variables that account for a relationship between two known variables)<sup>328</sup> that could account for the positive relation between parental IRS attendance and depressive symptoms.<sup>329</sup>
215. The sampling approach used by the First Nations Regional Health Survey (RHS) 2008/10<sup>330</sup> makes it a representative sample of the First Nations population living on-reserve in Canada “...and so we can be confident that the findings that we find based on this data really can generalize to the First Nations population living on-reserve in general”.<sup>331</sup> It is had also been deemed valid and reliable<sup>332</sup> by independent peer-reviewers.<sup>333</sup> The data from the RHS is really important as it is the most relevant data source speaking to the well-being of First Nations peoples living on-reserve, and in speaking to the risks and the needs of First Nations people living on-reserve.<sup>334</sup> It is also the only on-going

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<sup>326</sup> Pg. 69, Vol. 40, Dr. Amy Bombay Transcript.

<sup>327</sup> Pg. 69, Vol. 40, Dr. Amy Bombay Transcript.

<sup>328</sup> Pg. 127, Vol. 40, Dr. Amy Bombay Transcript.

<sup>329</sup> *Supra* note 324, pg. 379.

<sup>330</sup> The First Nations Information Governance Centre, First Nations Regional Health Survey (RHS) *Phase 2 (2008/10) National Report on Adults, Youth and Children Living in First Nations Communities* (Ottawa: The First Nations Information Governance Centre, June 2012), pg.

<sup>331</sup> Pg. 73, Vol. 40, Dr. Amy Bombay Transcript.

<sup>332</sup> Pg. 73-74, Vol. 40, Dr. Amy Bombay Transcript.

<sup>333</sup> Pg. 74-75, Vol. 40, Dr. Amy Bombay Transcript.

<sup>334</sup> Pg. 75, Vol. 40, Dr. Amy Bombay Transcript.

nationally-representative survey of First Nations on-reserve, and is particularly important because First Nations on-reserve are typically left out of other government surveys measuring health, meaning there is not a lot of accurate data regarding the health of those living on-reserve.<sup>335</sup> Dr. Bombay produced two chapters for the 2008-10 National Report, chapters 17 and 29, and conducted additional analyses based on the same dataset.

**i. Summary of Expert Opinion on Intergenerational Impacts**

216. Children of IRS survivors are at greater risk for negative outcomes.<sup>336</sup> This is because residential schools are an important contributor to the health disparities reported in First Nations and other Aboriginal peoples in Canada. There is a large portion of the First Nations population that have been intergenerationally effected by residential schools which has negatively impacted the overall collective health and wellbeing of those living on-reserve.<sup>337</sup>
217. Dr. Bombay's research and the work conducted by others in other oppressed populations consistently conclude the effects of collective and historical trauma on Aboriginal communities are "greater than the sum of the individual effects on [those] individuals who have been directly affected [by IRS]".<sup>338</sup>
218. "Historical trauma" has been found among Indigenous groups around the world, including in places such as the U.S., Australia and New Zealand. The similarity among Indigenous groups in these countries is a shared historical traumatic past associated with colonization. Not only have these groups experienced numerous collective traumas such as IRS, or forced relocation but they continue

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<sup>335</sup> Pg. 75, Vol. 40, Dr. Amy Bombay Transcript.

<sup>336</sup> Pg. 79-80, Vol. 40, Dr. Amy Bombay Transcript.

<sup>337</sup> Pg. 80-81, Vol. 40, Dr. Amy Bombay Transcript.

<sup>338</sup> Pg. 82, Vol. 40, Dr. Amy Bombay Transcript.

to face chronic oppression and discrimination.<sup>339</sup> Such as in Canada with the complaint relating to Crown policies regarding First Nation child welfare.

219. What “historical trauma” explains is that once a group has faced a number of consecutive collective trauma events over many generations, the resulting cumulative effect of multiple collective traumas experienced for the duration of an individual’s lifespan carries over to the next generation, making children more susceptible to subsequent individual and collective traumas.<sup>340</sup>
220. For First Nations people, the effect of historical trauma has put them at risk for more exposure to stress and made them more vulnerable to the negative effects of stress, at both an individual and community level. One example of this assertion was the relationship observed between the number of generations in one’s family who were affected by IRS and a greater likelihood of having spent time in foster care.<sup>341</sup>

ii. **Research Findings**

221. Familial residential school exposure is an important determinant of aboriginal health and is associated with greater exposure to trauma as well as a greater vulnerability to both childhood and adult trauma.<sup>342</sup>
222. The observed relationship between being affected by IRS and well-being, in combination with the large proportion of the on-reserve population affected by residential schools, suggests that the trauma presented by IRS is an important contributor to health disparities and continued high rates of stress and trauma seen in communities today. In particular, the high rates of “childhood adversity” is a harmful consequence of IRS as it is an essential mechanism in the

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<sup>339</sup> Pg. 83, Vol. 40, Dr. Amy Bombay Transcript.

<sup>340</sup> Pg. 83, Vol. 40, Dr. Amy Bombay Transcript.

<sup>341</sup> Pg. 83, Vol. 40, Dr. Amy Bombay Transcript.

<sup>342</sup> Pg. 84, Vol. 40, Dr. Amy Bombay Transcript.

proliferation of stressors and negative outcomes across one's individual lifespan and also across generations.<sup>343</sup>

223. Dr. Bombay's research brings to light the fact that the impact of IRS has resulted in an increased need both on-reserve and off-reserve for prevention and intervention efforts targeting future parents, in order to protect future generations of First Nations children against negative effects of these stressors and trauma.<sup>344</sup>

224. Dr. Bombay's research also suggests there needs to be some community wide interventions to address these community level effects, and that might be better addressed through alternative and more community-level healing interventions. The negative effects of IRS's will continue unless something is done to stop it through targeted efforts to put an end to the negative cycles that have been catalyzed by historical trauma. The continued removal of First Nations children from their parents and culture as a result of the consequences of IRS, such as poor health in parents, and other social and socio-economic consequences, really only serve to propagate the negative cycle.<sup>345</sup>

iii. **Indian Residential School Relationship with Spending Time in Foster Care**

225. Dr. Bombay performed research with colleagues by looking at the relationship between being affected by IRS and the likelihood of a child spending time in foster care. The opinion of Dr. Bombay was as follows: the data and statistical analyses suggest that those families who were more affected by IRS, for example, by having more generations of their family being a student in IRS, created consequences like having the lesser ability to provide adequate and

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<sup>343</sup> Pg. 84, Vol. 40, Dr. Amy Bombay Transcript.

<sup>344</sup> Pg. 84-85, Vol. 40, Dr. Amy Bombay Transcript.

<sup>345</sup> Pg. 85-86, Vol. 40, Dr. Amy Bombay Transcript.

stable care for their children, which in turn was associated with an increased likelihood of their children spending time in foster care.<sup>346</sup>

226. Unfortunately, as at the time of her testimony, Dr. Bombay had not yet published the results of this study: while the data was available, it had not yet been peer reviewed, so the study and data was not disclosed to the Respondent. The Attorney General objected to the admission of this particular portion of Dr. Bombay's power point slide presentation. The Panel decided to admit the evidence, but ruled that it would be given little or no weight.<sup>347</sup> Nevertheless, the research findings are consistent with Dr. Bombay's findings in her other studies on the intergenerational impacts of IRS. Moreover, as Dr. Bombay indicated in her testimony, "...many experts in the field consider the large scale removal of Aboriginal children from their homes to foster care to another example of a collective trauma..."<sup>348</sup> She cited for example an article by Dr. Laurence Kirmayer, a psychiatrist and researcher who is a leading expert in Aboriginal mental health.

#### iv. **The Health of Aboriginal People**

227. Using data from the most recent RHS, relative to the non-aboriginal population in Canada, First Nations adults report having higher rates of chronic health conditions, which includes high blood pressure, arthritis, intestinal problems, heart disease and diabetes. Some of these disparities are narrowing, but others are actually getting worse.<sup>349</sup> For example, rates of diabetes are growing at a faster rate than the general Canadian population.<sup>350</sup> Also, the RHS reports 40% of adults reported having more than one chronic health condition and

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<sup>346</sup> Pg. 86-87, Vol. 40, Dr. Amy Bombay Transcript.

<sup>347</sup> Pg. 19-28, Vol. 41, Dr. Amy Bombay Transcript.

<sup>348</sup> Pg. 15, Vol. 41, Dr. Amy Bombay Transcript.

<sup>349</sup> Pg. 87, Vol. 40, Dr. Amy Bombay Transcript.

<sup>350</sup> Pg. 88, Vol. 40, Dr. Amy Bombay Transcript.

approximately 20% of women reported having four or more chronic health conditions, which is a lot of health problems.<sup>351</sup>

228. Available evidence also suggests that rates of mental health problems in Aboriginal people are higher as well. For example, First Nations women living on-reserve were twice as likely to experience depression compared to non-Aboriginal women. These mental health disparities are perhaps most evident in high rates of suicide amongst Aboriginal people.<sup>352</sup>
229. Current rates of suicide are higher in Aboriginal peoples, particularly in First Nations youth, where the rates are approximately 6 to 7 times higher than the non-Aboriginal population.<sup>353</sup> This data has been consistent for more than 30-years as it has been an on-going problem that does not seem to be narrowing at all.<sup>354</sup>
230. Differences in the health status between Aboriginal and non-Aboriginal people can be explained by determinants of health. An example of a determinant is “health behaviour”. For example, 46.9% of mothers reported they had smoked during pregnancy, which is health behaviour linked to birth weight in First Nations babies.<sup>355</sup> Also, 37.5% of children live in an over-crowded home which is a significant stressor affecting well-being.<sup>356</sup> One of the most important determinants of health is socio-economic status: approximately 43% of First Nations children living on-reserve come from a household with an annual income of less than \$20,000.<sup>357</sup>
231. In the research among Aboriginal peoples, even when these mainstream determinants are controlled (i.e. controlled variable), these disparities continue

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<sup>351</sup> Pg. 88, Vol. 40, Dr. Amy Bombay Transcript.

<sup>352</sup> Pg. 88-89, Vol. 40, Dr. Amy Bombay Transcript.

<sup>353</sup> Pg. 89, Vol. 40, Dr. Amy Bombay Transcript.

<sup>354</sup> Pg. 89, Vol. 40, Dr. Amy Bombay Transcript.

<sup>355</sup> Pg. 90, Vol. 40, Dr. Amy Bombay Transcript.

<sup>356</sup> Pg. 90, Vol. 40, Dr. Amy Bombay Transcript.

<sup>357</sup> Pg. 90, Vol. 40, Dr. Amy Bombay Transcript.

to exist relative to the non-Aboriginal population in Canada, and it has been shown that increased exposure to stress and trauma appears to be an important contributor that explains these continuing health disparities.<sup>358</sup>

232. According to the most recent RHS, 39.2% of First Nations children live with their biological mother but not their biological father, so nearly half of First Nations children are coming from “broken homes” in “single-parent households”.<sup>359</sup> High rates of trauma apply to adults as well as they are four times more likely to have encountered severe trauma compared to the general Canadian population.<sup>360</sup> Another big problem is that Aboriginal women are more likely to be victimized, as they are 3 times more likely than non-Aboriginal women to be a victim of a violent crime.<sup>361</sup>
233. According to Elder Robert Joseph, the life expectancy of an Aboriginal child is six years shorter than that of a non-Aboriginal child. Aboriginal children also die at a rate three times higher than other, and they are more likely to be born with severe birth defects and debilitating conditions like Fetal Alcohol Spectrum Disorder. Also, suicide rates are six times higher compared to others, amongst a litany of other traumatic injuries.<sup>362</sup>
234. Elder Joseph also stated that nearly half of all Aboriginal children under 14-years of age are in foster care, and that Aboriginal children are more likely to experience sexual, physical and emotional abuse, and more likely to be victims of violent crime and to be incarcerated.<sup>363</sup>
235. In the research, even when controlling the effects of this general stress and trauma, which are higher in Aboriginal people and other minority groups, the

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<sup>358</sup> Pg. 91, Vol. 40, Dr. Amy Bombay Transcript.

<sup>359</sup> Pg. 91, Vol. 40, Dr. Amy Bombay Transcript.

<sup>360</sup> Pg. 91, Vol. 40, Dr. Amy Bombay Transcript.

<sup>361</sup> Pg. 91, Vol. 40, Dr. Amy Bombay Transcript.

<sup>362</sup> Pg. 93, Vol. 42, Elder Joseph Transcript.

<sup>363</sup> Pg. 93-94, Vol. 42, Elder Joseph Transcript.

health and social disparities continue to exist. This suggests that still additional factors related to Aboriginal identity are contributing to these health disparities. It is well-established that one of the important determinants of health that contribute to these disparities is experiences of racism and discrimination. When experienced on a chronic basis, racism and discrimination act as continual and chronic stressor that is exposed to these people sometimes on a daily basis.<sup>364</sup> As an example, the most recent RHS survey reported that 32.6% of those living on-reserve reported experiencing racism in the last year, and rates reported in urban sample have been much higher. According to Dr. Bombay, racism and discrimination is extremely common and pervasive that has really negative effects on health and well-being, and are important contributors to the continued health disparities among Aboriginal and non-Aboriginal peoples in Canada.<sup>365</sup>

**v. Indian Residential School is Collective Trauma**

236. IRS's are one example of the many collective traumas faced by Aboriginal peoples, and is only one of a larger history of chronic collective trauma exposure since colonization.<sup>366</sup> To further explain, the term "historical trauma", which was coined by Dr. Maria Yellow Horse Brave Heart, from the University of New Mexico, has been used to explain the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma. Collective and historical traumas influence the health of today's contemporary Aboriginal population.<sup>367</sup> Therefore, First Nation children in foster care today experience amplified effects of their parents, grandparents and extended family's traumas.

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<sup>364</sup> Pg. 92-93, Vol. 40, Dr. Amy Bombay Transcript.

<sup>365</sup> Pg. 93, Vol. 40, Dr. Amy Bombay Transcript.

<sup>366</sup> Pg. 94, Vol. 40, Dr. Amy Bombay Transcript.

<sup>367</sup> Pg. 95, Vol. 40, Dr. Amy Bombay Transcript.

vi. **Negative Effects of Early Life Adversity**

237. Early life adversity affects the brain and manifests itself in psychological and physical health outcomes, which are important to consider in the attempt to understand the risk factors faced by IRS survivors who endured high levels of early life adversity.<sup>368</sup> There is a large amount of research available on this subject. It is generally accepted that adverse conditions in early life can impact the developing brain and increase vulnerability to mood disorders and other disorders.<sup>369</sup> Transpiring are measurable differences in the functions and structure of the brain.<sup>370</sup> Pre-natal and early life adversities can result in vulnerability to the consequences of future stress through stress-related mechanisms that lead to epigenetic changes, which are changes in the expression of genes, meaning the environment can turn certain genes on and off, resulting in stable and lasting changes in gene expression.<sup>371</sup>
238. Early life adversity can be particularly damaging that has long-term health consequences.<sup>372</sup> These consequences can manifest themselves in negative health and social outcomes.<sup>373</sup> An important finding in the research is that these childhood adversities tend to be inter-related and tend to be experienced on a chronic basis. Studies have found that those who were exposed to any adverse childhood experience had an increased risk of being exposed to other negative experiences, meaning these negative experiences tend to cluster together.<sup>374</sup> Additionally, they tend to show cumulative effects such as the more adversity the individual is exposed to the greater the effects.<sup>375</sup> As an example, greater childhood adversity is associated with impaired worker performance, which in

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<sup>368</sup> Pg. 97, Vol. 40, Dr. Amy Bombay Transcript.

<sup>369</sup> Pg. 97, Vol. 40, Dr. Amy Bombay Transcript.

<sup>370</sup> Pg. 98, Vol. 40, Dr. Amy Bombay Transcript.

<sup>371</sup> Pg. 99, Vol. 40, Dr. Amy Bombay Transcript.

<sup>372</sup> Pg. 102-103, Vol. 40, Dr. Amy Bombay Transcript.

<sup>373</sup> Pg. 103, Vol. 40, Dr. Amy Bombay Transcript.

<sup>374</sup> Pg. 104, Vol. 40, Dr. Amy Bombay Transcript.

<sup>375</sup> Pg. 10, Vol. 40, Dr. Amy Bombay Transcript.

turn affects socio-economic status, and is associated with adolescent and unintended pregnancy, smoking as well as sexual activity.<sup>376</sup>

239. To summarize, early life adversity has really long-term negative effects on the brain and research shows how this is manifested in the increased risk of exposure to a range of mental and physical health outcomes seen in adulthood, however they begin to manifest early in life.<sup>377</sup>

vii. **Effects of Indian Residential School on Survivors**

240. According to Dr. Bombay, IRS survivors were subjected to high levels of early life adversity, and the research shows similar negative outcomes to those in the non-Aboriginal population affected by early life adversity.<sup>378</sup>

241. Although there is no research looking at the brains of IRS survivors, it could be hypothesized that the impacts on their physiological development would be at least the same and probably even greater because they were exposed to even greater adversity. What researchers have captured is that IRS survivors are more likely to suffer from various physical and mental health problems compared to Aboriginal adults who did not attend.<sup>379</sup> For example, IRS survivors report higher levels of psychological distress compared to those that did not attend, and they are also more likely to be diagnosed with a chronic physical health condition.<sup>380</sup> According to the most recent RHS survey, 76.1% of survivors had at least one chronic health condition versus 59.1% of First Nations adults who did not attend.<sup>381</sup>

242. Numerous qualitative research studies have shown that the lack of traditional parental role models in IRS impeded the transmission of traditional positive

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<sup>376</sup> Pg. 106, Vol. 40, Dr. Amy Bombay Transcript.

<sup>377</sup> Pg. 107, Vol. 40, Dr. Amy Bombay Transcript.

<sup>378</sup> Pg. 108, Vol. 40, Dr. Amy Bombay Transcript.

<sup>379</sup> Pg. 109, Vol. 40, Dr. Amy Bombay Transcript.

<sup>380</sup> Pg. 109, Vol. 40, Dr. Amy Bombay Transcript.

<sup>381</sup> Pg. 109-110, Vol. 40, Dr. Amy Bombay Transcript.

childrearing practices.<sup>382</sup> The 2002/03 RHS Survey reported that 43% of First Nations adults on-reserve perceived that their parents' attendance at IRS negatively affect the parenting that they received while growing up, accordingly 74.3% believed that their grandparents' attendance at IRS negatively affected the parenting that their parents received.<sup>383</sup>

#### viii. **The Intergenerational Effects of Indian Residential School**

243. Intergenerational effects are not unique to Aboriginal peoples. These effects have been shown in other populations and in other groups who have undergone similar collective race-based traumas that affected a large proportion of these groups. Much of this research has been conducted in the context of the Holocaust, but similar intergenerational effects have also been documented in the children of Japanese Americans interned during WWII, and in the context of the Turkish Genocide of Armenians. These are groups that have undergone major collective traumas.<sup>384</sup>
244. Research has consistently shown a greater need in these groups because of the greater health problems, however, with respect to intergenerational trauma in the context of IRS, before Dr. Bombay's research there had only been a few qualitative studies performed. Most of the early work focused on the impediment IRS presented to the transmission of positive parenting practices (or negative parenting practices), but some also dealt with how IRS survivors were struggling with mental health issues as well as issues relating to cultural identity, which in turn affect subsequent generations.<sup>385</sup>
245. Dr. Rosalyn Ing was one of the first to bring the issue of intergenerational trauma amongst IRS survivors to the fore in 2000. However, some of the first quantitative evidence that spoke to the intergenerational effects of IRS came

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<sup>382</sup> Pg. 110, Vol. 40, Dr. Amy Bombay Transcript.

<sup>383</sup> Pg. 110-111, Vol. 40, Dr. Amy Bombay Transcript.

<sup>384</sup> Pg. 111-112, Vol. 40 Dr. Amy Bombay Transcript.

<sup>385</sup> Pg. 113, Vol. 40, Dr. Amy Bombay Transcript.

from the first phase of the RHS Survey in 2005.<sup>386</sup> It reported that 37.2% of First Nations adults whose parents attended IRS had contemplated suicide in their life.<sup>387</sup> It also reported that the grandchildren of survivors were at an increased risk for suicide as 28.4% had attempted suicide versus only 13.1% of those whose grandparents did not attend IRS.<sup>388</sup>

246. Dr. Bombay's research on Aboriginal adults from across Canada consistently reports higher levels of depressive symptoms. In addition, her analyses of the RHS revealed that IRS offspring and grandchildren reported higher levels of psychological distress and are at greater risk for physical chronic health conditions.<sup>389</sup> For example, in the 2002/03 RHS Survey it was reported that 26.3% of residential school offspring had suicidal ideation versus only 18% of those who were not affected by IRS.<sup>390</sup>
247. In the most recent RHS Survey, similar results are found as the "youth portion" found that 31.4% of youth who had a parent who went to IRS reported symptoms of depression, versus only 20.4% of youth whose parents did not attend.<sup>391</sup>
248. The 2002/03 RHS Survey revealed that 48.7% of youth who had a parent who went to IRS reported having learning difficulties versus only 40.4% of youth whose parents did not attend. Similarly, 47.3% of IRS offspring had to repeat a grade versus only 35.2% of youth whose parents did not attend.<sup>392</sup> This is not only seen in youth living on-reserve but also in youth living off-reserve as well. A

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<sup>386</sup> Pg. 114, Vol. 40, Dr. Amy Bombay Transcript.

<sup>387</sup> Pg. 114, Vol. 40, Dr. Amy Bombay Transcript.

<sup>388</sup> Pg. 114, Vol. 40, Dr. Amy Bombay Transcript.

<sup>389</sup> Pg. 116, Vol. 40, Dr. Amy Bombay Transcript.

<sup>390</sup> Pg. 116-117, Vol. 40, Dr. Amy Bombay Transcript.

<sup>391</sup> Pg. 117, Vol. 40, Dr. Amy Bombay Transcript.

<sup>392</sup> Pg. 118, Vol. 40, Dr. Amy Bombay Transcript.

BC study found that having a parent who attended IRS was associated with underachieving in school.<sup>393</sup>

**ix. The Proportion Issue: First Nation Adults On-Reserve who attended IRS and/or who were Intergenerationally affected by Indian Residential School**

249. There is current data available that speaks to the proportion of individuals who either attended IRS themselves or have been intergenerationally affected by IRS.<sup>394</sup> Some of this data was published in the most recent National Report of the RHS Survey. In her research, Dr. Bombay found that 19.5% of adults living on-reserve attended IRS. Amongst survivors, 58.1% of them attended between the ages of 5 and 10, which are the ages when the brain is undergoing rapid development. Thus, these childhood adversities would have had significant effects.<sup>395</sup>
250. For those who have been intergenerationally affected by IRS, in Dr. Bombay's chapter of the RHS Survey 2008/10, 52.7% of First Nations adults on-reserve had at least one parent who attended, and 46.2% had at least one grandparent who attended. However, these statistics are not mutually exclusive because a lot of families were impacted in more than one generation.<sup>396</sup>
251. Nonetheless, 20.2% of First Nations adults living on-reserve reported attending IRS themselves, that is, they are IRS survivors.<sup>397</sup> Of this 20.2%, 29.8% had three generations of their family go through IRS; 27.8% had two generations go through IRS; and 42.4% had one generation go through IRS. This is important

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<sup>393</sup> Pg. 118, Vol. 40, Dr. Amy Bombay Transcript.

<sup>394</sup> Pg. 119, Vol. 40, Dr. Amy Bombay Transcript.

<sup>395</sup> Pg. 120, Vol. 40, Dr. Amy Bombay Transcript.

<sup>396</sup> Pg. 121, Vol. 40, Dr. Amy Bombay Transcript.

<sup>397</sup> Pg. 122, Vol. 40, Dr. Amy Bombay Transcript.

information because the more generations in the family that were affected by IRS the greater the risk in these individuals.<sup>398</sup>

252. With respect to the proportion of individuals intergenerationally affected, Dr. Bombay found that 31.1% of First Nations adults living on-reserve had at least one parent who attended IRS. Of this group, just over half also had a grandparent who attended IRS, with the remaining 47% just had a parent attend IRS. Meaning these individuals had more than one generation attend IRS.<sup>399</sup> In other words, a very large proportion of the on-reserve population has been either directly or indirectly affected by IRS.<sup>400</sup>

**x. Intergenerational Effects of Indian Residential School:  
Pathways/Mediators**

253. The research showed consistent intergenerational effects of IRS, and once that was established, Dr. Bombay began to explore the pathways and mechanisms by which these individuals seem to be at a greater risk for negative outcomes. This is important work because the pathways and mechanisms can serve as targets and interventions and in preventative efforts in addressing the negative effects of IRS.<sup>401</sup> For example, amongst these pathways/mechanisms include models of parenting and childrearing practices.<sup>402</sup>
254. The loss of cultural knowledge, language and tradition that happened as a result of IRS is one mechanism that contributes to the intergenerational transmission of these negative effects, the undermining of individual and collective identity and esteem, as well as damage to the relationship with the larger society.<sup>403</sup>

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<sup>398</sup> Pg. 122-123, Vol. 40, Dr. Amy Bombay Transcript.

<sup>399</sup> Pg. 123, Vol. 40, Dr. Amy Bombay Transcript.

<sup>400</sup> Pg. 125, Vol. 40, Dr. Amy Bombay Transcript.

<sup>401</sup> Pg. 127, Vol. 40, Dr. Amy Bombay Transcript.

<sup>402</sup> Pg. 128, Vol. 40, Dr. Amy Bombay Transcript.

<sup>403</sup> Pg. 128, Vol. 40, Dr. Amy Bombay Transcript.

255. In measuring these mediators, a statistical mediation model is used to seek to identify the mechanism between an independent variable, which for Dr. Bombay was parental residential school attendance or a familial residential school attendance, and a dependent variable, which for Dr. Bombay was looking at depressive symptoms.<sup>404</sup> As there is a known relationship between parental residential school attendance and depressive symptoms, the mediation analyses allows one to extract the contribution of the suspected variable hypothesized to be the underlying mediator that accounts for this known relationship. This is how research determines the different variables, mechanisms, and pathways that play a role in accounting for this or other known relationships.<sup>405</sup>
256. In her article, *The Impact of Stressors on Second Generation Indian Residential School Survivors*<sup>406</sup>, Dr. Bombay was researching how stressors might mediate this relationship between having a parent who went to IRS and oppressive symptoms – the first stressor looked at was adverse childhood experiences.<sup>407</sup> Although Dr. Bombay’s study measured various types of abuse, neglect, and household dysfunction (e.g., living in a household with an adult who abuses drugs/alcohol), IRS offspring have also been reported to be exposed to additional psychosocial (e.g., low socioeconomic status) and physiological (e.g., pre-natal stress associated with maternal smoking) early life stress.<sup>408</sup> Dr. Bombay’s findings are consistent with the work of other researchers who have found that children of survivors are exposed to higher levels of stress.<sup>409</sup>
257. As hypothesized, those individuals who had at least one parent who went to IRS experienced, on average, five (out of ten) of these childhood adversities (which

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<sup>404</sup> Pg. 129, Vol. 40, Dr. Amy Bombay Transcript.

<sup>405</sup> Pg. 129-130, Vol. 40, Dr. Amy Bombay Transcript.

<sup>406</sup> *Supra* note 324.

<sup>407</sup> Pg. 131, Vol. 40, Dr. Amy Bombay Transcript.

<sup>408</sup> Pg. 132, Vol. 40, Dr. Amy Bombay Transcript.

<sup>409</sup> Pg. 147, Vol. 40, Dr. Amy Bombay Transcript.

were provided in a questionnaire<sup>410</sup>), compared to about three (out of ten) childhood adversities which were experienced by those who did not have a parent who went to IRS. Note that three (3) is still higher than the mean found in the U.S. general population which is only two (2).<sup>411</sup> Her research showed that Aboriginal people who were affected by IRS are at an even greater risk for depressive symptoms.<sup>412</sup>

258. It has been shown that among Aboriginal children living off-reserve, those who had a parent who attended IRS were more likely to be raised in low socio-economic status households.<sup>413</sup> It is noteworthy that these intergenerational effects are not only seen in Canada, but higher rates of trauma are also seen in American Indian populations relative to the U.S. general population. Evidence suggests that this is because American Indians have undergone similar collective traumas to which Aboriginal people in Canada have been exposed.<sup>414</sup>
259. Having a parent who attended IRS was associated with twice the risk of having a lifetime history of abuse.<sup>415</sup> Also, children of residential school survivors perceive significantly higher levels of perceived discrimination compared to those whose parents did not attend.<sup>416</sup> In addition, having a parent who went to residential school was associated with higher levels of adverse childhood experiences, which is in turn associated with higher levels of adult traumas.<sup>417</sup> Similarly, having a parent who went to residential school was associated with higher levels of adverse childhood experiences which accounts for the higher levels of perceived discrimination reported by children of survivors.<sup>418</sup>

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<sup>410</sup> *Supra* note 324, at pg. 373-374.

<sup>411</sup> Pg. 133, Vol. 40, Dr. Amy Bombay Transcript.

<sup>412</sup> Pg. 133, Vol. 40, Dr. Amy Bombay Transcript; also, *supra* note 324, pg. 380.

<sup>413</sup> Pg. 136, Vol. 40, Dr. Amy Bombay Transcript.

<sup>414</sup> Pg. 137, Vol. 40, Dr. Amy Bombay Transcript.

<sup>415</sup> Pg. 139, Vol. 40, Dr. Amy Bombay Transcript.

<sup>416</sup> Pg. 139, Vol. 40, Dr. Amy Bombay Transcript.

<sup>417</sup> Pg. 141, Vol. 40, Dr. Amy Bombay Transcript.

<sup>418</sup> Pg. 141, Vol. 40, Dr. Amy Bombay Transcript.

260. Adulthood stressors mediated the effect between adverse childhood experiences and depressive symptoms, meaning that higher levels of childhood adversity in residential school offspring was associated with higher levels of adult traumas which accounted for their depressive symptoms, as did their higher levels of perceived discrimination as these were also associated with higher levels of depressive symptoms.<sup>419</sup>
261. Dr. Bombay and her associates conducted a mediational analysis called a “multiple mediation analyses” which considers the inter-relationship between childhood and adulthood stressors, and it was found that all three (3) stressors: adult traumas, adverse childhood experiences, and perceived discrimination, contributed uniquely to the higher levels of depressive symptoms in residential school offspring, meaning that all three stressors contribute to the differences between residential school offspring and the control participants.<sup>420</sup> These findings applied to First Nations adults living on-reserve as their exposure to these stressors, too, was associated with higher levels of psychological distress, and in this way there a replication of Dr. Bombay and her colleague’s findings the First Nations Regional Longitudinal Health Survey data, which is a national representative sample of First Nations adults living on-reserve.<sup>421</sup>
262. Typically, levels of depressive symptoms among IRS offspring and controls do not differ among those exposed to low levels of adverse childhood experiences. In contrast, among those who are exposed to high levels of adverse childhood experiences, the relationship between adverse childhood experiences and depressive symptoms is much is stronger. This suggests that second generation residential school offspring (i.e. children of residential school survivors<sup>422</sup>) are more vulnerable to the negative effects of adverse childhood experiences in

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<sup>419</sup> Pg. 142, Vol. 40, Dr. Amy Bombay Transcript.

<sup>420</sup> Pg. 142, Vol. 40, Dr. Amy Bombay Transcript.

<sup>421</sup> Pg. 143, Vol. 40, Dr. Amy Bombay Transcript.

<sup>422</sup> Pg. 149, Vol. 40, Dr. Amy Bombay Transcript.

relation to depressive symptoms.<sup>423</sup> This pattern is also seen in children of Holocaust survivors. What this also means is that children of residential school survivors are not only exposed to higher levels of these stressors, but they are also more affected by them.<sup>424</sup>

263. The exact same patterns are seen in relation to the effects of the number of traumas experienced in adulthood and the effects of perceived discrimination, and, again, children of residential school survivors were more likely to have higher levels of depressive symptoms when exposed to adulthood trauma as compared to the control participants, and are more affected by perceiving high levels of discrimination.<sup>425</sup>

#### **xii. Children of Residential School Survivors Perceive High Levels of Discrimination**

264. In Dr. Bombay's subsequent study, *Appraisals of Discriminatory Events Among Adult Offspring of Indian Residential School Survivors: The Influences of Identity Centrality and Past Perceptions of Discrimination*<sup>426</sup>, she and her colleagues were exploring potential reasons why children of survivors are perceiving high levels of discrimination, because appraisals have been shown to be critical in determining individual differences within minority groups with respect to levels of perceived discrimination and with respect to the effects of perceived discrimination.<sup>427</sup>
265. What this research has shown in other groups is that the effects of intergroup encounters on their wellbeing ultimately depend upon whether these encounters with discriminatory events elicit appraisal as being due to discrimination on the

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<sup>423</sup> Pg. 147-148, Vol. 40, Dr. Amy Bombay Transcript.

<sup>424</sup> Pg. 148-149, Vol. 40, Dr. Amy Bombay Transcript.

<sup>425</sup> Pg. 150, Vol. 40, Dr. Amy Bombay Transcript.

<sup>426</sup> Amy Bombay, Kimberly Matheson, and Hymie Anisman, "Appraisals of Discriminatory Events Among Adult Offspring of Indian Residential School Survivors: The Influences of Identity Centrality and Past Perception of Discrimination" (2013), *Cultural Diversity and Ethnic Minority Psychology* 2013, American Psychological Association 2014, Vol. 20, No. 1, pg. 75-86, CHRC BOD, HR-14, Tab 341.

<sup>427</sup> Pg. 151, Vol. 40, Dr. Amy Bombay Transcript.

part of the individual to whom they are interacting. The research shows that individual differences in appraisals of discrimination are more prevalent when the nature of the encounter is subtle rather than blatant, but there are individual differences in how the individual appraises the discrimination as a threat to their wellbeing or a threat to their identity. Dr. Bombay stated that it is really when an individual appraises an encounter with an outgroup member as reflecting discrimination, and when they appraise it as threatening to their identity or to their well-being that researchers would expect to see negative outcomes.<sup>428</sup>

266. Dr. Bombay's research here focuses on assessing these potential differences in appraisals of discrimination and in appraisals of threat between children of residential school survivors and the researcher's control subjects. This involved exposing both groups to either nine (9) subtle scenarios depicting potentially discriminatory events, or to nine (9) blatant discrimination scenarios.<sup>429</sup> The participants were asked to picture themselves in the potentially discriminatory events and to imagine what they would think and how they would feel as a basis for answering the questions asked of them in the researchers assessing their discrimination appraisals and threat appraisals.<sup>430</sup>

267. This research also explored potential predictors of these appraisals. Dr. Bombay and her colleagues already knew that residential school offspring perceived higher levels of discrimination, and so they predicted that these experiences would contribute to their altered appraisals of intergroup encounters as other similar research had shown. They predicted that having high levels of perceived discrimination in the past twelve (12) months would be associated with a greater likelihood of attributing these scenarios to discrimination.<sup>431</sup>

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<sup>428</sup> Pg. 151-153, Vol. 40, Dr. Amy Bombay Transcript.

<sup>429</sup> Pg. 153, Vol. 40, Dr. Amy Bombay Transcript.

<sup>430</sup> Pg. 157-158, Vol. 40, Dr. Amy Bombay Transcript.

<sup>431</sup> Pg. 159, Vol. 40, Dr. Amy Bombay Transcript.

268. Due to the fact that residential schools explicitly aimed to destroy Aboriginal cultural identity, Dr. Bombay and her colleagues were interested in exploring whether residential school offspring would differ in certain respects of Aboriginal identity.<sup>432</sup> In particular, they focused on one aspect of “identity”, *identity centrality*, which is the importance or the salience of one’s collective group membership to their own self-concept.<sup>433</sup> Research in other groups has shown that having high levels of identity centrality is associated with higher levels of perceived discrimination.<sup>434</sup> Also, those who consider their group identity to be an important aspect of their personal identity are more likely to explain ambiguous events in terms of their group identity as opposed to other characteristics or membership in another group.<sup>435</sup>
269. The results of Dr. Bombay’s research were that children of residential school offspring were more likely to attribute these scenarios to discrimination, and this was particularly the case in those who were presented with the subtle discrimination scenarios, although it was the case as well to a lesser extent with the blatant scenarios.<sup>436</sup> As well, the tendency to make discrimination appraisals was associated with the higher levels of perceived discrimination, as well as a greater tendency of making threat appraisals, and in turn this was subsequently associated with higher levels of depressive symptoms.<sup>437</sup>
270. Further, having a parent who attended residential school was associated with higher levels of identity centrality, meaning that those who had a parent who went to residential school were more likely to consider their Aboriginal heritage

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<sup>432</sup> Pg. 159, Vol. 40, Dr. Amy Bombay Transcript.

<sup>433</sup> Pg. 159, Vol. 40, Dr. Amy Bombay Transcript.

<sup>434</sup> Pg. 160, Vol. 40, Dr. Amy Bombay Transcript.

<sup>435</sup> Pg. 160, Vol. 40, Dr. Amy Bombay Transcript.

<sup>436</sup> Pg. 161, Vol. 40, Dr. Amy Bombay Transcript.

<sup>437</sup> Pg. 161, Vol. 40, Dr. Amy Bombay Transcript.

as an important part of their self-concept.<sup>438</sup> This as well was associated with a greater likelihood of making these appraisals of discrimination.<sup>439</sup>

271. Residential school offspring perceived higher levels of discrimination in the past 12-months and these past experiences of discrimination were associated with a greater tendency of attributing these scenarios to discrimination, which was in line with Dr. Bombay's past research.<sup>440</sup> Dr. Bombay made the point that past discrimination does lead to increased appraisals of discrimination, and that this tendency is part of circular relationship that may lead to more future higher levels of perceived discrimination.<sup>441</sup> A significant relationship between past discrimination and depressive symptoms are both higher in residential school offspring.<sup>442</sup>

### **xiii. Internalized Racism and Reduced Cultural Pride (Ingroup Affect)**

272. Internalized racism is defined as the personal conscious or subconscious acceptance of a dominant society's racist views, stereotypes and biases of one's ethnic group.<sup>443</sup> It is a research topic of interest minority children as early as the age of five-years-old are aware of stereotypes and biases that exist their own group. Dr. Bombay researched the qualitative differences in internalized racism among the offspring of residential school survivors and a control group.<sup>444</sup>
273. Some of the participant's responses indicated that their parents, who had attended residential school, showed a lot of internalized racism, which,

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<sup>438</sup> Pg. 161, Vol. 40, Dr. Amy Bombay Transcript.

<sup>439</sup> Pg. 162, Vol. 40, Dr. Amy Bombay Transcript.

<sup>440</sup> Pg. 162, Vol. 40, Dr. Amy Bombay Transcript.

<sup>441</sup> Pg. 162, Vol. 40, Dr. Amy Bombay Transcript.

<sup>442</sup> Pg. 162-163, Vol. 40, Dr. Amy Bombay Transcript.

<sup>443</sup> Pg. 163, Vol. 40, Dr. Amy Bombay Transcript.

<sup>444</sup> Pg. 164, Vol. 40, Dr. Amy Bombay Transcript.

according to Dr. Bombay, stemmed from the constant cultural denigration that existed in residential schools.<sup>445</sup>

274. Dr. Bombay's qualitative research found that a lot of residential school survivors reported feeling high levels of shame about being Aboriginal as children. Her research turned to another aspect of "identity", *ingroup affect*, and she began measuring how the individual feels about being Aboriginal. Although there were differences between the offspring of residential school survivors and the control group in recounting their childhood, their current levels of internalized racism and ingroup affect did not differ between groups.<sup>446</sup>
275. Dr. Bombay stated that this may be explained by how certain individuals report being able to have overcome the self-appraised shame of being Aboriginal, often through learning about residential schools in an effort to reclaim a certain cultural identity. However, there were differences related to parental communication that the offspring of residential school survivors received about residential schools and what it meant to be Aboriginal, and that these seem to have contributed to differences in identity and in their levels of perceived discrimination.<sup>447</sup>
276. Dr. Bombay stated that a lot of indirect communication about residential schools came from the parents of the offspring of residential school survivors without further and more direct information about the residential school system itself. In addition, a lot of non-verbal communication was also evident. A lot of these children (offspring of residential school survivors) were aware their parents attended residential school but that their parents never verbally discussed their residential school experiences, although the children were somewhat aware how their experience affected their parents.<sup>448</sup> Indirect and non-verbal

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<sup>445</sup> Pg. 165, Vol. 40, Dr. Amy Bombay Transcript.

<sup>446</sup> Pg. 165-166, Vol. 40, Dr. Amy Bombay Transcript.

<sup>447</sup> Pg. 166-167, Vol. 40, Dr. Amy Bombay Transcript.

<sup>448</sup> Pg. 167-168, Vol. 40, Dr. Amy Bombay Transcript.

communication was common amongst residential school offspring and the qualitative data indicated that it affected the children's' lives by contributing to higher levels of perceived discrimination.<sup>449</sup>

277. The quantitative data suggested the same.<sup>450</sup> Dr. Bombay and her colleagues found that those who had a parent in residential school were exposed to higher levels of indirect communication, and that this was in turn associated with higher levels of perceived discrimination.<sup>451</sup> Again, the higher levels of perceived discrimination were associated with higher levels of depressive symptoms.<sup>452</sup> Non-verbal communication about their parents' experiences in residential school was associated with higher levels of identity centrality in residential school offspring, which meant that being Aboriginal appeared to be an important part of their identity which was in turn associated with higher levels of depression.<sup>453</sup> Non-verbal communication was also associated with lower levels of ingroup affect that translates into higher levels of shame about being Aboriginal, which, according to Dr. Bombay, are associated with higher levels of depressive symptoms.<sup>454</sup>
278. Dr. Bombay's research also found that residential school offspring reported a lower quality of general communication with their parents that had its own negative effect on depressive symptoms. Together, this meant that the offspring of residential school survivors had more indirect communication about residential schools, more non-verbal communication, and a lower general quality of communication with their parents, and that all of these factors contributed to higher levels of depression.<sup>455</sup>

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<sup>449</sup> Pg. 169, Vol. 40, Dr. Amy Bombay Transcript.

<sup>450</sup> Pg. 169, Vol. 40, Dr. Amy Bombay Transcript.

<sup>451</sup> Pg. 170, Vol. 40, Dr. Amy Bombay Transcript.

<sup>452</sup> Pg. 171, Vol. 40, Dr. Amy Bombay Transcript.

<sup>453</sup> Pg. 171, Vol. 40, Dr. Amy Bombay Transcript.

<sup>454</sup> Pg. 171-172, Vol. 40, Dr. Amy Bombay Transcript.

<sup>455</sup> Pg. 172, Vol. 40, Dr. Amy Bombay Transcript.

279. In a subsequent study on these different types of communication, a strong relationship was revealed between the offspring of residential school survivors learning about their parents' negative experiences at residential school and higher levels of identity centrality. This meant that hearing about their parents negative experiences made it more likely that their Aboriginal identity played a deeper role in explaining "who they are" as individuals, which was associated with higher levels of perceived discrimination and higher levels of depressive symptoms. Learning about these negative experiences was also associated with lower levels of ingroup affect.<sup>456</sup>
280. What this research shows is that it would be beneficial to give these children information about residential schools and explain what it means to be Aboriginal, without describing in too much age inappropriate details about the trauma that happened to their parents.<sup>457</sup>

#### **xiv. Collective Effects of Indian Residential Schools**

281. Residential schools affected not only individuals but also whole communities, referred to as *collective effects*, which are greater than the sum of the effects on those individually affected. Collective effects have been observed in other groups, such as Holocaust survivors, that have experienced major collective traumas and research has shown that collectively experienced traumas have unique social and psychological trajectories. These traumas create collective responses and collective interpretations of what the trauma means in respect to their identity and wellbeing as a collective in general.<sup>458</sup>
282. Collective trauma at the family and community levels in turn modify the social dynamics of a community or group by modifying the processes, structures and

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<sup>456</sup> Pg. 174, Vol. 40, Dr. Amy Bombay Transcript.

<sup>457</sup> Pg. 175, Vol. 40, Dr. Amy Bombay Transcript.

<sup>458</sup> Pg. 178-179, Vol. 40, Dr. Amy Bombay Transcript.

functioning within the group.<sup>459</sup> A number of consistent findings were found across groups and the community-level changes that have been documented include the erosion of basic trust, the deterioration of social norms, and the deterioration of traditional values of the group.<sup>460</sup> Elder Robert Joseph described the dramatic change as though a cyclone or tsunami hit you.<sup>461</sup>

283. Similar to how the offspring of residential school survivors experienced indirect or non-verbal communication from their parents, this tendency is also expressed on the community level where there is community silence and possibly denial of the effects of the collective trauma, coined the “conspiracy of silence”. In addition, collective traumas have shown to elicit collective fear and defence of violence in communities that have been traumatized. For communities affected by residential schools, ‘individual shame’ translates into ‘collective shame’ and ‘collective changes in the community identity’. Where this begins to effect perception, this is called ‘internalized racism’ in individuals and ‘internalized oppression’ or ‘lateral violence’ on the collective.<sup>462</sup>
284. Lateral violence occurs within marginalized groups where members strike out at each other as a result of being oppressed, that is, the oppressed become the oppressors of themselves and each other, which is a collective effect that research has shown affects the health of the overall group.<sup>463</sup> Lateral violence is a well-documented and researched collective effect.<sup>464</sup>
285. For the Aboriginal Healing Foundation, Dr. Bombay’s researched “student-to-student abuse” that occurred in the residential schools, which was a topic that had not been explored before, and she focused on the factors that contributed to this. One of the main research questions was exploring the collective effects of

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<sup>459</sup> Pg. 179, Vol. 40, Dr. Amy Bombay Transcript.

<sup>460</sup> Pg. 179, Vol. 40, Dr. Amy Bombay Transcript.

<sup>461</sup> Pg. 42, Vol. 42, Elder Joseph Transcript.

<sup>462</sup> Pg. 180-181, Vol. 40, Dr. Amy Bombay Transcript.

<sup>463</sup> Pg. 181, Vol. 40, Dr. Amy Bombay Transcript.

<sup>464</sup> Pg. 181-182, Vol. 40, Dr. Amy Bombay Transcript.

student-to-student abuse in residential schools on whole communities. Two of the main themes present in the research conducted were the concepts of lateral violence and collective silence.<sup>465</sup>

286. One contemporary consequence of residential schools is the high rates of community violence and child abuse existing in some communities. Based on some of the responses gathered in this research for the Aboriginal Healing Foundation, residential schools not only affected the children of those who attended, but when a sizeable proportion of the population within a community went to residential school, the effects of attendance affect even those who did not attend.<sup>466</sup> Again, some of the responses gathered show that residential schools created negative consequences in a cyclical pattern that is seemingly never-ending, which, according to Dr. Bombay, would require creative interventions in order to break the cycle.<sup>467</sup> Dr. Bombay explains that the health of Aboriginal infants and children are a reflection of the health of the overall Aboriginal group, which appear to be a mechanism through which these disparities continue to exist.<sup>468</sup>

#### **xv. Indian Residential Schools and Historical Trauma**

287. Historical trauma is the cumulative emotional and psychological wounding over the lifespan of an individual and across generations emanating from massive group trauma.<sup>469</sup> It is a perspective that links current health and social disparities to the traumatic colonial past of Aboriginal peoples.<sup>470</sup> And, it is a perspective that resonates well in the literature relating to Aboriginal health because it

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<sup>465</sup> Pg. 182-185, Vol. 40, Dr. Amy Bombay Transcript.

<sup>466</sup> Pg. 186-187, Vol. 40, Dr. Amy Bombay Transcript.

<sup>467</sup> Pg. 187-188, Vol. 40, Dr. Amy Bombay Transcript.

<sup>468</sup> Pg. 190, Vol. 40, Dr. Amy Bombay Transcript.

<sup>469</sup> Pg. 2, Vol. 41, Dr. Amy Bombay Transcript.

<sup>470</sup> Pg. 2, Vol. 41, Dr. Amy Bombay Transcript.

assists in understanding the past in explaining why we see dysfunction in Aboriginal communities today.<sup>471</sup>

288. Dr. Teresa Evans-Campbell, University of Washington, who Dr. Bombay stated is a renowned expert in American Indian health, suggests that to consider historical trauma one needs to show that current health disparities are connected to the trauma and continue to undermine well-being by interacting with contemporary stressors. This is expressed in responses influenced by the accumulation of risk based in the collective trauma. The effects accumulate across generations leading to increased risk typically expected from assessing the collective trauma as a separate event.<sup>472</sup>
289. It is an important concept in order to counteract modern racist attitudes, such as “laissez-faire racism”, as applied by Dr. Jeff Denis to Indigenous populations, who found that the non-Aboriginal population in Canada have a tendency to blame Aboriginal peoples for their social inequities, and that they tend to show a resistance to policies that address those inequities.<sup>473</sup>
290. IRS’s continue to undermine the health of today’s Aboriginal population in Canada, and among children of residential school survivors, not only are these children more exposed to higher levels of contemporary stress and trauma, but they also have a greater vulnerability to the effect of these historical traumas.<sup>474</sup> In her paper, *The Impact of Stressors on Second-Generation Indian Residential School Survivors*<sup>475</sup>, children of residential school survivors were more affected by contemporary encounters with discrimination. Dr. Bombay measured this

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<sup>471</sup> Pg. 2, Vol. 41, Dr. Amy Bombay Transcript.

<sup>472</sup> Pg. 3, Vol. 41, Dr. Amy Bombay Transcript.

<sup>473</sup> Pg. 4-5, Vol. 41, Dr. Amy Bombay Transcript.

<sup>474</sup> Pg. 7, Vol. 41, Dr. Amy Bombay Transcript.

<sup>475</sup> *Supra* note 324.

inter-generational impact and found empirical support that this risk does accumulate over time and across generations.<sup>476</sup>

291. Looking at ‘psychological distress’ in the First Nations Regional Health Survey data 2008/10, Dr. Bombay and her colleagues began to measure the inter-generational effects of residential schools by measuring how having more generations in a family who attended residential school influences wellbeing. The research showed that the lowest levels of psychological distress were seen in those families who had not been affected by residential schools. This increases significantly amongst those who had a parent or a grandparent who attend a residential school. The highest levels of psychological distress were found among those who had one generation in their family who attended; those who had two generations were even higher.<sup>477</sup>
292. The fact is a majority of people living on-reserve have been affected by inter-generational effects of residential schools. However, Dr. Bombay emphasized that residential schools were only one example of significant collective trauma – another is *forced relocation* that many Aboriginal communities endured.<sup>478</sup> This is important because Dr. Bombay’s findings with regard to the collective trauma of residential schools are consistent with similar research in the U.S. with regard to government relocation programs effecting American Indian communities.<sup>479</sup> This similarity speaks to the effect of these collective traumas and their accumulation over time.<sup>480</sup>

#### **xvi. Implications of Dr. Bombay’s Research**

293. The implications of Dr. Bombay’s research suggest that past government policies, namely the residential school system, is linked with current-day health

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<sup>476</sup> Pg. 8, Vol. 41, Dr. Amy Bombay Transcript.

<sup>477</sup> Pg. 8-9, Vol. 41, Dr. Amy Bombay Transcript.

<sup>478</sup> Pg. 13, Vol. 41, Dr. Amy Bombay Transcript.

<sup>479</sup> Pg. 14, Vol. 41, Dr. Amy Bombay Transcript.

<sup>480</sup> Pg. 15, Vol. 41, Dr. Amy Bombay Transcript.

and social disparities relative to the non-Aboriginal population in Canada. However, it did not eradicate the will of Aboriginal people such as Elder Robert Joseph to re-empower themselves and raise their children in a way they chose.<sup>481</sup> Residential schools are associated with increased risk and therefore increased need for support on-reserve due to the association with the number of generations affected such as those who had a parent or grandparent attend residential school.<sup>482</sup>

294. Cycles of childhood adversity have resulted from these increases. Also, high levels of childhood adversity have developed which is a central mechanism in the proliferation of these cycles, which were initially catalyzed by the introduction of residential schools. Other negative cycles also exist and are inter-related such as cycles of mental illness, low socio-economic status and substances abuse, which are collective effects found in Aboriginal communities.<sup>483</sup>
295. These disparities have existed for a long-time and do not seem to be narrowing, and in some cases are growing. This points to the need that something different needs to be done in order to intervene in these cycles, otherwise it is expected that these high rates of removal of Aboriginal children will continue, all of which is empirically linked to the negative impact of residential school. Dr. Bombay stated scientifically that wide-ranging holistic and multi-faceted intervention and prevention programming is needed.<sup>484</sup>
296. Elder Joseph testified that Canadians must elevate their consciousness and begin sharing and developing values and principles that will improve the lives of Aboriginal and non-Aboriginal Canadians alike. A new discussion and leading to better way of understanding one another is required in order to break down the walls of ignorance, racism and indifference, so as to discover who we are

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<sup>481</sup> Pg. 7, Vol. 42, Elder Joseph Transcript.

<sup>482</sup> Pg. 28, Vol. 41, Dr. Amy Bombay Transcript.

<sup>483</sup> Pg. 28-29, Vol. 41, Dr. Amy Bombay Transcript.

<sup>484</sup> Pg. 30, Vol. 41, Dr. Amy Bombay Transcript.

together as a country.<sup>485</sup> Real discussions not about what separates and different identities, but who we are together<sup>486</sup> are necessary.

## **G) The Testimony of Elder Robert Joseph**

### **i. A Discussion of the Negative Impacts of Residential Schools**

297. The negative impacts of residential schools are empirically linked to many social disparities existent in Aboriginal communities and families today. Elder Joseph testified that his residential school experience was not uncommon and was indeed a negative one that had injected a deep, deep sense of loneliness into his life. He said the experiences suffered by the survivors of these schools was a deep and sensitive issue that no one or very few people spoke of because of the sense of shame and brokenness their school experiences brought into their lives. For example, it was not until his brother was lying on his deathbed four years ago that he apologized for not being able to protect him, at which time Elder Joseph realized how much his brother had suffered within, as he told him the “horror stories” that he, and probably Elder Joseph’s younger sister, had endured at residential school. Elder Joseph said it broke his heart to hear his brother speak of his experiences and that it was very difficult to hear him tell his story.<sup>487</sup>
298. Elder Joseph said every aspect of the children’s lives was monitored in these schools and that his school experience was “really brutal”.<sup>488</sup> The teachers and staff were cruel, “they pull on your ears, cuff you over the years or beat you with a pointer or stand you in a corner for hours on end”. His point is that these types of cruel punishments were happening to “little six, seven, eight-year-old” children, and that once you think of that it becomes easier to understand that

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<sup>485</sup> Pg. 24, Vol. 42, Elder Joseph Transcript.

<sup>486</sup> Pg. 8-9, Vol. 42, Elder Joseph Transcript.

<sup>487</sup> Pg. 45-46, Vol. 42, Elder Joseph Transcript.

<sup>488</sup> Pg. 41, Vol. 43, Elder Joseph Transcript.

“this was a pretty – pretty brutal place and [the schools} never should have happened”.<sup>489</sup>

“There was nothing I did, there wasn’t a breath that I took where a supervisor wasn’t close by monitoring where you were and what you were doing. You could be eating, sleeping, praying, working, eating, all of it was subject to monitoring and timetables and rules. And you have to remember that during those early, early times they targeted little children as young as three years old because it was thought that they could undergo transformation from the natural – ways to that of civilization...”<sup>490</sup>

299. The children suffered a great cultural loss. They were segregated all the time and eventually lost the ability to relate with family and friends and others, to the point that, at least for Elder Joseph, he “had no social skills around young women, girls, none at all”. He said he was so shy and that he did not know how to relate to other people. In addition, his language was “absolutely forbidden” and that so many cultural skills were lost. Abuse, strip searches, withholding gifts and visits from family members, and public shaming were very commonplace.<sup>491</sup> Some of these searches he said were thinly veiled and actually were instead instances of sexual assault. Also, children were sometimes locked in closets and cages. Racism was really strong in the schools and Elder Joseph said there was hardly a sentence uttered that was not some sort of racist remark.<sup>492</sup>
300. Elder Joseph spoke of the “spiritual blanket” and the cultural significance children held in the family and community, and the important cultural practice of elevating a child’s sense of value, worth and purpose:

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<sup>489</sup> Pg. 41-42, Vol. 43, Elder Joseph Transcript.

<sup>490</sup> Pg. 84, Vol. 42, Elder Joseph Transcript.

<sup>491</sup> Pg. 86, Vol. 42, Elder Joseph Transcript.

<sup>492</sup> Pg. 86, Vol. 42, Elder Joseph Transcript.

“I think of all of the things that so many of us lost in our childhoods that we didn’t really experience that should have been the experience were those ideas about being honoured and valued, and so these words are critically important, much more I think than we realize.”<sup>493</sup>

301. The tragedy of losing the language is difficult to overcome. Elder Joseph describes that his language, Kwak’wala, is a language that describes his people’s position in the universe, in creation, in community, and in family. The language is used in how they place themselves within current realities.<sup>494</sup> The horrible things that were happening at residential schools, and which Elder Joseph said he witnessed, that is, the inhumane treatment, negatively affected his personal value and that of his people, to the point that he “began to believe that none of us had any value or any worth...and [that] nobody cared”.<sup>495</sup>

“That kind of environment was constant and sustaining over time, and for me – not everybody, I don’t think, got as beat up psychologically as I did, but I was really beat up. I still hear those little voices, I still get scared sometime, I still withdraw sometimes, I still hurt sometimes...”<sup>496</sup>

302. Elder Joseph testified that “one of the worst things about [his] experiences and [his] residential school life was this deep, deep sense of loneliness” that he endured as child in the school, as an adolescent, and later as an adult, he said he “just always felt so lonely”.<sup>497</sup> When he graduated and was permitted to leave the school and forge a life for himself, upon embarking down the “infamous stairs” from the residential school building, he suddenly realized the futility of his life. He said he stared out over the ocean realizing he had no sense of his life’s purpose, and that he had no idea what he would do or where he would live. And,

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<sup>493</sup> Pg. 18-19, Vol. 43, Elder Joseph Transcript.

<sup>494</sup> Pg. 22, Vol. 43, Elder Joseph Transcript.

<sup>495</sup> Pg. 44, Vol. 43, Elder Joseph Transcript.

<sup>496</sup> Pg. 43, Vol. 43, Elder Joseph Transcript.

<sup>497</sup> Pg. 48, Vol. 42, Elder Joseph Transcript.

he said this was at a time when he thought he should be full of “dreams” about his future and what it held for him, the possibilities, but instead, unfortunately, he said he was “just a broken human being”.<sup>498</sup>

303. He found it difficult to cope with the sense of loss and purpose instilled in him from his school experience. In his testimony, he acknowledged that his residential school experience is a sad story but an important one because people must understand what the little children endured at these schools. When these little children grew up he said they were “haunted” by their experiences at these schools in many ways. Elder Joseph testified that his experience haunted him and affected his ability to, for example, hold onto a job. He said that he would retreat when he achieved too much or became too successful because he did not know how to be accountable in controlling how his residential school experience was affecting him. He turned to drinking and became an alcoholic, and he said his life sank into deep despair and was “just out of control”.<sup>499</sup>
304. Elder Joseph said this is not just about children. There is a grander scale that must be appreciated because what we are really talking about are the effects to whole families, whole communities and whole generations that were disrupted because of the negative impacts of residential schools.<sup>500</sup> His experiences continue to haunt him and he is “so afraid that this may be happening again to our kids, different ways, but happening again”.<sup>501</sup>

## **ii. Effects on Personal Life**

305. Elder Joseph was taken by the authorities as a child and placed in St. Michael’s residential school in Alert Bay, BC. He said that he did not know at the time, but this “would be the beginning of his personal descent into brokenness and despair...” It was an awful experience for him and he said he “shudder[s] even

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<sup>498</sup> Pg. 51, Vol. 42, Elder Joseph Transcript.

<sup>499</sup> Pg. 52-53, Vol. 42, Elder Joseph Transcript.

<sup>500</sup> Pg. 79, Vol. 42, Elder Joseph Transcript.

<sup>501</sup> Pg. 53, Vol. 42, Elder Joseph Transcript.

when I think about what happened to me” at that school. Elder Joseph, of course, was not the only one taken away as a child. Many children across Canada, little children as young as three years old, were taken away from their families and communities and placed in residential schools, not really knowing what was happening to them nor why they were being taken away.<sup>502</sup>

306. In his own language, Kwak’wala, Elder Joseph remembers his granny, Granny Ulih, who would often say affectionately in their language that she would be “nothing” and would have “no value without him”. As a child within his own culture these types of sentiments were shared all the time. His value and purpose as an individual was lifted and given meaning as a result. Elder Joseph said this was a part of life in his culture that was “so constant and sustaining that a child absolutely felt cared for, nurtured, loved and, of course, belonged, belonged somewhere, belonged to a family, a village, a community”. He testified that he went from being a child cared for in these loving family circumstances to being ripped away and placed in a residential school – he said this experience was “crushing and devastating”.<sup>503</sup>

307. Like many others, Elder Joseph said he did not understand English well in those early years at residential school. It was a new language for him. Every instruction that he did not understand, and every wrong response, was an indignity because it meant a form of punishment would be administered: a strapping, a slap on the ear, a hit with a ruler, whatever it was. The first early years he described as “really brutal”. He remembers the first few nights crying and crying, but he said he could not cry out loud for others to hear because there was a punishment for crying too.<sup>504</sup>

308. The indignities suffered by the little children were numerous. One example Elder Joseph shared was when, as a teenager, he was stripped down naked in front

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<sup>502</sup> Pg. 29, Vol. 42, Elder Joseph Transcript.

<sup>503</sup> Pg. 34, Vol. 42, Elder Joseph Transcript.

<sup>504</sup> Pg. 47, Vol. 42, Elder Joseph Transcript.

of the entire boy's division of the school because he was caught smoking. He was told to bend over something and so he did. Elder Joseph said he was so humiliated by that experience and that he will remember it forever.<sup>505</sup>

309. Before Elder Joseph reached Grade 12 he started drinking and by the time he graduated he was already a full-blown alcoholic.<sup>506</sup> He said he never knew how to be accountable because it was something that was never taught to him. While struggling with this impact from his residential school experience he developed a "bad, bad, addiction and was drinking too much". He testified that one day he arrived at his home in Campbell River only to realize nobody was there – his wife and five (5) children were gone – at which point he sank into a deep despair about his life.<sup>507</sup>
310. Elder Joseph said "I still struggle very deeply about my relationship with my wife". His wife was young when she married him, which was sometime after they had both attended residential school. He described his marriage falling "off the platform" but that he has a deep sense of trying to make amends because he knows that he hurt her. But it was not only Elder Joseph who was at fault because both of their experiences at residential school certainly did not help them parent their children, who suffered in their own ways as a result. Although each had their own experience growing up, and not all of them were bad, they were nonetheless affected by their parent's experiences in residential school.<sup>508</sup>
311. Although none of his children attended residential school themselves, Elder Joseph said that without a doubt they were gravely injured by his own

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<sup>505</sup> Pg. 50, Vol. 42, Elder Joseph Transcript.

<sup>506</sup> Pg. 48, Vol. 42, Elder Joseph Transcript.

<sup>507</sup> Pg. 52-53, Vol. 42, Elder Joseph Transcript.

<sup>508</sup> Pg. 34-35, Vol. 43, Elder Joseph Transcript.

experience, and that, sometime in the course of their own lives, they too suffered greatly as a result of his residential school experience.<sup>509</sup>

### iii. The Importance of *Reconciliation*

312. Elder Joseph testified that these schools and the things that happened in them, which was in his estimation a period of 130 years, set the stage for the most massive attempt at social engineering Canada had ever undertaken. He said there is a cycle of brokenness, despair, violence and abuse prevalent as a result, and that if Canada and Aboriginal families and communities do not get involved in breaking this cycle, that there will be a “huge mess down the road” and that another 150,000 lives will be lost. Elder Joseph testified that there is not much time available, and that the problems associated with residential schools must be resolved “as soon as we can”.<sup>510</sup>
313. It was a slow process convincing the elders that *reconciliation* was important but now there are enough elders who agree that *reconciliation* must be a “way of life” or else “we would destroy ourselves”. It was understood that somehow and someday Aboriginal people had to find the will within themselves to reconcile, to get along, to live with each other, and to co-exist. Elder Joseph said it took courage for these elders to recognize that *reconciliation* is a noble and honourable thing to do, and that it was something worth pursuing.<sup>511</sup>
314. Elder Joseph testified that the Aboriginal population in Canada has suffered and continues to suffer from the effects of residential school, and that overcoming these indignities will not be an easy task. Ultimately, however, Canadians and Aboriginal people, including the Tribunal, must “dig down deep” into themselves and look at the current framework on which Aboriginal children are subjected,

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<sup>509</sup> Pg. 34, Vol. 43, Elder Joseph Transcript.

<sup>510</sup> Pg. 71, Vol. 42, Elder Joseph Transcript.

<sup>511</sup> Pg. 92, Vol. 42, Elder Joseph Transcript.

and assess what the needs are and to provide adequate support in seeing that they are met.

315. Many Aboriginal children who have been negatively affected by residential schools are in care, and Elder Joseph thinks that the best result would be to include Aboriginal parents and families so that they can take ownership and responsibility for these children<sup>512</sup>:

“At the heart of it, it’s about us, about our own attitudes, about our own courage and our willingness to find ways to do what it is that we really need to do to save little children from further harm and loss”<sup>513</sup>

316. Elder Joseph said the traditional teachings speak to acts such as holding one another, walking together, finding balance and healing and unity, and that our stories show how these teachings can heal our pain and restore our dignity. Aboriginal people discovered that, in all of the cultural traditions, there are teachings about reconciliation, forgiveness, unity, healing, and that a general invitation has been extended to Canadians, to this Tribunal, to search in their own traditions for the same.<sup>514</sup> Elder Joseph’s own children went through this process, and now that he has grandchildren, to know how he failed his own children, he is able to avoid the same with his grandchildren.<sup>515</sup>

317. These are important lessons. For survivors, recognizing the void in their lives takes courage and understanding, and learning about it is important. For children of survivors recognizing “that area of their childhood” affected by the experiences of their parents at residential school ensures that they too learn from it in their own way. This is a healthy process but Elder Joseph testified that

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<sup>512</sup> Pg. 94, Vol. 42, Elder Joseph Transcript.

<sup>513</sup> Pg. 92, Vol. 42, Elder Joseph Transcript.

<sup>514</sup> Pg. 106, Vol. 42, Elder Joseph Transcript.

<sup>515</sup> Pg. 58, Vol. 43, Elder Joseph Transcript.

it takes more than just the family in order to overcome and heal.<sup>516</sup> Various levels of government, working together, including First Nations governments, to provide culturally-appropriate care to children is also needed, and Elder Joseph believes “everyone has a part to play”.<sup>517</sup>

## PART II – QUESTIONS AT ISSUE

318. **A)** Is there *prima facie* discrimination in the way AANDC provides child welfare services/funding through its policies and programs (“federal child welfare services”) for First Nation children on reserve?
- 1) Is there historic disadvantage and/or historic prejudice?
  - 2) Do federal child welfare services perpetuate a disadvantage and/or historic prejudice for First Nations children living on reserve?
319. **B)** Is there a fiduciary duty owed to First Nations with regard to federal child welfare services?

## PART III – SUBMISSIONS

### 1. Is there *Prima Facie* Discrimination?

320. The AFN submits that the way AANDC provides child welfare services/funding through its policies and programs for First Nation children on reserve constitutes systemic discrimination.
321. In order to demonstrate a *prima facie* case of discrimination, complainants are required to show that they have a characteristic protected from discrimination;

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<sup>516</sup> Pg. 61, Vol. 43, Elder Joseph Transcript.

<sup>517</sup> Pg. 71, Vol. 43, Elder Joseph Transcript.

that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.

322. According to the Supreme Court of Canada, a *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent<sup>518</sup>
323. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under the *Canadian Human Rights Act*. If it cannot be justified, discrimination will be found to occur.
324. The *CHRA* is quasi-constitutional legislation which Parliament was enacted to give effect to the fundamental Canadian value of equality - a value that the Supreme Court of Canada has described as lying at the very heart of a free and democratic society.<sup>519</sup> The Supreme Court has ruled that the *Act* should be interpreted in a broad, liberal and purposive manner that best advances its broad underlying policy considerations.
325. As identified in section 2 of the *Act*,<sup>520</sup> the purpose of the legislation is to ensure that individuals have an equal opportunity to make for themselves the lives that they are able and wish to have, without being hindered by discriminatory practices based upon considerations such as race, national or ethnic origin, sex and age, amongst others.

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<sup>518</sup> *Ontario (Human Rights Commission) v. Simpsons Sears Ltd*, [1985] 2 S.C.R. 536, para 18.

<sup>519</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, p. 615.

<sup>520</sup> *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

**i. The Legal Test for a *Prima Facie* Case of Discrimination**

326. The AFN adopts the test to prove a *prima facie* case of discrimination as set out in the Commission's submissions. In addition the AFN relies on the factors set out below to submit that a *prima facie* case of discrimination has been established:

- the Tribunal may consider all the factors that may be relevant in a given case, including historic disadvantage, stereotyping, prejudice and vulnerability of a claimant group;
- a flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*;

327. In order to prove a *prima facie* case that an individual or group has been adversely impacted the Court must apply a purposive and contextual approach to discrimination and is not limited to a formal equality analysis. The Court in *Morris* indicated the following:

With respect to discrimination claims under the CHRA, this Court has similarly rejected a formulaic analysis in favour of a purposive and contextual approach, stating, "a flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*..."<sup>521</sup>

328. The test for establishing a *prima facie* case of discrimination is a flexible one, and does not necessarily contemplate a rigid comparator group analysis. As previously determined by the Federal Court the test for a *prima facie* case of discrimination under section 5 of the CHRA is broad enough to allow the Tribunal to have regard for all the factors that may be relevant in a given case, including "historic disadvantage, stereotyping, prejudice, vulnerability, the

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<sup>521</sup> *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, para.28.

purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.”<sup>522</sup>

329. The AFN relies on the criteria as set out in the Supreme Court of Canada’s decision *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 (*Withler*) to prove a *prima facie* case of discrimination. In *Withler*, the Supreme Court provided a non-exhaustive list of means by which a claimant may present and prove a *prima facie* case of discrimination including:

- i) Reliance or use of stereotypes;
- ii) Perpetuating a historic advantage;
- iii) Differential outcomes or impact on the affected group;
- iv) A comparison to other recipients of the service or an equivalent service; or
- v) A comparison to other service providers, including in this case provincial governments.

330. In *Quebec (Attorney General) v. A*, Justice Abella ruled that a *prima facie* finding of discrimination may be established using different criteria and stated the following:

*Withler* is clear that “[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s15(1) of the Charter? Prejudice and stereotyping are two of the indicia that may help answer that question: they are not discrete elements of the test which the claimant is obliged to demonstrate...”<sup>523</sup>

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<sup>522</sup> *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, para. 338.

<sup>523</sup> *Quebec (Attorney General) v. A*, 2013 SCC 5, para. 325.

331. The Supreme Court in *Law*<sup>524</sup> described stereotypes as “probably the most prevalent reason that a given legislative provision may be found to infringe section 15(1)...” Similarly, in *Withler* the Supreme Court ruled that discrimination can be established by “showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group”.
332. The equality jurisprudence under both the *Charter* and the *Canadian Human Rights Act* informs the content of the equality jurisprudence. The Supreme Court indicated the following in *Andrews* with respect to the application of the *Charter* to human rights legislation:
- “...it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1).”<sup>525</sup>
333. Pursuant to the framework as set out by the Supreme Court, the AFN submits it is able to establish a *prima facie* case of discrimination by proving the government has continually perpetuated the historic disadvantage of First Nations children living on reserve.<sup>526</sup>

### **1) Is there Historic Disadvantage and/or Historic Prejudice?**

334. The Supreme Court in *Withler* stated that a claimant may establish discrimination by showing that the impugned law has the effect of perpetuating prejudice and disadvantage to members of a group on the basis of a protected ground.<sup>527</sup> The Court noted that this will typically occur where a law treats a

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<sup>524</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>525</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 172-176; see also, *Moore v. British Columbia (Education)*, 2012 SCC 61.

<sup>526</sup> *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504.

<sup>527</sup> *Withler* at para. 35.

historically disadvantaged group in a way that exacerbates the situation of the group.<sup>528</sup>

335. In order to prove discrimination a claimant must provide evidence that goes to establishing a historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected.

**i. Analytical Framework for Proving Historic Disadvantage and/or Historic Prejudice**

336. In order to prove discrimination the claimant must show that:

- i) First Nation children living on reserves suffered a historical prejudice or disadvantage and;
- ii) Federal child welfare services funding perpetuates the prejudice or disadvantage of First Nation children living on reserves.

337. The evidence led shows that the government's prejudicial legislation and historical policies directed at "civilizing" and then "assimilating" First Nations children have denied and/or had a disproportionately adverse effect on First Nations children on reserve based on the prohibited grounds of race and/or national or ethnic origin, contrary to section 5 of the CHRA.

338. The first step in the analysis is to determine whether First Nations children living on a reserve suffered a historical prejudice or disadvantage. To establish historical prejudice, one may point to evidence of "direct discrimination". Evidence of government directed policies to civilize, assimilate and integrate First Nations children by forcing them to attend Indian residential schools would

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<sup>528</sup> *Withler* at para. 35.

constitute as “direct discrimination” and support a claim of First Nations children suffering a historical prejudice or disadvantage.

339. In addition to the assimilation and integrations policies adopted by the government to support the creation of IRS, the AFN relies on historical evidence offered by Dr. Milloy on the continuing operation and administration of IRS’ including the conduct of those officials in a supervisory roles as evidence which points to direct discrimination towards Frist Nations children.

340. The evidence clearly establishes a historical position of disadvantage and demonstrates an existing prejudice against First Nations children. As discussed above, a central consideration is the historical evidence which sets out the motivation and intensions of the government in establishing the purpose for IRS. The government’s allocation of resources and legislative policy goals are also factors to be considered when proving historical prejudice. The AFN has led evidence which proves the government’s policies specifically discriminated against First Nations children by perpetuating a historical disadvantage and/or by stereotyping the group.

ii. **Historical Policies of Civilization, Assimilation and Integration**

341. Dr. Milloy, an expert witness who testified before the Tribunal, provided much of the evidence on the historical foundations of the government’s policies and their role in the creation and operation of IRS. Dr. Milloy in his book, *The National Crime*, provides the following insight:

In the early 1800’s, the British Imperial government began formulating its policy for the “civilization” of the Indian population which eventually bore the concept of establishing “boarding” and “industrial” schools and later residential school education, although their “civilizing efforts” were manifested in other forms as well.<sup>529</sup>

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<sup>529</sup> *A National Crime*, pg. 9.

Similar to other colony holdings the Imperial government sought to adopt a policy of forced assimilation. The prevailing theory at the time was that the “savage” could be “saved” and become more self-reliant if they were forced to adopt the habits of their European colonizers, and moved into a “higher” state of civilization. It was, however, in essence an effort to make in Canada but one community – a non-Aboriginal, Christian one.<sup>530</sup>

342. At the core of the Imperial government’s policy was education of the children because, as Dr. Milloy indicated, there “lay the most potent power to effect cultural change” which was to be brutally implemented through the residential schools.<sup>531</sup> The school was to be two things: a school and a home. As a “school” it was to have educational aspects to it, it was to adopt a certain pedagogy, the teachers were to be properly qualified; and as a “home” the children were to be cared for as they would had been in their own homes.<sup>532</sup>

### iii. Colonial Civilization Policies

343. According to Dr. Milloy the colonizers adopted the idea that they were parenting the world, especially British Protestant Victorians, and that their responsibility was to raise the Indian people to a higher level of civilization.<sup>533</sup> This ideal that the residential school was a “better home” for the Indian children was referred to as “the circle of civilized conditions”.<sup>534</sup>
344. The Imperial government saw the civilization of the savages as their “benevolent duty” and as was to be a “national goal” of Canada.<sup>535</sup> Dr. Milloy pointed to statements made by Sir John. A. Macdonald, where he indicated the “benevolent” colonizers were “to do away with the tribal system and assimilate

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<sup>530</sup> *A National Crime*, pg. 9.

<sup>531</sup> *A National Crime*, pg. 3.

<sup>532</sup> Pg. 47-48, Vol. 33, Dr. John S. Milloy Transcript.

<sup>533</sup> Pg. 56, Vol. 33, Dr. John S. Milloy Transcript.

<sup>534</sup> Pg. 48, Vol. 33, Dr. John S. Milloy Transcript.

<sup>535</sup> *A National Crime*, pg. 6; also, pg. 80, Vol. 42, Elder Joseph Transcript.

the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit to change.”<sup>536</sup>

345. Dr. Milloy provided the following with respect to the prevailing colonial perception of social order, “There was a sort of ladder of evolution of cultural development, with the Ojibway (and other Indian nations) down at the bottom, because they wandered about all the time...and with the Protestant Victorian Englishman at the top. That was the top of the pyramid.”<sup>537</sup> In order to re-make the Indian the process would require the Bible and it would require connecting the savages to the colonizer’s society.<sup>538</sup> This, according to Dr. Milloy, was because the Indians were believed to be living in isolation and darkness; the British saw the missionary as “the perfect person to turn the key” and turn on “civilization” within the Indian.<sup>539</sup>
346. The idea of residential schools was first brought forward in 1820 by Sir Peregrine Maitland, the Governor of Upper Canada, in the context of a proposal he made to the Colonial Office, for “...ameliorating the condition of the Indians in the neighbourhood of [the Colonial] settlements” which “...called for the conversion of hunters into settled agriculturalists under the supervision of the Indian Affairs Department and missionaries...” Dr. Milloy testified that even at this early time the focus of the governments civilizing plan was very much on the children.<sup>540</sup>
347. As pointed out by Dr. Milloy, the “policy of civilization” unilaterally adopted by the government was underway and in the 1840’s Governor Sir Charles Bagot concluded that after 15 years “Aboriginal people in the province who were involved in this process were in a half-civilized state...”<sup>541</sup> Amongst other things,

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<sup>536</sup> *A National Crime*, pg. 6; also, pg. 80, Vol. 42, Elder Joseph Transcript.

<sup>537</sup> Pg. 59, Vol. 33, Dr. John S. Milloy Transcript.

<sup>538</sup> Pg. 60, Vol. 33, Dr. John S. Milloy Transcript.

<sup>539</sup> Pg. 60, Vol. 33, Dr. John S. Milloy Transcript.

<sup>540</sup> *A National Crime*, pg. 14-15.

<sup>541</sup> Pg. 69, Vol. 33, Dr. John S. Milloy Transcript.

the Commissioners were dissatisfied with the state of Indian education, which was, at that point, being conducted in the day schools.<sup>542</sup> For them, attendance was a problem because the students' Aboriginal lifestyle precluded them at times from attending regularly.<sup>543</sup> The Commissioners' focus was on attendance and from their report they proposed residential education as an appropriate solution, which would be conducted in schools then called 'manual labour schools'. Dr. Milloy indicated that although the name of the schools was different, manual labour schools operated in the same manner as residential schools and on the same premise.<sup>544</sup>

348. Dr. Milloy testified that in 1856, another commission was undertaken by Governor Sir E. Head, in which he concluded that "any hope of raising the Indians as a body to the social and political level of their white neighbours, is yet a glimmering and distant spark."<sup>545</sup> According to Dr. Milloy's testimony, the Head Commission determined, "Progress" was slow because the reserve lands were secluded and isolated and British pursuits of "civilizing" the Indians were stymied because the Indians were too far away from the influence of British/European civilization.<sup>546</sup> An issue identified by the Department was that the students, upon returning to their communities, were not progressing in a process which Dr. Milloy referred to as "cultural backsliding".<sup>547</sup> When these students went home they became First Nations individuals all over again thereby blunting the whole socializing experiment.<sup>548</sup>

349. The reasons for the colony experiment's failure were mixed and unsettled. The Department blamed "older Indians" and the "reserve environment". Dr. Milloy explained that the failure actually occurred within the school itself, before the

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<sup>542</sup> Pg. 69, Vol. 33, Dr. John S. Milloy Transcript.

<sup>543</sup> Pg. 69-70, Vol. 33, Dr. John S. Milloy Transcript.

<sup>544</sup> Pg. 70-71, Vol. 33, Dr. John S. Milloy Transcript.

<sup>545</sup> *A National Crime*, pg. 9 and pg. 158; pg. 71, Vol. 33 Dr. John S. Milloy Transcript.

<sup>546</sup> *A National Crime*, pg. 9 and pg. 158; pg. 71, Vol. 33, Dr. John S. Milloy Transcript.

<sup>547</sup> *A National Crime*, pg. 9 and pg. 158; pg. 71, Vol. 33, Dr. John S. Milloy Transcript.

<sup>548</sup> Pg. 72, Vol. 33, Dr. John S. Milloy Transcript.

child left, as there were profound deficiencies within the system: “the educational failure was rooted in those two persistent characteristics of the system: inadequate funding and the Department’s lack of supervision of the operation of the schools.”<sup>549</sup>

#### iv. Assimilation Policies

350. According to Dr. Milloy the Act to *Encourage the Gradual Civilization of the Indian Tribes in the Province* (1857) was seen as a straight forward solution to the developmental problem facing the Department in the mid-1850’s:

“It circumvented the tribal position on reserve land and reformulated the civilizing system by providing a place for Aboriginal people within colonial society. Any male judged to be “sufficiently advanced in the elementary branches of education,” to be of good character and free from debt could, on application, be awarded forty acres of land “and the rights accompanying it.” He would be enfranchised relinquishing tribal affiliation and “any claim to any further share in the lands or moneys then belonging to or reserved from the use of his tribe and [would] cease to have a voice in the proceeding thereof.” He would be thereafter a full member of colonial society.”<sup>550</sup>

351. The idea was that these graduates would abandon their communities through enfranchisement in pursuit of being placed on their own land, and being fully assimilated into the British colony. To be enfranchised meant the First Nations individual would leave their Indian status in order to obtain benefits they did not have as First Nations people such as voting and owning property. The schools would first separate the child from their parents and when successfully educated

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<sup>549</sup> *A National Crime*, pg. 161.

<sup>550</sup> *A National Crime*, pg. 18.

the child would have the opportunity to become enfranchised which would require separation from their community.<sup>551</sup>

352. The impact of the *Act* was profound as it re-defined “civilization”. According to Dr. Milloy, the prior Imperial goal of creating “communities of self-sufficiency” on reserve lands was abandoned in favour of assimilating the Indian individual. In other words, the attack was now on the individual rather than the collective, with progress toward that goal to be measured in the reduction of the size of First Nations through enfranchisements.<sup>552</sup>
353. Shortly after Confederation, in 1879, Nicholas Flood Davin produced a report entitled *Industrial Schools for Indians and Half-Breeds*, which was recognized as the manifesto for residential education.<sup>553</sup> According to Dr. Milloy the report was commissioned by Sir John A. MacDonald to entertain the possibility of having residential schools in western Canada as an aide to colonizing the west. The government was fearful of the potential uprising of Aboriginal communities, especially in the west, and the danger posed to their occupation over their colonial settlements of the northwest in 1870. Dr. Milloy pointed out that at the time Aboriginal communities had much to be distressed about, such as the dwindling buffalo herds and smallpox epidemics. The pressure for a report came from the churches and the Indian Affairs Department, but also the Mounties.<sup>554</sup> In essence, residential schools were a policy the government had adopted to ensure that the path to settlement in frontier areas was peaceful and positive.<sup>555</sup>
354. Davin’s report brought together two things: (i) the post-1830 Imperial policy of assimilation, and (ii) the felt need to separate the “savage” parent from the child. The latter was an essential element in the success of residential school education. Dr. Milloy states, that the report constituted a concerted attack by

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<sup>551</sup> Pg. 137-138, Vol. 34, Dr. John S. Milloy Transcript.

<sup>552</sup> Pg. 72, Vol. 33, Dr. John S. Milloy Transcript; also, *A National Crime*, pg. 19.

<sup>553</sup> Pg. 94, Vol. 33, Dr. John S. Milloy Transcript.

<sup>554</sup> Pg. 95, Vol. 33, Dr. John S. Milloy Transcript.

<sup>555</sup> Pg. 156, Vol. 34, Dr. Jon S. Milloy Transcript.

church and state upon Aboriginal culture, and it underpinned the “curricular and pedagogical strategy” that made the residential schools sites for re-socialization. Dr. Milloy provided the following summary of the Devlin report:

“The thought even before the deed – that is before the residential school system took full physical shape across the country – was violent in its intention to “kill the Indian” in the child for the sake of Christian civilization. In that way, the system was, even as a concept, abusive.<sup>556</sup>

355. The government set out a detailed strategy for re-socializing Aboriginal children and it was anchored in the fundamental belief that to educate Aboriginal children effectively they had to be separated from their families. In other words, the parenting process had to be disrupted. The results were very damaging and posed a serious interruption in the ability of these Aboriginal cultures to care for their children.<sup>557</sup> This belief also arose because the Department’s initial attempts with “day schools”, which allowed the child to return home to its parents, had failed. However, according to Dr. Milloy, the Department’s initial failed attempts could only be understood in the context of the European representation of the character and circumstances of the Indian “race”.<sup>558</sup>
356. The Department opined that day schools could not educate Aboriginal children. This was due to several practical reasons such as justifying the expense of a day school for a small demographic, and the distance many children had to travel in order to attend. For certain parts of the year, such as in wintertime, attendance was low. Lawrence Vankoughnet, the Deputy Superintendent General of Indian Affairs, reported that the Indian “race” itself, that is the Indian

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<sup>556</sup> *A National Crime*, pg. xiv-xv.

<sup>557</sup> Pg. 31, Vol. 43, Elder Joseph Transcript.

<sup>558</sup> *A National Crime*, pg. 23.

parents and the children's communities, were an impediment because the "influence of the wigwam was stronger than the influence of the school."<sup>559</sup>

357. Based on their experience in "civilizing" the Indian race, the Department concluded that residential schooling was the only way "of advancing the Indians in civilization": "Aboriginal people were, in Departmental and church texts, "sunk" in "ignorance and superstitious blindness," a well of darkness from which they were in need of "emancipation." Dr. Milloy pointed to the discriminatory comments made in an earlier report of 1886 by J.A. Macrae, Inspector of the Department's Schools for the North West, where he indicated the focus was on children because adult Indians were, "physically mentally and morally...unfitted to bear such a complete metamorphosis."<sup>560</sup>

358. The governments discriminatory theory, according to Dr. Milloy, was that adult Indians were irredeemable and were a hindrance to the civilizing process; however it was acknowledged their influence and teaching ability toward their own children was formidable. They taught their children the natural order of things and a traditional way of understanding the world. Dr. Milloy indicated that this concerned Davin as he pointed out in his report that children who attended day schools "learned little and what little he learned soon forgot while his tastes [were] formed at home..." Similarly, Dr. Milloy pointed to discriminatory comments of Vankoughnet, the acting Deputy Superintendent General of Indian Affairs where he stated:

"Children...unswervingly "followed the terrible example set them by their parents" and thus became "as depraved themselves notwithstanding all the instructions given them at a day school." Unlike the upbringing that children received in Canadian homes,

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<sup>559</sup> *A National Crime*, pg. 24.

<sup>560</sup> *A National Crime*, pg. 25.

Aboriginal education taught “little that is beneficial” or useful in a modern world...<sup>561</sup>

359. According to the Department, the Indians were not to be given the time to “evolve” into the “civilized man of today”. They were not to be graced with the privilege of natural evolution. Instead, “[the Indian] has been called upon suddenly and without warning to enter upon a new existence...” This, as was explained by Dr. Milloy, was because Department Officials and “Victorian Canadians” felt the Aboriginal population was destined to die off, and that the rapid incursion of settlement and resource development was needed in order to force a change in the Indian’s condition, “The point at which to strike so as to “kill the Indian in him and save the man” was equally obvious: “it is to the young that we must look for the complete change of condition.”<sup>562</sup>
360. As an example of the prevailing theory of the day Dr. Milloy pointed to the actions of the Catholic Archbishop of St. Boniface and four other bishops who petitioned the government to take children from their families as young as six, for it was understood as being important that they be “caught young to be saved from what is on the whole the degenerating influence of their home environment.”<sup>563</sup>
361. In order to effect the separation of child from “savage” parent, the Department enacted two models: “planting out” and residential schools. Dr. Milloy’s described “planting out” as a government strategy where by children “at the age character is formed” were placed with “respectable white people,” thus relieving them from the influence of their parents. It was essentially a form of fostering that was also called “outing” or “farming out”. According to Dr. Milloy the

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<sup>561</sup> *A National Crime*, pg. 26.

<sup>562</sup> *A National Crime*, pg. 27.

<sup>563</sup> *A National Crime*, pg. 27.

practise was employed by the Department in a limited fashion and always in conjunction with the second more popular option – the residential school.<sup>564</sup>

362. Separation was to be maintained as long as possible in order to properly achieve the “socialization” of the children, in what was referred to as “continual residence”, and which was aimed at the total isolation of the child: “The more remote from the Institution and distant from each other [family and child] are the point from which the pupils are collected, the better for their success.”<sup>565</sup> According to Dr. Milloy, the process of separating and isolating children from their Indian parents was so important to the Department and church officials that children vacations became an early issue and were restricted as much as possible.<sup>566</sup>
363. According to Dr. Milloy, Nicholas Flood Davin advised that through the schools, and thus, through education, the danger posed by Aboriginal distress could be neutralized, however this concern of an Aboriginal uprising was somewhat tempered by the long-term separation of the children that was already underway: “It is unlikely that any Tribe or tribes would give trouble of a serious nature to the government whose members had children completely under government control.” In this way, Dr. Milloy explained, residential schools were part of a network of institutions that served the colonizer’s need for lawfulness, labour, and the security of their property.<sup>567</sup>
364. The “self-interested needs of the state”, is one of the pillars that Dr. Milloy identifies as the government’s founding vision of Aboriginal education. Dr. Milloy provided the following insight:

“The vision of Aboriginal education developed by leaders in the churches and the department was erected on the pillars of selfless

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<sup>564</sup> *A National Crime*, pg. 28.

<sup>565</sup> *A National Crime*, pg. 30.

<sup>566</sup> *A National Crime*, pg. 30.

<sup>567</sup> *A National Crime*, pg. 32-33.

duty and the self-interested needs of the state. As different as these motives may be, they both underpinned, in their own way, the single conclusion that children had to be removed from their families, “from evil surroundings,” and, as Davin recommended, “kept constantly within the circle of civilized conditions” – residential schools.

The school was a circle – an all-encompassing environment of re-socialization. The curriculum was not simply an academic schedule or practical trades training but comprised the whole life of the child in the school. One culture was to be replaced by another through the work of the surrogate parent, the teacher.<sup>568</sup>

365. The other pillar of Aboriginal education identified by Dr. Milloy is “selfless duty” and was premised upon the colonizer’s need to ameliorate the condition of the Indian and lift him up towards “civilization”.<sup>569</sup>
366. Within the first decade of Confederation assimilation had become official government policy. “The intellectual emancipation of the Indian”, as Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet put it, “could only be done through education” that was to be specifically pursued through residential schools, to which two earlier versions had already begun doing, that being “boarding” schools and “industrial” schools.<sup>570</sup>
367. By indoctrinating the young Indian boys and girls at an early age the Department of Indian Affairs hoped to solve the “Indian problem”. In 1920 before a Parliamentary Committee, Duncan Campbell Scott declared:

“I want to get rid of the Indian problem,”...“Our objective is to continue until there is not a single Indian in Canada that has not

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<sup>568</sup> *A National Crime*, pg. 33.

<sup>569</sup> *A National Crime*, pg. 33.

<sup>570</sup> *A National Crime*, pg. 7.

been absorbed into the body politic, and there is no Indian question, and no Indian department.<sup>571</sup>

368. Duncan Campbell Scott statements are clear indications of the government's intentions to assimilate and integrate First Nations children into society, which were based on stereotype and created a historical disadvantage.
369. According to Dr. Milloy the assimilative government policies started to develop in the pre-Confederation era. Indeed, some of Canada's modern day federal "Indian policy" principles stem from this era. These policies, which were intended to assimilate Indians, were developed by the Imperial government of the time, further developed in the immediate period before Confederation, and then carried over into legal parlance and given further legal effect in the *British North America Act*, 1867, specifically under subsection 91 (24).<sup>572</sup>
370. Dr. Milloy provides the following insight on the effects of the Imperial Government's decision to implement residential schools:

"The Imperial policy heritage of the 1830's, 1840's and 1850's, supplemented by federal legislation and programming in the first decade of Confederation, was both the context and the rationale for the development of residential schools, which in turn constituted part of the most extensive and persistent colonial system – one that marginalized Aboriginal communities within its constitutional, legislative, and regulatory structure, stripped them of the power of self-government, and denied them any degree of self-determination. As a consequence, Aboriginal people became, in the course of Canada's first century, wards of the Department of

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<sup>571</sup> *A National Crime*, pg. 46.

<sup>572</sup> *A National Crime*, pgs. 8-9; According to Dr. Milloy, "there is not one word spoken that was recorded by the Fathers of Confederation about section 91(24) – pg. 156, Vol. 33, Dr. John S. Milloy Transcript

Indian Affairs and increasingly the objects of social welfare, police, and justice agencies.<sup>573</sup>

371. According to Dr. Milloy's expert opinion the policies underlying residential schools were focused on the eradication of a culture and are therefore policies based purely on racial prejudice and discrimination. Residential schools had a discriminatory purpose and operated on a negative prejudice toward First Nations people as a group and toward their ideas and beliefs.<sup>574</sup>
372. It is the AFN's position that the historical record set out by Dr. Milloy which outlines the government's colonizing policies, directives, reports and public statements clearly establishes a continuous, historical prejudice against First Nations. The intentions of the government were clear, direct, and unfortunately, for First Nations children, very damaging, with impacts that continue to the present.

**v. Royal Commission Acknowledges Historical Prejudice Against First Nations**

373. The historical record between Aboriginal peoples in Canada and successive colonizing governments is not one that evokes a sense of national pride for Canadians. Numerous studies, commissions, reports and debates have centered on the "mistreatment" of Aboriginal peoples at the hands of the government. The *Royal Commission of Aboriginal Peoples*, a work of five volumes completed over a period of five years and covering some 3,500 pages, concluded:

"Residential schools were more than a component in the apparatus of social construction and control. They were part of the

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<sup>573</sup> *A National Crime*, pg. 9.

<sup>574</sup> Pg. 109, Vol. 35, Dr. John S. Milloy Transcript.

process of nation building and the concomitant marginalization of Aboriginal communities.”<sup>575</sup>

374. The *Royal Commission* also found that, “Put simply, the residential school system was an attempt by successive governments to determine the fate of Aboriginal people in Canada by appropriating and reshaping their future in the form of thousands of children who were removed from their homes and communities and placed in the care of strangers.”<sup>576</sup>

#### vi. Supreme Court Recognizes Historical Prejudice Against First Nations

375. In addition to the finding of the Royal Commission on Aboriginal Peoples, the Supreme Court has previously expressed concerns of the historical hardships endured by Aboriginal peoples in Canada, most notably in the following decisions:

- *R. v. Ipeelee*, at para. 60 , “courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples;”<sup>577</sup>
- *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, at para. 66, “the legacy of stereotyping and prejudice against Aboriginal peoples”;<sup>578</sup>
- *Lovelace v. Ontario*, at para. 69, “Aboriginal peoples experience high rates of unemployment and poverty, and

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<sup>575</sup> Report of the Royal Commission on Aboriginal Peoples, Vol. 1, Part 2, Chapter 10, CHRC BOD, Ex. HR-02, Tab 7.

<sup>576</sup> Report of the Royal Commission on Aboriginal Peoples, Vol. 1, Part Two, Chapter 10.

<sup>577</sup> *R. v. Ipeelee*, 2012 SCC 13, para. 60.

<sup>578</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, para. 66.

face serious disadvantages in the areas of education, health and housing”;<sup>579</sup>

- *R. v. Kapp*, at para. 59, “More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day”;<sup>580</sup>
- *R v. Sparrow*, at p. 1103, “And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, 1985 CanLII 320 (BC SC), [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: “We cannot recount with much pride the treatment accorded to the native people of this country.”<sup>581</sup>
- *Canada (Human Rights Commission) v. Canada (Attorney General)* at para. 334, “At the same time, no one can seriously dispute that Canada’s First Nations people are amongst the most disadvantaged and marginalized members of our society.”<sup>582</sup>

376. The evidentiary record before the Tribunal including: the detailed historical accounts of Dr. Milloy, the findings of the *Royal Commission on Aboriginal Peoples*; and the Supreme Courts previous recognition of the hardships endured by First Nations clearly shows a continuous history of prejudice towards First Nations children by the government.

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<sup>579</sup> *Lovelace v. Ontario*, 2000 SCC 37, para. 69.

<sup>580</sup> *R. v. Kapp*, 2008 SCC 41, para. 59.

<sup>581</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075. See also: *Mitchell v. M.N.R.*, 2001 SCC 33.

<sup>582</sup> *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, para. 334.

## 2) Federal Child Welfare Services Funding Perpetuates the Prejudice or Disadvantage of First Nation Children Living on Reserves

377. Based on the analytical framework, as set out by the Court above, the second step in proving a *prima facie* case of discrimination is to show how the government continues to perpetuate the historic disadvantage of First Nations children living on reserve. Unlike the evidence tendered to prove historical prejudice discussed above, the nature of evidence to prove historical disadvantage includes evidence of a “discriminatory effect”.

378. With respect to the second step of the analysis the Supreme Court in *Withler* provided the following instructions:

“[T]he particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case....[A]t the end of the day, all factors that are relevant to the analysis should be considered”<sup>583</sup>

379. The Supreme Court in *Withler* relied on the following statement from J. Wilson in *Turpin* to provide further support for the analysis:

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]<sup>584</sup>

380. The negative and long term effects of IRS on children and their families is direct evidence to support the discriminatory effects. The AFN submits that the impacts of the IRS system on First Nations children and on subsequent generations establishes a clear historical disadvantage and further supports a

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<sup>583</sup> *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 66.

<sup>584</sup> *Ibid.*

*prima facie* case of discrimination as set out under the *Canadian Human Rights Act*.

381. For the purposes of this proceeding the evidence relied upon by AFN to show historical disadvantage is based on: i) historical opinion on patterns of conduct by the Department as well as anecdotal findings and department statistics; and ii) sociological, psychological and psychiatric opinion based on social and mental health indicators.

**i. The Neglect and Abuse of Children in Residential School**

382. Dr. Milloy summarized the immediate effects of implementing residential schools on First Nation's children in the following passage from his text "The National Crime":

"One of the darkest hues in that tapestry [growing Aboriginal poverty] came from the fact that the main thrust of the colonial system's assimilative strategy had concentrated on the young...across the land. They were the vulnerable future of communities and of Aboriginal culture, and they had been removed from their homes and placed in the care of strangers, many of whom were hostile to their culture, beliefs, and language. For the sake of civilization, in the discharge of a national duty, they were placed in the residential schools. For those children and their communities and, indeed, for all Canadians, the consequence of those schools...has been truly tragic."<sup>585</sup>

383. From 1879 to 1946, sensitivity to the plight of the children was rare as a "voluminous catalogue of mistreatment...was creating a sorrowful and difficult legacy."<sup>586</sup> The Department and the churches failed to "be humane and kindly" to the children. According to Dr. Milloy, the Department and the churches failed to meet their "parental" responsibilities or the needs of the children, and they did

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<sup>585</sup> *A National Crime*, pg. 9.

<sup>586</sup> *A National Crime*, pg. 110.

not provide an education adequate enough so to justify their removal from their parents and communities. This was partly due to chronic underfunding but also because the schools staff was not of the requisite quality for the difficult task of parenting the children.<sup>587</sup>

384. Dr. Milloy indicated that abuse flourished in the schools as the Department made no serious response to the dozens of incidents involving severe punishment or neglect that caused injury or death. Abuse was a persistent phenomenon in the schools; “the Head office, regional, school, and church files are replete with incidents.” Dr. Milloy provided the following insight as to the Department’s apathy towards reported incidents of abuse:

“There was a pronounced and persistent reluctance on the part of the Department to deal forcefully with the incidents of abuse, to dismiss, as was its right, or lay charges against, school staff who abused the children.”<sup>588</sup>

385. The Department and churches were overwhelmed and neither institution possessed the necessary financial or administrative resources to address the immediate tragedy.<sup>589</sup> More seriously, they lacked the moral resources, even by European-Christian standards, to rectify these persistent problems and properly “parent” the children. Neglect was a habit in the schools and harsh discipline and excessive cruelty were routinely excused or ignored. But, the Department made no attempt to halt the system or to change it and allowed the situation to prevail despite reports that called for urgent change and despite many petitions and protests from both parents and communities.

386. Dr. Milloy described the dire situation in the following manner, “The system had a life and trajectory of its own, where thoughtless persistence, not sympathy, nor

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<sup>587</sup> *A National Crime*, pg. 111.

<sup>588</sup> *A National Crime*, pg. 144.

<sup>589</sup> Pg. 50, Vol. 34, Dr. John S. Milloy Transcript.

intervention by the Department on behalf of those unfortunate people was the hallmark of this deplorable institution – it was allowed to simply continue unabated.”<sup>590</sup>

ii. **Lack of Nutrition Leads to Chronic Health Problems**

387. In addition to the physical and sexual abuse endured by the children attending IRS, the children often went hungry as they were not provided with enough to eat and, due to the lack of nutritious food, their vitality suffered as well. Dr. Milloy provided the following insight with respect to the Departments’ policy on the provision of food:

“According to Departmental regulations, adopted at the beginning of the industrial school era, schools were to follow a Departmental “dietary,” or scale of rations, including amounts, to be provided weekly to the children. This was reaffirmed in 1892 and 1894 and in the 1911 contracts, which stipulated that all schools receiving a government grant had “to be kept up to a certain dietary.” As with health regulations, these were honoured more in the breach than in the observance, resulting in confusion and finger pointing.”<sup>591</sup>

388. Chronic underfunding by the Department was the overriding factor in determining the dietary needs of the children within the schools. Many of the principals could not have complied with the dietary regulations because the Department’s per-capita level was too low, or because they did not have a large enough student population. Budgetary reductions during the Depression and Second World War made the task of feeding the children even more difficult.<sup>592</sup>

389. In response to the persistent underfunding by the government and churches, the schools turned to producing their own goods for consumption and for sale. The schools often operated as a farm as well where the children would work under

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<sup>590</sup> *A National Crime*, pg. 111.

<sup>591</sup> *A National Crime*, pg. 116; also, pg. 170-171, Vol. 33, Dr. John S. Milloy Transcript.

<sup>592</sup> *A National Crime*, pg. 118.

the direction of the principal or farm instructor. It is equally noteworthy that the children also carried out the general housework of the school as opposed to attending educational classes which were the main reason they were in the schools.<sup>593</sup>

390. Food shortages remained persistent, and the children's labour fulfilled what in fact was a duty of their new "parents" to them:

"The final irony in this was that in all areas of the country, except the high plains after the disappearance of the buffalo, children on entering the schools likely left behind a better diet, provided by communities that were still living on the land, than that which was provided to them by school authorities. This had in fact been Cornellius Bignell's main point about Elkhorn School – that living conditions in the community were better than in the school."<sup>594</sup>

### iii. Tuberculosis

391. As set out by Dr. Milloy, "the underfunding of residential schools took expression in many horrific forms – overcrowding, poor hygiene, poor diet, amongst others – and the children died in astonishing numbers as a result of these conditions."<sup>595</sup> Most horrifying could be the indifference of the Department and churches as they sat idly by as "neither...could have pretended otherwise." These deplorable conditions were reported in Dr. Bryce's report as early as 1907<sup>596</sup> as well as being included amongst the contract discussions in 1911 about the crisis in conditions, sanitation, and health in the schools:

"The appalling number of deaths among the younger children appeal loudly to the guardians of our Indians. In doing nothing to obviate the preventable causes of death, brings the Department within unpleasant nearness to the charge of manslaughter."

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<sup>593</sup> *A National Crime*, pg. 120; also, pg. 171-172, Vol. 33, Dr. John S. Milloy Transcript.

<sup>594</sup> *A National Crime*, pg. 121.

<sup>595</sup> *A National Crime*, pg. xv.

<sup>596</sup> Pg. 129, Vol. 33, Dr. John S. Milloy Transcript.

392. Dr. Milloy pointed to the increasing number of deaths being directly contributable to removing children from healthy “out of door life” to the confines of badly constructed schools made worse over time by neglectful and inadequately funded maintenance programs. “Perhaps even more pertinent, careless administration of health regulations, a lack of adequate medical services and the effect on children of the harsh and alien routines of education added [to] their deadly weight.”<sup>597</sup>
393. According to Dr. Milloy, the deplorable health conditions were attributable in part to the poor construction of the buildings and which were erected in most cases without prior consultation with the Department. Further, they were buildings designed by amateurs often without any professional guidance or input, and often without any Department inspection. “From the outset, schools had been built with an eye to economy” and fashioned in the “simplest and cheapest construction.”<sup>598</sup>
394. Underfunding meant the schools were poorly constructed.<sup>599</sup> In addition, the locations of the schools were identified as a problem as many were unsuitable for human habitation with some actually being located in flood plains under constant threat of flood.<sup>600</sup>
395. Department and church officials were on notice, according to Dr. Milloy, of the range of problems rooted in construction deficiencies, siting and short budgets related to the construction and location of the residential school buildings:

“A single report, submitted in 1908 by F.H. Paget, an accountant with the Department, gives some sense both of the scope of the problem and of senior Departmental staff’s awareness of it....Paget’s report revealed that the schools ran the gamut from

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<sup>597</sup> *A National Crime*, pg. 77.

<sup>598</sup> *A National Crime*, pg. 78-79.

<sup>599</sup> *A National Crime*, pg. 78-79.

<sup>600</sup> *A National Crime*, pg. 81.

good to deplorable. The majority – fifteen out of the twenty-one – were in the latter category...Finally; the report indicated what was by 1908 a commonplace, the connection between the condition of the schools and the ill health of children, particularly through tubercular infection.”<sup>601</sup>

396. The Department was fully aware, before either the Bryce Report (1907) or the Paget Report (1908), of the plague of tuberculosis affecting the First Nations children and the fact that it had insinuated itself into the schools.<sup>602</sup> The rate of infection was probably as high as 42 percent of the children were infected with tuberculosis.<sup>603</sup> Dr. Milloy provided the Tribunal with the following testimony regarding the effects of tuberculosis on the student population attending residential schools:

DR.MILLOY: ... it went right through the schools and he found that at least 24 percent of the children in the schools had tuberculosis in the schools and were literally breathing in each other's faces because of the overcrowding, with so many kids packed into the schools that it was just going rife in it.

One of the problems is -- and I didn't a bit of math, and I do have a colleague who is very good at maths -- and we figured out that the real rate was probably as high as 42 percent of the children were infected with tuberculosis.

One of the things the schools did was that when kids got really sick they sent them home, which meant that the children died somewhere else, right, they are not on the stats in the schools, so the numbers are somewhat higher, because Davin said "or within three years after leaving they would die of tuberculosis." You have to add those people in; right?

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<sup>601</sup> *A National Crime*, pg. 82-83.

<sup>602</sup> *A National Crime*, pg. 83.

<sup>603</sup> Pg. 131, Vol. 33, Dr. John S. Milloy Transcript.

The other thing that schools did, which was -- sorry.

MR. NAHWEGAHBOW: The 24 percent, is that the percentage with tuberculosis or --

DR. MILLOY: Those are deaths.

MR. NAHWEGAHBOW: Those are deaths from tuberculosis?

DR. MILLOY: Yeah.

MR. NAHWEGAHBOW: Okay.

DR. MILLOY: Yeah. So, the number of children who had tuberculosis at the time of the survey, obviously, would have been larger. And this is a partial survey. It's not every school who's a residential school that reports. So, overcrowding was a problem, clearly. Children coming in from the communities with tuberculosis and infecting others was a problem.<sup>604</sup>

397. Dr. Milloy has indicated that "nearly fifty percent (50%) of the children sent to residential school died."<sup>605</sup>

398. According to Dr. Milloy the topic of "health" in the schools was reported by Bryce in 1907. At the time Bryce was the Medical Inspector to the Department of the Interior and Indian Affairs and his report, "brought the consequences for the children of all the health issues, overcrowding, the lack of proper sanitation and ventilation, and the failure of administrative controls, into horrifying focus."<sup>606</sup>

Dr. Milloy provided the following insight on the Bryce report:

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<sup>604</sup> Pg. 131-132, Vol. 33, Dr. John S. Milloy Transcript.

<sup>605</sup> *A National Crime*, pgs. 77-78.

<sup>606</sup> Pg. 110 and 112, Vol. 34, Dr. John S. Milloy Transcript.

Bryce reported that the incursion and spread of tuberculosis in the schools was largely attributed to the lack of any system of government inspection, the lack of discrimination on the part of the principals as to the degree of health of the pupils admitted, and the ignorance of the school staff to the “actual situation” unfolding before them. Ventilation, for Bryce, was identified as a serious problem. However, it was the statistics produced by Bryce that caught the nation’s attention: “It was the stuff of headlines”; “Indian boys and girls are dying like flies in these institutions or shortly after leaving them”; “Even war seldom shows as large a percentage of fatalities as does the education system we have imposed on our Indian wards.”<sup>607</sup>

399. According to Dr. Milloy, Bryce’s statistics underestimated the death rate as it was actually higher than he initially reported. And, Bryce’s numbers were later supported by a second western trip made in association with Dr. J.D. Lafferty. The statistics on this second trip matched the original findings. In fact, those schools which had been in existence for a longer period of time revealed higher percentages.
400. In 1922, in response to his critical reports on the health conditions of First Nations children, Bryce wrote a pamphlet entitled, The Story of a National Crime.<sup>608</sup> Bryce specifically laid the blame for the continuing death of children after 1907 on “the dominating influence,” of Duncan Campbell Scott, who had become “the reactionary” Deputy Superintendent General in 1913 and prevented “even the simplest effective efforts to deal with the health problem of the Indians along modern scientific lines.”<sup>609</sup> Within a year of publishing A Nation Crime, Scott removed Bryce from his position and replaced him.<sup>610</sup>

“Bryce’s report providing the chilling reality that, “The children in the schools were completely defenceless and the conditions were

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<sup>607</sup> *A National Crime*, pg. 90.

<sup>608</sup> Pg. 143, Vol. 33, Dr. John S. Milloy Transcript.

<sup>609</sup> Pg. 144, Vol. 33, Dr. John S. Milloy Transcript.

<sup>610</sup> *A National Crime*, pg. 95.

described as “nothing less than criminal...”, with the children who died being buried like paupers with two to a grave.”<sup>611</sup>

401. The discriminatory practices of the government were highlighted by Dr. Milloy with respect to his critical comments on the state of the school system:

The reality was that the school system “drifted without a firm hand” and “without concerted intervention”: “Many, many children – perhaps as high as fifty percent according to Scott’s estimate – would not “attain maturity and be able to exercise any civilizing influence” in their communities...a significant cause of this lay with personnel in the Department and in the churches involved directly in the management of the system.”<sup>612</sup>

iv. **Sexual Abuse and Suicide**

402. Dr. Milloy found that physical and sexual abuse of First Nations children was a prevalent practice within the residential school system.<sup>613</sup> When acts of sexual interference were discovered, and reported to school officials the sexual assaulter would often be re-located or transferred. The assaulters were simply moved around rather than disciplined. According to Dr. Milloy, the government’s decision to remove the children from their parents and communities and into the schools placed them in a “dangerous place.”
403. According to Dr. Milloy the prevalence and degree of sexual abuse against First Nations by staff members, administrators and teachers “was shocking and extremely sad, and the impact on the children and on their communities is perhaps the worst of all the school crises or impacts.”<sup>614</sup>

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<sup>611</sup> *A National Crime*, pg. 97.

<sup>612</sup> *A National Crime*, pg. 101.

<sup>613</sup> Pg. 10, Vol. 35, Dr. John S. Milloy Transcript.

<sup>614</sup> Pg. 12, Vol. 35, Dr. John S. Milloy Transcript.

404. The victimization of the children created a “spillover effect” into their lives as adults. Dr. Milloy testified before the Tribunal of a number of women’s organizations who had spoken out as to the pervasiveness of the spillover effect and the connection to the residential school system.<sup>615</sup>

v. **Lasting Impacts of Residential School**

405. Dr. Milloy provided the following quote with respect to the roughly 85 percent of First Nation student who did not attend residential school: “Thank God the majority of Indian children did not go to residential school”.<sup>616</sup> However, according to Dr. Milloy, “it is probably more accurate to state that 100 percent of First Nations people were negatively affected by residential schools.”<sup>617</sup>

406. Dr. Milloy testified that those children who did not attend residential schools still lived in the same communities as those who did attend, and in this way they were affected by the “spillover or flow-back of their residential school experience.”<sup>618</sup> Aboriginal communities become the poorest communities across the country and their children are apprehended at much greater numbers than children from other poor ethnic groups, and Aboriginal people begin to fill up Canadian jails in greater proportions than other poor ethnic groups.<sup>619</sup> The intergenerational impacts, too, disrupted the children whose parents had attended, and likewise, in this way, residential schools continue to affect the First Nations population.<sup>620</sup>

407. The effects on those children who attended residential schools were devastating and life altering. Elder Robert Joseph testified before the Tribunal regarding the trauma residential schools inflicted on those students who attended:

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<sup>615</sup> Pg. 9, Vol. 35, Dr. John S. Milloy Transcript.

<sup>616</sup> Pg. 111, Vol. 35, Dr. John S. Milloy Transcript.

<sup>617</sup> Pg. 111, Vol. 35, Dr. John S. Milloy Transcript.

<sup>618</sup> Pg. 113, Vol. 35, Dr. John S. Milloy Transcript.

<sup>619</sup> Pg. 176, Vol. 35, Dr. John S. Milloy Transcript.

<sup>620</sup> Pg. 115, Vol. 35, Dr. John S. Milloy Transcript.

Can anyone imagine what it must have been like for little children to be ripped away from their families when the Residential School era came on, from the comfort of their families and communities and cultures. It was crushing and devastating. It was unimaginable to go from being the centre of life itself to being a non-entity with no value whatsoever in a Residential School. That was my experience.<sup>621</sup>

408. The direct impacts of residential schools on First Nations children in the form of abuse, neglect, disease, and for some death, are undeniable. Dr. Milloy's evidence points to countless incidents, reports, studies and government findings of an imposed school system replete with unspeakable acts of violence and discriminatory practices.
409. The *Royal Commission on Aboriginal Peoples* (RCAP) summarized the churches and the federal government contribution to the harms suffered by First Nations children while in IRS:

“The persistently woeful condition of the school system and the too often substandard care of the children were rooted in a number of factors: in the government's and churches' unrelieved underfunding of the system, in the method of financing individual schools, in the failure of the department to exercise adequate oversight and control of the schools, and in the failure of the department and the churches to ensure proper treatment of the children by staff. Those conditions constituted the context for the neglect, abuse and death of an incalculable number of children and for immeasurable damage to Aboriginal communities.”<sup>622</sup>

vi. **Intergenerational Impacts of Residential School**

410. In addition to the immediate effects IRS had on the students who attended those institutions, there is evidence that the negative impacts of IRS are being passed

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<sup>621</sup> Pg. 34-35, Vol. 42, Elder Joseph Transcript.

<sup>622</sup> Report of the Royal Commission on Aboriginal Peoples, Vol. 1, Part Two, Chapter 10, *Systemic Neglect: Administrative and Financial Realities*.

on to subsequent generations. Dr. Amy Bombay was qualified by the Tribunal as a psychological expert on the effects and transmission of stress and trauma on well-being, including inter-generational transmission of trauma among offspring of Indian residential school (IRS) survivors, and the application of the concepts of collective and historical trauma.<sup>623</sup>

411. Dr. Bombay provided evidence to show the extent of the damage done as a result of the Indian residential school system. Dr. Bombay testified before the Tribunal that in these circumstances the use of qualitative research, that includes information such as interviewee responses and word data, is key to understanding the inter-generational impacts of IRS survivors.<sup>624</sup>
412. Dr. Bombay's research focused on the long-term effects of Indian residential schools with a greater focus on the inter-generational effects of Indian residential schools.<sup>625</sup> Some of her research has focused on the grandchildren of residential school survivors and to those who have not been impacted by residential schools.<sup>626</sup> Her approach is multi-disciplinary in the way she integrates perspectives from various fields of psychology, including health psychology, social psychology and cultural psychology, while also drawing on current research from the fields of neuroscience and behavioural neuroscience.<sup>627</sup>
413. Dr. Bombay provided the following summary of her initial findings with respect to intergenerational impacts of IRS:

The observed relationship between being affected by IRS and well-being, in combination with the large proportion of the on-reserve population affected by residential schools, suggests that

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<sup>623</sup> Pg. 4, Vol. 40, Dr. Amy Bombay Transcript.

<sup>624</sup> Pg. 61, Vol. 40, Dr. Amy Bombay Transcript.

<sup>625</sup> Pg. 60, Vol. 40, Dr. Amy Bombay Transcript.

<sup>626</sup> Pg. 60, Vol. 40, Dr. Amy Bombay Transcript.

<sup>627</sup> Pg. 61, Vol. 40, Dr. Amy Bombay Transcript.

the trauma presented by IRS is an important contributor to health disparities and continued high rates of stress and trauma seen in communities today. In particular, the high rates of “childhood adversity” is a harmful consequence of IRS as it is an essential mechanism in the proliferation of stressors and negative outcomes across one’s individual lifespan and also across generations.<sup>628</sup>

414. IRS’s are one example of the many collective traumas faced by Aboriginal peoples, and is only one of a larger trauma experienced since colonization.<sup>629</sup> To further explain, the term “historical trauma”, which was coined by Dr. Maria Yellow Horse Brave Heart, from the University of New Mexico, has been used to explain the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma. Collective and historical traumas influence the health of today’s contemporary Aboriginal population.<sup>630</sup>
415. Dr. Bombay’s research on Aboriginal adults from across Canada consistently reports higher levels of depressive symptoms. In addition, her analyses of the RHS revealed that IRS offspring and grandchildren reported higher levels of psychological distress and are at greater risk for physical chronic health conditions.<sup>631</sup> For example, in the 2002/03 RHS Survey it was reported that 26.3% of residential school offspring had suicidal ideation versus only 18% of those who were not affected by IRS.<sup>632</sup>
416. With respect to the proportion of individuals intergenerationally affected, Dr. Bombay testified that 31.1% of First Nations adults living on-reserve had at least one parent who attended IRS. Of this group, just over half also had a parent who attended IRS, with the remaining 47% just had a parent attend IRS.

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<sup>628</sup> Pg. 84, Vol. 40, Dr. Amy Bombay Transcript.

<sup>629</sup> Pg. 94, Vol. 40, Dr. Amy Bombay Transcript.

<sup>630</sup> Pg. 95, Vol. 40, Dr. Amy Bombay Transcript.

<sup>631</sup> Pg. 116, Vol. 40, Dr. Amy Bombay Transcript.

<sup>632</sup> Pg. 116-117, Vol. 40, Dr. Amy Bombay Transcript.

Meaning these individuals had more than one generation attend IRS.<sup>633</sup> In other words, a very large proportion of the on-reserve population has been either directly or indirectly affected by IRS.<sup>634</sup>

417. Residential schools, according to Dr. Bombay, “affected not only individuals but also whole communities which are expressed as *collective effects* that have greater than the sum of the effects on the individual”. Collective effects have been observed in other groups, such as Holocaust survivors, that have experienced major collective traumas and research has shown that collectively-experienced traumas have unique social and psychological trajectories. These traumas create collective responses and collective interpretations of what the trauma means in respect to their identity and well-being as a collective in general.<sup>635</sup>
418. Collective trauma at the family and community levels modify the social dynamics of a community or group by modifying the processes, structures and functioning within the group.<sup>636</sup> Dr. Bombay identified the following community-level changes: the erosion of basic trust, the deterioration of social norms, and the deterioration of traditional values of the group.<sup>637</sup> Elder Robert Joseph in his testimony described this dramatic change in social dynamics as “though a cyclone or tsunami hit you.”<sup>638</sup>
419. One contemporary consequence of residential schools is the high rates of community violence and child abuse that exists in some communities. Dr. Bombay pointed to research from the Aboriginal Healing Foundation which shows residential schools not only affected the children of those who attended, but when a sizeable proportion of the population within a community went to

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<sup>633</sup> Pg. 123, Vol. 40, Dr. Amy Bombay Transcript.

<sup>634</sup> Pg. 125, Vol. 40, Dr. Amy Bombay Transcript.

<sup>635</sup> Pg. 178-179, Vol. 40, Dr. Amy Bombay Transcript.

<sup>636</sup> Pg. 179, Vol. 40, Dr. Amy Bombay Transcript.

<sup>637</sup> Pg. 179, Vol. 40, Dr. Amy Bombay Transcript.

<sup>638</sup> Pg. 42, Vol. 42, Elder Joseph Transcript.

residential school, the effects of attendance affect even those who did not attend.<sup>639</sup>

420. Residential schools created negative consequences in a cyclical pattern that is seemingly never-ending, which, according to Dr. Bombay, “would require creative interventions in order to break the cycle”.<sup>640</sup> Dr. Bombay explained “that the health of Aboriginal infants and children are a reflection of the health of the overall Aboriginal group, which appear to be a mechanism through which these disparities continue to exist”.<sup>641</sup>
421. Dr. Milloy testified that as early as the 1960’s, the government was acutely aware of the negative impacts residential schools was having on First Nations people:

“By the 1960s and the 1970s the Department begins to say to psychiatrists – psychologists, excuse me, and social workers, “Well, what is actually happening with these children? What is the actual impact on the children of these institutions; of isolation from their parents; of loss of culture and language,” et cetera and so forth. And they being to talk and tell the Department in the ‘60s some really astounding facts about the psychological impact – the massively negative psychological impact that these children suffer because of the way in which the system operates.”<sup>642</sup>

422. Dr. Bombay’s provided the following statistics with respect to residential school survivors:

- 19.5% of First Nations adults living on reserve are residential school survivors;<sup>643</sup>

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<sup>639</sup> Pg. 186-187, Vol. 40, Dr. Amy Bombay Transcript.

<sup>640</sup> Pg. 187-188, Vol. 40, Dr. Amy Bombay Transcript.

<sup>641</sup> Pg. 190, Vol. 40, Dr. Amy Bombay Transcript.

<sup>642</sup> Pg. 206, Vol. 33, Dr. John Milloy Transcript.

<sup>643</sup> Pg. 120, Vol. 40, Dr. Amy Bombay Transcript.

- 52.7% had at least one parent who was a residential school survivor, and 46.2% had at least one grandparent who was a residential school survivor.<sup>644</sup>
- 52.7% who had at least one parent who attended could have also included survivors, because many of these families were impacted at more than one generation.”<sup>645</sup>
- 64.2% of First Nations on-reserve has either been directly or intergenerationally affected by residential schools.”<sup>646</sup>

423. Dr. Bombay’s research provides an understanding of the intergenerational impacts of residential schools on the overall health of First Nation communities and the issues related to subsequent generations of family members.

vii. **Historical Prejudice or Disadvantage is Perpetuated by Canada’s Child Welfare Services/Funding**

424. The historical disadvantage imposed by the government on First Nations children as a result of residential schools is being perpetuated by the current child welfare system.

425. Dr. Bombay testified as to how the historic disadvantage of residential schools continues to affect First Nations communities and manifests itself in the form of “mental health issues, as well as issues related to cultural identity, in addition to how First Nations people feel about being aboriginal”<sup>647</sup>

426. First Nations children are disproportionately represented within the child welfare process.<sup>648</sup> It is “estimated that there are three times as many First Nations children placed in out-of-home care today” than were placed in Indian Residential Schools “at the height” of the residential school movement.<sup>649</sup> The

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<sup>644</sup> Pg. 120-121, Vol. 40, Dr. Amy Bombay Transcript.

<sup>645</sup> Pg. 121, Vol. 40, Dr. Amy Bombay Transcript.

<sup>646</sup> Pg. 125, Vol. 40, Dr. Amy Bombay Transcript.

<sup>647</sup> Pg. 165-166, Vol. 40, Dr. Amy Bombay Transcript.

<sup>648</sup> FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 16

<sup>649</sup> FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 1

overrepresentation of First Nations children within the child welfare system has been described as an extension of the, “historic pattern of removal of First Nations children from their homes which is grounded in colonial history”.<sup>650</sup>

427. AANDC has previously acknowledged the overrepresentation of First Nation within the child welfare system. AANDC provided the following response to the question: “Why are First Nations children (6 times) more likely than non-aboriginal children to be placed in care?”

As the Auditor General’s report noted, numerous studies have linked the difficulties faced by many Aboriginal families to historical experiences and poor socio-economic conditions. The Report of the Royal Commission on Aboriginal Peoples in 1998 linked the residential school system to the disruption of Aboriginal families. Data from the 2003 Canadian Incidence Study of Reported Child Abuse and Neglect link poverty and inadequate housing on many reserves to the higher substantiated incidence of child abuse and neglect occurring on reserves compared to off reserve.<sup>651</sup>

428. Bombay’s research findings supported community wide interventions in order to deal with the negative effects of Indian Residential schools.

This research also points to the fact that residential schools have resulted in an increased need on-reserve and off-reserve for prevention and intervention efforts targeting future parents because they are the ones who are, you know, really responsible and can protect children from the exposure to negative experiences. And, as well, because there are these high rates already of trauma faced by children, interventions need to be implemented to protect these children against the negative effects of these stressors and trauma.

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<sup>650</sup> FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 1

<sup>651</sup> Master Qs & As: First Nations Child and Family Services, CHRC BOD, Ex. HR-13, Tab 329 at p. 4

Dr. Considering the collective effects that this experience has produced in communities, in addition to these interventions targeting individuals, this research also suggests that there needs to be some communitywide interventions to address these community level effects, and that might be better addressed through alternative more community-level healing interventions.<sup>652</sup>

429. Dr. Bombay expressed concern that by failing to address the historic disadvantage imposed by residential schools the same cycle of negative effects will continue to perpetuate:

“This research also suggests that the negative cycles that have been catalyzed by residential schools and by other historical traumas will continue and have been continuing unless we do something to stop it through targeted efforts to put an end to the cycle.”

“The continued removal of First Nations children from parents as a result of the consequences of residential schools, such as the poor health in parents, other social and socioeconomic consequences of the residential schools, these consequences really just serve to propagate these cycles, and so something else is really needed in order to stop this from continuing.”<sup>653</sup>

430. The evidence provided by Dr. Bombay clearly indicates that if corrective measures are not implemented to address the negative effects caused by residential schools the intergenerational cycle of discrimination will continue.

#### viii. **Transition to Child Welfare System**

431. The evidence put forward in the form of oral testimony, in addition to the findings of the FNCIS Reports, supports the AFN’s submissions that First Nations family services are essentially an extension of the residential school system. According

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<sup>652</sup> Pg. 84-85, Vol. 40, Dr. Amy Bombay Transcript.

<sup>653</sup> Pg. 85-86, Vol. 40, Dr. Amy Bombay Transcript.

to Dr. Bombay, intergenerational issues caused by the abuse suffered by parents who attended residential school continue to plague First Nations children. Dr. Milloy testified before the Tribunal that residential schools have evolved from institutions designed to assimilate First Nations children to child welfare institutions where children become wards of the state, as opposed to being taken away from their families to attend school.<sup>654</sup>

432. Dr. Milloy testified as to the transition of First Nations children from residential schools to the child welfare system and stated the following:

So there is this segue from residential schools as educational institutions to residential schools as child welfare institutions, and then as they close children are found --children who cannot be integrated successfully in -- with respect to their families and local social welfare services are found to be wards of the Children's Aid Society across the country and in large numbers, whatever that might mean.<sup>655</sup>

433. The current child welfare system continues to perpetuate the historical disadvantage suffered by First Nations children.

**ix. Statistics Show Worsening Social and Mental Health Conditions For First Nations**

434. Through her research findings Dr. Bombay has been able to show a statistical link between being inter-generationally affected by residential schools and the likelihood of spending time in foster care.<sup>656</sup> She and her colleagues found in a representational sample of Aboriginal people in Canada a positive relationship with the likelihood of spending time in foster care. It was found that the more generations in a family affected by residential schools the lower levels of stability

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<sup>654</sup> Pg. 200-201, Vol. 33, Dr. John Milloy Transcript.

<sup>655</sup> Pg. 200-201, Vol. 33, Dr. John Milloy Transcript.

<sup>656</sup> Pg. 16, Vol. 41, Dr. Amy Bombay Transcript.

for these individuals in their childhood while growing up.<sup>657</sup> The low stability was a result of the family's history relating to residential schools which put them at risk for being taken away from their homes and spending time in foster care.<sup>658</sup>

435. Dr. Bombay noted even when controlling the effects of this general stress and trauma, which are higher in Aboriginal people and other minority groups, the health and social disparities continue to exist. This suggests that still additional factors related to Aboriginal identity are contributing to these health disparities. It is well-established that one of the important determinants of health that contribute to these disparities is experiences of racism and discrimination. When experienced on a chronic basis, racism and discrimination act as continual and chronic stressor that is exposed to these people sometimes on a daily basis.<sup>659</sup>
436. As an example, the most recent RHS survey reported that 32.6% of those living on-reserve reported experiencing racism in the last year, and rates reported in urban sample have been much higher. According to Dr. Bombay, racism and discrimination is extremely common and pervasive that has really negative effects on health and well-being, and are important contributors to the continued health disparities among Aboriginal and non-Aboriginal peoples in Canada.<sup>660</sup>
437. Elder Joseph, testified to the Tribunal that life expectancy of an Aboriginal child is six years shorter than that of a non-Aboriginal child. Aboriginal children also die at a rate three times higher than other, and they are more likely to be born with severe birth defects and debilitating conditions like Fetal Alcohol Spectrum

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<sup>657</sup> The power point slide representing this study was objected to by the Respondent because the study was not yet published and was not disclosed in advance to the Respondent. However, it was admitted into evidence and the non-disclosure goes to its weight. However, AFN submits that the findings in this study are consistent with the body of research that establishes the impacts of IRS on children.

<sup>658</sup> Pg. 17-18, Vol. 41, Dr. Amy Bombay Transcript.

<sup>659</sup> Pg. 92-93, Vol. 40, Dr. Amy Bombay Transcript.

<sup>660</sup> Pg. 93, Vol. 40, Dr. Amy Bombay Transcript.

Disorder. Also, suicide rates are six times higher compared to others, amongst a litany of other traumatic injuries.<sup>661</sup>

438. Elder Joseph also stated that nearly half of all Aboriginal children under 14-years of age are in foster care, and that Aboriginal children are more likely to experience sexual, physical and emotional abuse, and more likely to be victims of violent crime and to be incarcerated.<sup>662</sup>

x. **Statistics on Removal of First Nations Children Remains the Same or Worse**

439. Dr. Nicolas Trocmé, Professor of Social Work at McGill University, was qualified as an expert before the Tribunal in the epidemiology of child maltreatment and neglect, as well as child welfare service trends and policies. Dr. Trocmé testified before the Tribunal as to the overrepresentation of First Nations within the Child Welfare system. Dr. Trocmé provided the following insight with respect to his research findings on the subject:

DR. TROCMÉ: So, we were able to do a more comprehensive analysis in the 2003 study and that analysis confirmed what we had found in 1998, which was that First Nations children and families were overrepresented at the level of the initial investigation and that they were subsequently more likely to be substantiated and much more likely to be placed in out of home care, foster care, group care, than were non-aboriginal children.

So, nothing new in the sense that these findings were consistent with what we had found in the 1998 study but further evidence that there was a significant overrepresentation of First Nations children and that we needed to better understand the needs of these

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<sup>661</sup> Pg. 93, Vol. 42, Elder Joseph Transcript.

<sup>662</sup> Pg. 93-94, Vol. 42, Elder Joseph Transcript.

children and families if we wanted to make sure that their needs were being adequately addressed.<sup>663</sup>

440. Dr. Trocmé provided detailed findings to the Tribunal with respect to the *Wen:De – The Journey Continues* Report,<sup>664</sup> which found an overrepresentation of First Nations children in the child welfare system as compared to non-Aboriginal children.

DR. TROCMÉ But the -- the main -- my main involvement was really in producing the Chapter 2, which was a further analysis of the 2003 data, comparing Aboriginal and -- Aboriginal children to non-Aboriginal ones, and then broken down by First Nations, and then on-reserve/off-reserve comparisons.

MR. POULIN: So what were your conclusions in *Wen:de*?

DR. TROCMÉ: Well, our conclusions were very similar to the ones I have reported to date, which was that there was a -- the most dramatic difference was the difference between the First Nations and the non-Aboriginal children both with respect to their overrepresentation at the front end, even greater overrepresentation in rates of placement; greater likelihood to be reported because of issues around neglect; a clinical profile, which was generally more complex, involving concerns both with respect to substance abuse, housing problems, poverty related problems.<sup>665</sup>

441. Dr. Trocmé testified of numerous research findings which showed a significant differences between First Nations and non-Aboriginal children including:

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<sup>663</sup> Pg. 72-73, Vol. 7, Dr. Nicolas Trocme Transcript.

<sup>664</sup> *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5.

<sup>665</sup> Pg. 141-142, Vol. 7, Dr. Nicolas Trocmé Transcript.

- A significant difference in rates of substantial neglect; there were five (5) times as many cases of neglect per capita involving Aboriginal families as compared to non-Aboriginal families;<sup>666</sup>
- A higher percentage of investigated cases of abuse that proceed to court for First Nations on Reserve (13%) compared to non-Aboriginals (6%);<sup>667</sup>
- A higher formal child welfare placement for First Nations children (13.6 per 1000) compared to non-Aboriginal children (1.1 per 1000);<sup>668</sup>
- Disparity between the rate of substantiated neglect of 29 per 1,000 for First Nations children compared to 6 per 1,000 for non-Aboriginal children;<sup>669</sup>

442. According to Dr. Trocmé the *Wen:De* reports concluded that AANDC's funding formula provided "more incentives for taking children into care than it provides support for preventative, early intervention and least intrusive measures."<sup>670</sup> First Nations children are subject to the perils of the child welfare system as a result of neglect. As identified in the series of *Wen:De* series of reports poverty, substance abuse, poor housing are key factors that that directly contribute to the over representation of First Nations children in substantiated child welfare cases.

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<sup>666</sup> Pg.146, Vol. 7, Dr. Nicolas Trocmé Transcript.

<sup>667</sup> Pg. 152, Vol. 7, Dr. Nicolas Trocmé Transcript.

<sup>668</sup> Pg. 95, Vol. 7, Dr. Nicolas Trocmé Transcript.

<sup>669</sup> Pg.146, Vol. Dr. Nicolas Trocmé Transcript.

<sup>670</sup> *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 114.

443. As a result, First Nations children are denied an equitable chance to stay safely at home due to the structure and amount of funding provided by the government.<sup>671</sup>

*xi. United Nations Declaration on the Rights of Indigenous Peoples*

444. In addition to the evidence and the case law which supports a *prima facie* finding of discrimination the Tribunal must also consider the *UN Declaration on the Rights of Indigenous Peoples*. (“UNDRIP”). UNDRIP, which was endorsed by Canada on November 12, 2010 makes special provision for the rights of children. According to the Supreme Court of Canada, such instruments are relevant and persuasive sources for interpretation of human rights. The AFN therefore submits that UNDRIP is relevant to the Tribunal’s interpretation of the Canadian Human Rights Act.

445. Article 21 (1) and (2) of UNDRIP provides the following protections:

Article 21-1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.<sup>672</sup>

446. Article 22 of the UN Declaration provides further protections and guarantees for the rights of indigenous children:

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<sup>671</sup> *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

<sup>672</sup> United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution /adopted by the General Assembly, 2 October 2007, A/RES/61/295 [“UNDRIP”], Article 21(1)(2).

Article 22–1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall 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.<sup>673</sup>

447. Despite Canada's ratification of the UN Declarations the United Nations Committee on the Rights of the Child has expressed concern that Aboriginal children in Canada continue to experience greater discrimination in comparison to non-Aboriginal children.<sup>674</sup>

#### **B) Is There a Federal Fiduciary Duty owed to First Nations?**

448. At the outset, the AFN submits that although it takes the position that a fiduciary duty exists in relation to AANDC's First Nation Child and Family Service program, a finding of discrimination does not depend on the existence of a fiduciary duty. The historical contextual evidence establishes that the Department has had a long standing role in child welfare matters of First Nation children on reserve, which runs through the IRS period and transitions into the modern child welfare system. The current AANDC child welfare funding programs and policies must be seen in this historical context. It is also clear that although the provinces have jurisdiction over child welfare generally, the federal government has always maintained *de facto* jurisdiction and responsibility over First Nation children on reserve. This is undoubtedly what led Mr. Justice La Forest to conclude in *Mitchell v. Peguis* that: "The provincial

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<sup>673</sup> *UNDRIP*, Article 22.

<sup>674</sup> United Nations Committee on the Rights of the Child; Concluding Observations: Canada, CHRC BOD, Ex. HR-03, Tab 23 p.13.

Crowns bear no responsibility to provide for the welfare and protection of native peoples ....<sup>675</sup>

449. The fiduciary duty is rooted in the Crown's assertion of sovereignty, the federal government's historical role in First Nation child welfare matters, and Canada's undertaking to fund First Nation child welfare programs.
450. A finding that a fiduciary duty exists is important in the present case as it creates a standard which demands the Crown: protect the interests of First Nation children; treat Aboriginal people fairly;<sup>676</sup> and not to profit at the expense of the Beneficiary in the exercise of its duties.<sup>677</sup> This obligation is binding on the Crown and enforceable by this Tribunal.<sup>678</sup>
451. The Supreme Court of Canada's recognition of a fiduciary relationship between the federal government and First Nation Peoples established important guiding principles for Crown-Aboriginal relations. The federal government recognizes the existence of a fiduciary relationship and that fiduciary obligations are owed to Aboriginal Peoples.<sup>679</sup> In *Guerin*, a landmark Supreme Court decision establishing the Canadian government's fiduciary duty to First Nations, Dickson J. describes the fiduciary duty as "sui generis" to acknowledge the unique legal and historical relationship when he wrote:

As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore

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<sup>675</sup> *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, p. 143.

<sup>676</sup> *Wewaykum Indian Band v. Canada*, 2002 SCC 79, para 79.

<sup>677</sup> *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, pp. 646-47.

<sup>678</sup> *Guerin v. The Queen*. [1984] 2 S.C.R. 335; see also, *Wewaykum Indian Band v. Canada*, 2002 SCC 79, para. 79.

<sup>679</sup> Canada, Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, *Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues – A Guide for Managers* (Ottawa: n.p., 1995) [Justice] recognized the existence of this fiduciary obligation and stated that this fiduciary duty must be applied to Aboriginal people in general.

not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.<sup>680</sup>

452. *R. v. Sparrow*<sup>681</sup> constitutionalized the Crown's fiduciary duty when the Supreme Court of Canada stated:

The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship...

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.<sup>682</sup>

453. In *Sparrow*, the Court confirmed it is the particular legal and historical relationship between the Crown and Aboriginal peoples that is the source of the fiduciary duty:

The sui generis nature of Indian title and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation.<sup>683</sup>

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<sup>680</sup> *Guerin*, p. 385

<sup>681</sup> [1990]1 S.C.R. 1075

<sup>682</sup> *Sparrow*, paras. 59 and 62.

<sup>683</sup> *Sparrow*, p. 1108.

454. Moreover, in *Hogan v. Newfoundland (Attorney General)*<sup>684</sup>, the Newfoundland Court of Appeal elaborated why the fiduciary duty owed by the Crown to Aboriginal peoples should not be extended to other groups in Canada, stating:

[I]t is clear that, indeed, that relationship is an unparalleled one. The unique nature of such rights was addressed by *Guerin v. The Queen*, [1984] 2 S.C.R. 335 when at p.387 Dickson J. said "the fiduciary obligation which is owed to the Indians by the Crown is sui generis." *Guerin* was, of course, decided without consideration of the Constitution Act, 1982. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 Lamer C. J., for the majority, discussed the nature of aboriginal rights, which were recognized and affirmed by s. 35 of the Constitution Act 1982. The primary rationale for the existence of aboriginal rights is said to be one simple fact: "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal and now constitutional status."<sup>685</sup>

455. In *Galambos v. Perez*<sup>686</sup>, the Supreme Court affirmed that: "the focus of fiduciary law is on relationships"<sup>687</sup>, and quoting from *Guerin*, noted that "[i]t is the nature of the relationship that gives rise to the fiduciary duty."<sup>688</sup>
456. The underlying purpose of fiduciary law is to protect and enforce the integrity of relationships in which one party has a discretionary power to affect the interests of the other.<sup>689</sup>

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<sup>684</sup> *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12.

<sup>685</sup> *Ibid.*, para. 67.

<sup>686</sup> *Galambos v. Perez*, [2009] 3 S.C.R. 247.

<sup>687</sup> *Ibid.* at para. 70.

<sup>688</sup> *Ibid.* at para. 67.

<sup>689</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, para. 38.

### i. Principles of the Fiduciary Relationship

457. In *Frame v. Smith*<sup>690</sup>, Wilson J. outlined three general characteristics for identifying fiduciary relationships: (1) the fiduciary has the scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power so as to effect the beneficiary's legal or practical interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary powers.<sup>691</sup>
458. In sum, the law holds that a fiduciary relationship exists where one party has undertaken to act in another party's best interests and exercises discretion over a legal or substantial practical interest of the second party. The types of relationships that have been characterized as fiduciary in nature are not exhaustive<sup>692</sup> but with certainty the Courts are clear that it includes the Crown's relationship with First Nations, and one can add to the established categories where the test is met.<sup>693</sup>
459. Further, *Guerin* affirms the obligations assumed by the Crown in the *Indian Act*<sup>694</sup> give rise to a fiduciary obligation. *Guerin* also recognizes the honour of the Crown as a core principle in the process of reconciliation. The Court found that once the Crown assumes discretionary control over a specific Aboriginal interest, the honour of the Crown is invoked, which holds the government to a strict fiduciary standard of conduct. As Justice Dickson wrote:

The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within

<sup>690</sup> *Frame v. Smith*, [1987] 2 S.C.R. 99.

<sup>691</sup> *Ibid.*, paras. 39-42.

<sup>692</sup> *Ibid.*, para. 136; *Alberta v. Elder Advocates of Alberta Society*, [2011] S.C.J. No. 24, para. 36; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, paras. 30, 32; *Lac Minerals Ltd. v. International Corona Ltd.*, [1989] 2 S.C.R. 574 at 599.

<sup>693</sup> *Galambos v. Perez*, para 66. It essential to all *ad hoc* fiduciary relationships, including those involving elements of power-dependency, that the fiduciary itself undertake to exercise a discretionary power in the vulnerable party's best interests.

<sup>694</sup> R.S.C. 1985, c. I-5.

which the Crown was free to act... it would be unconscionable to permit the Crown simply to ignore those terms.<sup>695</sup>

460. Fiduciary law is rooted in the nature of relationships<sup>696</sup> and meant to offer power to the powerless by holding the fiduciary to the highest level of conduct. In other words, the underlying purpose of fiduciary law is to protect and enforce the integrity of relationships in which one party has a discretionary power to affect the interests of the other. The interests which fiduciary law serves to protect are not limited to property or even legal interests, such as the doctor-patient relationship<sup>697</sup> or the advisor-client relationship.<sup>698</sup> In *Hodgkinson*, La Forest J. stated:

In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue<sup>699</sup>

461. In *Wewaykum*,<sup>700</sup> Binnie J. held that the proper application of establishing the existence of a fiduciary duty "is to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation."<sup>701</sup>
462. A First Nation "interest" may stem from a treaty, a unilateral undertaking by the Crown or legislation, including an order in council, without a pre-existing legal interest. The "obligation" may be found in the government commitment that carries with it a discretionary power or control. Furthermore, a statute, such as

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<sup>695</sup> *Guerin*, p. 388.

<sup>696</sup> *Guerin*, p. 384.

<sup>697</sup> *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.

<sup>698</sup> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

<sup>699</sup> *Hodgkinson*, para 32.

<sup>700</sup> *Wewaykum Indian Band v. Canada*, 2002 SCC 79.

<sup>701</sup> *Wewaykum*, para 83.

the *Indian Act*, that creates a legal entitlement may give rise to a fiduciary duty on the part of government in relation to administering that interest.<sup>702</sup>

## ii. The Federal Undertaking

463. It is submitted that the federal government's unilateral decision to exercise jurisdiction and authority over First Nation child welfare on reserve establishes an undertaking that creates a fiduciary duty on the part of the Crown to act for the benefit of First Nations children and families. In sum, the AFN submits that in relation to First Nation child welfare, the Crown is a fiduciary.<sup>703</sup>

464. The federal government's asserted control over First Nation affairs through the *Indian Act*. As John Milloy states:

“In subsequent legislation, the Indian Acts of 1876 in 1880, and the Indian Advancement Act of 1884, the government took for itself the power to mold, unilaterally, every aspect of life on the reserve and to create whatever infrastructure it deemed necessary to achieve the desired end – assimilation through enfranchisement and, as a consequence, the eventual disappearance of First Nations. It could, for example, and did in ensuing years, determine who was and who was not an Indian, control the election band councils, manage reserve resources, developmental initiatives, and band funds, and even impose individual landholding through a ticket-of-location system.”<sup>704</sup>

465. In carrying of its role, the federal government has historically, and continues, to provide variety of programs and services in First Nation communities. In almost all cases the federal government is the sole funder of these programs and services. The AFN submits that in the context of the First Nation-Crown relationship AANDC's FNCFS Program and “funding” is a service within the

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<sup>702</sup> *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261, at paras. 45, 48-51

<sup>703</sup> *Guerin*, p. 385; *Wewaykum*, paras 74, 81, 85.

<sup>704</sup> *A National Crime*, p. 21.

meaning of the s. 5 of the CHRA. The AFN further submits that federal funding “funding” has always been a service in the First Nation-Crown relationship, dating back to, and perhaps before, confederation.<sup>705</sup>

466. The federal funding, as a service, has always been controlled and safeguarded by the federal government. As Dr. Milloy testified with respect to the Indian residential school system:

[I]n 1892 the government decided that it would try to take control of the system in a much more universal and effective way than was the case, so in the text I talk about the Order-in-Council of 1892 where the government introduces a more comprehensive per capita funding system for all the schools and states right out when it does that, we pay and therefore we decide.

So the Federal government says you will receive money on a per capita basis and you will follow the regulations which are developed by the government for the operation of the schools, and that meant any regulation with respect to any of the school operations, whether you were talking about classrooms or dormitories or medical facilities or dining halls or whatever, they would be providing them with regulations in that regard.<sup>706</sup>

467. The funding of child welfare services in First Nation communities is an extension of this historical relationship. As the funder, the federal government exercises a significant degree of control over the programs and operations of many First Nation CFS agencies.

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<sup>705</sup> In *Mitchell v M.N.R.*, 2001 SCC 33, para. 9, McLachlin CJ connects the Crown’s assertion of sovereignty with the rise of an overarching fiduciary obligation. The fiduciary principle in this context is clearly motivated to ensure that Aboriginal peoples, who once had “their own social and political structures”, can now rely on fiduciary law to ensure that the Crown treats them fairly and honourably and protects them from exploitation.

<sup>706</sup> Pg. 139, Vol. 33, Dr. John S. Milloy Transcript.

468. With respect to child welfare the federal government has asserted its jurisdiction over this subject matter during the residential schools system and more formerly in the 1960s.<sup>707</sup>

469. The federal government is of the view that legislative jurisdiction over child and family services rest with the provincial governments, as stated by Ms. Murphy

“I think I said it yesterday, and I think I said it at the beginning when we were -- I'm talking about, it's the government of Canada's position that the jurisdiction for child welfare rests with provinces and territories.”<sup>708</sup>

470. Even if a First Nation was to pass a by-law relating to child and family services, the federal government would not recognize the First Nations laws relating to their own families and children, as Ms. D'Amico states:

“The basic answer is, there is not official documentation because [*Splatsin*] by-law model should have never been approved by the region. I think some language around our Program authorities allowing AANDC to only support Delegated Agencies under provincial legislation ...”, something like that, [*Splatsin*] is essentially an anomaly.”<sup>709</sup>

471. This position is reiterated by Lili Awart in an email where she writes:

Child and family services are matters of provincial and territorial jurisdiction and legislation. If First Nation bands pursue their own by-laws, the province would no longer need to delegate authority over child welfare; thus eliminating their oversight and monitoring responsibilities. The authority for Aboriginal Affairs and Northern Development Canada (AANDC) to fund First Nation service providers/Agencies is that they have been delegated by the

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<sup>707</sup> Pg. 3-4, Vol. 34, Dr. John S. Milloy Transcript.

<sup>708</sup> Pg. 121, Vol. 56, Sheilagh Murphy Transcript.

<sup>709</sup> Pg. 180, Vol. 53, Barbara D'Amico Transcript; see also, HR-15, Tab 406.

province to operate under provincial legislation. While Splatsin (Spallumcheen) First Nation passed their own by-law for child welfare services, this is a practice AANDC can neither support nor encourage in other First Nations since it contravenes services for which department has authority to fund.<sup>710</sup>

472. Despite Canada's assertion that child welfare is a provincial matter, the federal position is not supported by the provinces themselves, as stated by Ms. Sheilagh Murphy:

MEMBER LUSTIG: So then is it your understanding that the provinces take the position that the federal government is responsible as a consequence of its responsibility with respect to Indians and reservations to provide funding for children on reservations in this area?

MS MURPHY: I believe that that would be the provincial interpretation.<sup>711</sup>

473. The AFN submits that the Crown's assertion of jurisdiction over child and family services on-reserve, in addition to the funding it provides, and its unwillingness to recognize First Nation authority all support the argument that the federal government has effectively established an undertaking to act in the best interest of First Nation children and families, with respect to child and family services. This undertaking satisfies the necessary elements required to establish fiduciary relationship.
474. Nevertheless, in the alternative, the AFN further submits that evidence of an undertaking is not required in the Crown-Aboriginal context. Evidence of an undertaking to act in the best interests of the beneficiary is only a requirement of *ad hoc* fiduciary obligations. In the Aboriginal context, the Crown's obligation to

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<sup>710</sup> See also HR-15 Tab 406.

<sup>711</sup> Pg. 32-33, Vol. 54, Sheilagh Murphy Transcript.

act honourably is well-recognized in law. As established in *Wewaykum*, what is required is a specific obligation or an interest over which the Crown has assumed discretionary control. This is the case for funding First Nation child welfare. The facts give rise to a fiduciary duty on the part of the Crown and therein the honour of the Crown requires the government act in the best interests of the Aboriginal beneficiaries, without any necessity for the Crown's express undertaking to so act.<sup>712</sup>

### iii. Fiduciary Relationship in the Present Case

475. The Supreme Court of Canada identifies the following three elements to establish a fiduciary relationship: 1) an undertaking by the fiduciary to act in the best interests of the alleged beneficiary; 2) a defined person or class of persons vulnerable to the fiduciary's control; and 3) a legal or substantial practical interest of the beneficiary that may be adversely affected by that control. These same factors are to be considered to determine whether a government is subject to a fiduciary obligation.<sup>713</sup> The federal government's First Nation CFS program has all three elements necessary to find that a fiduciary relationship exists on the facts.

476. The three elements of the fiduciary relationship are outlined below.

#### 1) AANDC has the Scope for the Exercise of Some Discretion or Power

477. First, AANDC has inserted itself as the authority in the provision of child welfare services for First Nations. In the provision of such services, the Crown asserts it will act for the benefit of First Nations children and families. Indeed, as a fiduciary it is required to do so by law.

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<sup>712</sup> *Galambos v. Perez*, 2009 SCC 48, para. 76

<sup>713</sup> Such duties are to be imposed on a government "where the relationship is akin to one where a fiduciary duty has been recognized on private actors". *Frame* at 136; *Authorson (Guardian of) v. Canada (Attorney General)*, (2002) 58 O.R. (3d) 417 (C.A.), at 68-69, 71, 76; *Hodgkinson*, at paras. 32, 37; *Elder Advocates* at paras. 26, 36, 48; *Harris v. Canada*, [2001] F.C.J. No. 1876 at para. 178.

478. The CFS program creates two defined classes of vulnerable persons, First Nations parents and children, who are the beneficiaries of the CFS service. AANDC's funding and programming are the mechanisms through which the federal government confers this benefit. It is the only available means by which First Nations children and families get meaningful access to the FNCFS Program services they require.

479. More specifically, AANDC funds and manages the First Nations CFS on reserve as a benefit for First Nation families and children. At the time the complaint was filed, AANDC described the service it offered in the purpose section of the First Nations Child and Family Service Program Manual:

To support culturally appropriate child and family services for Indian children and families resident on reserve or ordinarily resident on reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.<sup>714</sup>

480. The purpose of the First Nation Child and Family Service program has changed since the filing of the complaint and now reads:

The FNCFS program provides funding to assist in ensuring the safety and wellbeing of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.<sup>715</sup>

481. In either version of AANDC's purpose for the programming, it is clear AANDC has considerable authority and discretion over the First Nation CFS program. AANDC has sole authority over the amount of funding provided to First Nation CFS Agencies. AANDC has final say over policy development, what eligible

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<sup>714</sup> Indian and Northern Affairs Canada [INAC], *First Nations Child and Family Services National Program Manual*, May 2005 (CBD, Vol. 3, Tab 29, p. 49).

<sup>715</sup> Aboriginal Affairs and Northern Development Canada [AANDC], *National Social Program Manual*, January 31, 2012 (CBD, Vol. 13, Tab 272, p. 34).

expenses are reimbursable and the federal department provides oversight over First Nation CFS agencies. Furthermore, AANDC requires that First Nation agencies provide the services in accordance with provincial legislation.

482. AANDC has sole discretion for funding CFS for First Nations children and families ordinarily resident on reserve. AANDC has designed the funding formulas (Directive 20-1, EPFA and the 1965 Agreement), which dictates the amounts First Nation agency can use for operations, prevention and maintenance. By controlling the funding available to agencies, AANDC indirectly determines the extent and manner in which child welfare services are provided to First Nations children and families on reserve.
483. AANDC's Program Manual demonstrates the wide extent the federal government's control over First Nations CFS agencies. The Program Manual provides the program description under the three mandates (Directive 20-1 and EPFA). The Policy Manual sets out what allotments are available to First Nation agencies for maintenance, operations and prevention services, and the process by which First Nations agencies may or may not be reimbursed for their expenses.
484. The federal government retains control over the First Nations CFS through AANDC's departmental authorities and mandate established by the central agencies. The federal government declines to permit any significant participation by First Nation governments and agencies in the development of the programs' mandate.
485. In the context of this case, the fiduciary duty arises from the large degree of control that Canada retained over First Nation children and families, and specifically with respect to all aspects of the CFS program, which it imposes on First Nations despite ongoing and historical requests for local control. The

Crown undertook, through the exercise of statutory to provide a CFS program to First Nation peoples.<sup>716</sup>

486. The First Nations were not only vulnerable in the sense described above, but they trust and expect Canada to act in their best interests and the best interests of First Nation children.
487. In *Elder Advocates*, the Court held that a government may be found to owe a fiduciary duty where the government has given an undertaking to act in a beneficiary's interest, and where there is a "strong correspondence" with one of the traditional categories of fiduciary duty. In the present case, as in *Brown v Canada (AG)*,<sup>717</sup> the Child Welfare system has considerable impacts on the rights of a family and child and their respective relationships. AANDC's child welfare system has been designed in a way that encourages the removal of First Nations children from their families and communities and their placement in non-indigenous foster homes. The Court in *Brown v. Canada* stated:

a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.<sup>718</sup>

488. The undertaking to act arises from the relationship between the parties. As set out in the evidence and law, the connection necessary for finding a fiduciary relationship is established by the government's role as CFS funder and program

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<sup>716</sup> *Galambos*, para. 77

<sup>717</sup> *Brown v Canada (Attorney General)*, 2013 ONSC 5637.

<sup>718</sup> *Ibid*, *Brown* at para 44.

developer. This is particularly the case where the First Nation governments and agencies are required to conform to AADNC program mandates, authorities and operate within an imposed legislative and policy framework.<sup>719</sup>

## **2) AANDC can Unilaterally Exercise that Power so as to Effect the Beneficiary's Legal or Practical Interests**

489. AANDC is specific in the beneficiaries of its funding – namely First Nations children and families living on reserves who are “Indians” as defined by the *Indian Act*.
490. The federal government exercises discretionary control over a First Nations beneficiary's interests. The specific Aboriginal interests at stake include: parents right to care for their children; children right to family and community; one's right to their culture and language; the transmission of culture, language, cultural expressions and traditional knowledge from one generation to the next; and a First Nations right to self-determination and self-government. Due to the federal government's unilateral assertion of jurisdiction it has assumed discretionary control over programs and services that have direct impact on those Aboriginal interests, which are constitutionally protected under the section 35 of the *Constitution Act, 1982*.
491. The federal government's ability to unilaterally make changes to the child welfare program, funding methodology, eligible programs/services and culturally appropriate prevention programs exhibits its discretionary control. The federal government further demonstrated its power over First Nation CFS agencies through the changes from the 2005 CFS Policy Manuel to the 2012 rendition. The changes in AANDC CFS policies were not directed, or even contemplated

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<sup>719</sup> *Elder Advocates*, para. 46–47; also, *Galambos*, para. 84

by statute, but were accomplished solely by virtue of the discretionary power held by the federal government.<sup>720</sup>

492. This discretionary power has been repeatedly exercised in a way that could affect First Nation governments, agencies and families' interests. For instance, the government's decision to prohibit the use of funding to cover expenses relating to capital, legal fees for apprehensions, or the prohibition of prevention programs under Directive 20-1 have had real impacts the First Nation agencies' ability to provide programs and keep First Nation children in their family home.
493. Moreover, the removal of First Nation children confers significant powers on the Crown who now stands in the position of guardian of such children. In *KLB v British Columbia*,<sup>721</sup> the court noted:

The government, through the Superintendent of Child Welfare, is the legal guardian of children in foster care, with power to direct and supervise their placement. The children are doubly vulnerable, first as children and second because of their difficult pasts and the trauma of being removed from their birth families. The parties agree that, standing in the parents' stead, the Superintendent has considerable power over vulnerable children, and that his placement decisions and monitoring may affect their lives and well-being in fundamental ways.<sup>722</sup>

494. Finally the federal government can unilaterally make determinations on how the funding can be used and which programs would be eligible for reimbursement. This risk was confirmed when the government eliminated funding for Band Representative Program, for example. Accordingly, First Nations governments and agencies can be left to shoulder the burden of any decisions by government

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<sup>720</sup> *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, para. 127

<sup>721</sup> *K.L.B. v British Columbia*, 2003 SCC 51

<sup>722</sup> *Ibid.*, para 38.

to eliminate funding for various CFS programs or create new ones without increasing existing contributions.

495. There is ample evidence that illustrates to overwhelming degree of power and discretion the federal government exercises in the child welfare system. The AFN submits that the First Nations CFS program has been designed to promote the removal of First Nations children from their families and communities and their placement in non-indigenous foster homes, resulting in further harm to the individual and collective interests relating to First Nations cultures and languages.

**3) First Nation beneficiaries are peculiarly vulnerable to or at the mercy of the fiduciary holding the discretionary power**

496. Finally, as established in the expert evidence of Dr. Milloy and testimony of Elder Joseph, First Nation children and families who are the intended beneficiaries of the funding have been adversely impacted by the Crown's level of funding to the extent that Kwakwaka'wakw children are no longer honoured with the *Heiltsu gula* ceremony, which was first undermined by the IRS and continues to be subverted today through the Crown's current First Nations child welfare funding, programs and policies.
497. The vulnerability of the First Nation communities, families and children arises from a number of sources. First Nations are statutorily subject to both the Indian Act and provincial child protection legislation. First Nations can neither choose which legislation better serves their needs nor opt out of either. First Nations also rely of the federal government for funding of other services such as education, housing, band administration, etc.
498. Moreover, the foundational terms of First Nation CFS programs and funding are subject to change at any time by Parliament. This provides the federal government with an opportunity to alter the terms of funding agreements and/or

the mandates of the First Nation CFS program in its entirety. To this end, First Nation governments, agencies and families face significant political risks that the government may reduce future benefits. This vulnerability is not hypothetical.

499. First Nation children are particularly vulnerable to the Crown's discretionary power, as they also do not have the legal capacity to manage their own affairs. When the Crown steps into the position of a parent the tasks undertaken by the Crown are clear. The Crown must act for the benefit of the child in managing his/her affairs because the child is incapable of doing so himself/herself. This is quintessentially the kind of act which courts have regulated using the law of fiduciary duty.<sup>723</sup>

#### **iv. Reverse Onus**

500. Fiduciaries are generally held to a higher standard of behavior due to the nature of their duties and relationship. It is the unequal positions of power between the parties that requires reversal of onus onto the fiduciary in most fiduciary relationships, where there is an allegation of a breach of duty.
501. Beneficiaries who argue they have suffered a loss as result of the action of fiduciary are treated differently and are afforded more favorable rules as to the remoteness and causation of the loss. Due to the power relationships between the fiduciary and the beneficiary and the ability of the fiduciaries to obscure a breach by virtue of their control over the beneficiary's affairs, the burden of proof is lessened for a beneficiary who alleges there is a breach of fiduciary duty. Beneficiaries only need to establish a *prima facie* case of fiduciary obligations. Thus, a reverse onus is imposed that shifts the burden onto the fiduciary to disprove the beneficiary's allegations.

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<sup>723</sup> *Authorson (Guardian of) v. Canada (Attorney General)*, [2002] O.J. No. 962.

502. The basis of the reverse onus is described in *Erlanger v. New Sombrero Phosphates Co.*<sup>724</sup>, where the court stated:

The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether the matters of contract or gift; and this relationship and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.<sup>725</sup>

503. In such cases beneficiary need only establish a *prima facie* inference of the fiduciary relationship. Once relationship has been established beneficiaries must demonstrate that the breach of a fiduciary duty has occurred. Once a beneficiary establishes these two elements, the fiduciary relationship imposes of reverse onus whereby the burden of proof in shifts to the fiduciary who must disprove the *prima facie* inference.

504. Prof. Len Rotman explains the reverse onus in greater detail:

Unlike the burden imposed on beneficiaries, fiduciaries must disprove the allegations on the balance of probabilities. Thus, fiduciaries are saddled with a more onerous burden than beneficiaries are. Fiduciaries may not rebut an allegation of breach simply by demonstrating that a transaction was fair or that beneficiaries also benefited from it. Moreover, as indicated above, fiduciaries will not be cleared of liability for breaching fiduciary duties by showing that any actions taken were entered into in good faith or with absence of bad faith, or because of beneficiaries' inability to prove actual harm or loss suffered. Fiduciaries may also

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<sup>724</sup> *Erlanger v. New Sombrero Phosphates Co* [1933] 3 D.L.R. 161 (SCC), affirmed [1934] 3 D.L.R. 465 (Canada PC).

<sup>725</sup> *Ibid.*, para. 164.

not refute *prima facie* inferences of breach by demonstrating the beneficiaries' inability to obtain benefit from the impugned transactions or that the beneficiaries' loss would have occurred notwithstanding the breach, a principle generally referred to as "inevitability of loss" which is discussed further below. These matters are all peripheral to the conduct complained of and do not relate to the question of fiduciaries' liability.<sup>726</sup>

505. The reverse onus burden of proof was applied in *Lee Estate v. Royal Pacific Realty Corp.*<sup>727</sup> where Satanove J. held that certain relationships and specific categories of actors are presumed by law to be of a fiduciary in nature. In cases where:

dealings with the defendants fell within the class of relationship which is presumed by law to be of a fiduciary nature. The onus is on the defendants to rebut that presumption.<sup>728</sup>

506. The reverse onus alters the ability of a fiduciary to defend a claim of a breach without the necessity of assessing the beneficiaries claim a balance probabilities. The reverse onus is necessary because of the prejudicial position that beneficiaries in a fiduciary relationship find themselves. By placing the primary evidentiary burden on fiduciaries, the reverse onus assists in evening out the power imbalance of a fiduciary relationship.

507. In summary, the AFN submits that in the present complaint, the elements of a fiduciary relationship are clearly present with the onus resting on the Crown to rebut this presumption.

#### **PART IV – REMEDIES**

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<sup>726</sup> Leonard, Rotman, *Fiduciary Law*, (Thompson/Carswell: 2005), p. 617.

<sup>727</sup> *Lee Estate v. Royal Pacific Realty Corp. and Chan*, 2003 BCSC 911.

<sup>728</sup> *Ibid* Lee at para 28

508. Based on facts, expert evidence and law, the discriminatory application of the Crown's, through the AANDC's FNCFS program adversely affects the whole First Nation population as a collective.
509. The FNCFS program has had real consequences for First Nation children and families both in the past and the present. The Tribunal has heard testimony on the impacts and harms of the FNCFS program on First Nation families.
510. The Tribunal has heard evidence that the Crown has known for years, decades even, about the problems and harms being inflicted on First Nation children and families and has done relatively nothing about it. The shortfalls and harms of the discriminatory funding practices were documented in the NPR (2000), Wen-de reports (2004-05) and Reports of the Auditor General of Canada (2008) and (2011). In addition, the Crown has conducted its own internal reviews of the FNCFS programs and found inequities.<sup>729</sup>
511. The AFN submits that the Crown's failure to remedy the discrimination and knowingly continuing to prolong the harms to First Nation children and families amounts to wilful and reckless conduct.
512. The AFN submits that by ignoring so many efforts both externally and internally to bring about change with respect to its FNCFS program and funding the Crown has deliberately denied protection from discrimination to those in need of it. During the course of the hearing before this Tribunal, the Respondent did not provide a reasonable explanation as to why AANDC or the federal government

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<sup>729</sup> Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at pp. ii; Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. R-05, Tab 48 at pp. xviii, 29-31; Mid-Term National Review for the Strategic Evaluation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program (2011), CHRC BOD, Ex. HR-08, Tab 113 at pp. v-vii, 18-20, 43; Evaluation of the First Nations Child and Family Services (FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303; see also Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359.

has failed to take measures to remedy the numerous inequities identified by both internal and external experts, as well as the Auditor General of Canada. The AFN submits that one cannot expect the full compliance by the federal government to any Order issued by this Tribunal. Therefore, the Tribunal must retain jurisdiction to ensure that effective remedies are implemented and applied.

513. The Crown's lack of effort and lack of concern through the AANDC takes many forms over many years including: disregard for the findings in the NPR and WEN-de Reports; developing the EPFA model policy and freezing the rates upon signing of tripartite agreements resulting in continued discrimination and inequitable treatment of First Nations people; pursuing arbitrary policies that are unwritten and not universally followed; lack of training even at the senior management level; refusal to revisit the inequitable funding formulas; refusal to implement Jordan's Principle; refusal to provide adequate funding for prevention programs, thereby preventing FN Agencies from conforming to provincial standards; basing formulas on out-dated presumptions; creating perverse incentives that result in the apprehension of First Nation children; and failing to correct known flaws and inequities in Directive 20-1, EPFA and the 1965 Agreement.
514. AANDC has also been aware since 1996 of the recommendations of the Royal Commission on Aboriginal Peoples, whereby child and family services was extensively studied. RCAP noted that Aboriginal agencies have inherited many of the problems: "They struggle with ill-fitting rules made outside their communities; with levels of family distress and need beyond their limited resources; and, with the challenge of finding ways to protect children."<sup>730</sup>

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<sup>730</sup> *Highlights from the report of the Royal Commission on Aboriginal Peoples*, Minister of Supply and Services Canada 1996, section on Our children are our Future: <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp5>.

515. The general remedial powers of the Tribunal are set out in section 53 of the *Canadian Human Rights Act*, which provides:

53. (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 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.

(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.

(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.

516. Subsections 53 (1)-(4) outline the discretionary awards and orders that the Tribunal may make against a respondent following its substantiation of the complaint before it. Included are orders to cease a discriminatory practice; awards covering expenses incurred as a result of the loss from the discriminatory action, and the taking of measures to redress the discriminatory practice; to prevent the same or similar practice from occurring in the future; and awards for pain and suffering, including special compensation.

517. First Nations are entitled to self-determination and self-government<sup>731</sup>, which rights have never been extinguished.<sup>732</sup> The AFN submits it is appropriate that the Tribunal's Order reflect and support the overall arching goal of *reconciliation* between First Nations peoples and the Crown. *Reconciliation* is founded on the principle of equality and mutual respect. It rejects discrimination in all forms<sup>733</sup>, as well as the colonial mindset of AANDC. *Reconciliation* is about cooperation based on mutual need and respect between Canadians and First Nations.

518. In addition, the Tribunal Order should incorporate the Crown's duty to consult and accommodate. Consultation with First Nations peoples is a constitutional

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<sup>731</sup> *UNDRIP*.

<sup>732</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para 25.

<sup>733</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para 50; see also remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada to the Canadian Club of Ottawa, February 5, 2013.

principle.<sup>734</sup> The duty to consult arises when the Crown is contemplating conduct that could potentially affect established or claimed Aboriginal rights.<sup>735</sup>

Consultation should happen at the stages of strategic high level decision-making.<sup>736</sup> From this flows accommodation. Where claims are not yet proven, accommodation means “seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process requires good faith efforts to understand each other’s concerns and move to address them”.<sup>737</sup>

### **A) Systemic Remedies**

519. The evidence in this case supports the allegation that Canada’s funding of Child Welfare is discriminatory. The AFN further asserts that the current discriminatory funding regime is not a recent phenomenon, but rather one that is historic, perpetual and completely ingrained in the federal government’s administration of First Nation programs. In short, the federal government has historically treated First Nation peoples as second class citizens and continues to do so in a manner inconsistent with section 35 of the Constitution Act and the duty to consult and accommodate.
520. Systemic discrimination occurs where “practices, attitudes, policies or procedures impact inexplicably on certain statutorily protected groups”.<sup>738</sup> The difficulty in addressing systemic discrimination is the fact that where it exists, it is likely to be hidden.

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<sup>734</sup> *Beckman v. Little Salmon/Carmacks First Nation*, [2010] SCR 103.

<sup>735</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; see also, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

<sup>736</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] SCR 650.

<sup>737</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 49.

<sup>738</sup> *CNR v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, pp. 1138-1139; *Public Service Alliance of Canada v. Canada Department of National Defense*, para 12-16; *British Columbia v. Crockford*, 2006 BCCA 360, 55 B.C.L.R. (4th) 282, para. 49.

521. Systemic discrimination requires systemic remedies.<sup>739</sup> A systemic remedy is a remedy designed to correct the discrimination and to prevent a future recurrence of the discrimination. A systemic remedy can include requirements that the respondent carry out certain acts in order to impress upon a respondent the importance of compliance and the severity of the violations.<sup>740</sup> Such remedies can be designed to remedy for the individual complainant, or to create an environment in which others will not be subjected to the type of discrimination imposed on the complainant.

522. In *Action Travail*, the Supreme Court upheld the Tribunal's authority to impose upon the employer an employment equity program to address the problem of systemic discrimination.

“An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.”<sup>741</sup>

523. Human rights tribunals have latitude to order a variety of actions which may be taken in order to ameliorate systemic discrimination. There is recognition in the jurisprudence that, depending on the nature of the discrimination, different

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<sup>739</sup> *CNR*, pp. 1138-39.

<sup>740</sup> *Hartling v. Timmins (Municipality) Commrs. of Police* (1981) 2 CHRRD/487 (Ont. Bd. of Inquiry).

<sup>741</sup> *CNR* at 1143.

remedies will be required in order to target the particular problems experienced.<sup>742</sup>

524. The AFN asks the Tribunal grant the following remedies to address the systemic discrimination in the FNCFS program and funding:
- i. A finding that AANDC's funding formulas for Directive 20-1, EPFA and the 1965 Agreement are discriminatory and contrary to section 5 of the *CHRA*;<sup>743</sup>
  - ii. An Order that AANDC cease and desist its discriminatory funding formula practices for Directive 20-1, EPFA and the 1965 Welfare Agreement and substitute for this funding practice by immediately providing equitable funding and services offered by the provinces to First Nation CFS agencies under the FNCFS Program for a minimum period of six months or until a long-term plan is developed pursuant to (vi) below;<sup>744</sup>
  - iii. An Order that AANDC cease and desist in applying the discriminatory aspects of the FNCFS Program to FN Agencies and others who provide CFS services to First Nation families on reserve;
  - iv. An Order that the AANDC provide funding to the AFN for a jointly commissioned study relating to child welfare in First

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<sup>742</sup> *Curling v. Torimiro*, [2000] OHRBID No. 16; *Drummond v. Tempo Paint*, (1999), 33 CHRR D/184 (Ont. Bd. of Inquiry); *Moffatt v. Kinark Child and Family Services*, (1999), 33 CHRR D/184 (Ont. Bd. of Inquiry); *Gohm v. Domtar*, (1992), 89 DLR (4th) 305 (Ont. Div. Ct.); *Espinoza v. Coldmatic Refrigeration of Canada Ltd.*, (1995), 95 CLLC 230-026; *Niedzwiecki v. Beneficial Finance System*, (1982), 3 CHRR D/1004; *Miller v. Sam's Pizza House*, [1995] NSHRBID No. 2.

<sup>743</sup> AANDC has acknowledged that many First Nations "children and families are not receiving services reasonable comparable to those provided to other Canadians", and that "First Nations are not receiving a fair level of services as compared to non-First Nations in Canada." The lack of comparability is a result of the funding model which is insufficient "to permit First Nation communities to effectively and efficiently meet the needs of their communities and their statutory obligations under provincial legislation." (AANDC Briefing Note, "Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2; and AANDC Power Point, "Overview of Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 7 & 10.

<sup>744</sup> At a minimum funding level should be equitable to account for the greater need First Nation families and the Respondents' responsibility for harms associated with Indian Residential Schools and/or its fiduciary obligations.

Nation communities, specifically to determine the most effective means of providing care for First Nations children and families;

- v. An Order that the Crown cease and desist its system of organizational operations and complacency that has supported systemic discrimination and be replaced with a mandate to close the gap in child welfare services for First Nation children and families through individual annual performance measurements and evaluations of AANDC employees, including management, agents and others employed by the Crown related to the provision of First Nation child and family welfare. That to be effective, the Order require successful measurement of improvement by Crown employees in both the provision of child welfare services and a closing of the gap between First Nation children and all other Canadian children or individual salary increases and promotions shall be withheld;
- vi. As the short-term remedy sought is equitable funding, an Order that AANDC fund and participate in a joint policy development initiative with the AFN, FNCFCS and other First Nation child and family welfare experts, to be agreed upon, that will work in consultation with the Commission and report back to the Tribunal annually on establishing effective long-term child welfare services regime and funding for First Nation families, which will be in keeping with the following principles:
  - a. Support First Nation rights to self-governance that will enable First Nation solutions to child and family welfare as established by experts, and set out in the Royal Commission on Aboriginal Peoples;
  - b. AANDC funding of child and family welfare services for First Nations in keeping with the principles of UNDRIP supporting the rights of Indigenous Peoples' to raise and protect children and structure families;
  - c. Is consistent with the fiduciary relationship and obligations between the Crown and First Nations;

- d. Is consistent with reconciliation between the Crown and First Nations; and,
  - e. To eliminate federal child welfare policies that perpetuate the historical disadvantage of First Nation children and families.
- vii. An Order that should negotiations to develop a long-term child welfare regime in (vi) fail, the Tribunal shall hear submissions of the parties on the long-term remedy;
- viii. An Order that AANDC, AFN, FNCFCFS and the Commission form an expert panel to establish appropriate individual compensation (pain and suffering as well as wilful acts of discrimination), for children, parents and siblings impacted by the discriminatory First Nation child welfare practices between 2006 and the date of the Tribunal's Order in this matter, which AFN and the FNCFCFS participation will be funded by AANDC;
- ix. An Order that any increase of funding for the FNCFCFS not result in any inequity or cause further harm in relation to other AANDC programs in capital, housing, education, etc., an audited financial accounting of which shall be provided annually to the Tribunal for an initial period of two fiscal years in order to ensure Crown accountability and transparency;
- x. An Order compelling AANDC to fully fund an annual gathering for a period of at least five years of Crown and First Nation child welfare experts for the purposes of Crown education on First Nation family and child welfare laws, customs and traditions; to support the closing of the gap between First Nation and Canadian children; and to promote positive First Nation/Crown relations and reconciliation;
- xi. An Order that AANDC establish written policies satisfactory to the complainants and the CHRC within 12 months to ensure that First Nations children and families are not be deprived of

equal CFS benefits and services available to all other Canadians.

**B) Additional Relief**

- xv. An Order that AANDC shall report to the Tribunal in at least three-month intervals about its progress in implementing this Order.
- xvi. An Order that the Tribunal will remain seized in this matter to the later date of the implementation of the other parts of this Order, including any further implementation Orders as required.
- xvii. An Order that AANDC shall pay AFN cost in the amount of \$14,339 to cover throw away expenses relating to the Respondents failure to produce documents and Counsel's appearance at the Motion to Produce Documents.
- xviii. An Order that this Tribunal will retain jurisdiction for 2 years after the filing of this Decision, in the event that the parties are unable to reach agreement with respect to the implementation of any of the remedies awarded. Extensions of this jurisdiction may be required.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**Dated: August 29, 2014**

  
**Stuart Wuttke & David C. Nahwegahbow**  
**Counsel for the Assembly of First Nations**

## **PART V – LIST OF AUTHORITIES**

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